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**IN THE SUPREME COURT  
OF NEW SOUTH WALES  
BANCO COURT**

**BATHURST CJ  
AND THE JUDGES OF THE  
SUPREME COURT**

**Monday 22 February 2013**

**FAREWELL CEREMONY FOR  
THE HONOURABLE JUSTICE JAMES ALLSOP AO  
UPON THE OCCASION OF HIS RETIREMENT AS A JUDGE  
AND PRESIDENT OF THE COURT OF APPEAL  
OF THE SUPREME COURT OF NEW SOUTH WALES**

- 1 **BATHURST CJ:** We are here this morning to mark the retirement of the Honourable Justice James Allsop as President of the Court of Appeal of the Supreme Court of New South Wales. It is a day of mixed emotions. Today, we have an opportunity to celebrate your Honour's extraordinary contribution to the legal system of this State and your richly deserved appointment as Chief Justice of the Federal Court of Australia. However, it is also with inevitable sadness that we say goodbye to an exceptional jurist and a good friend. I know I speak for the whole Court when I say that we will miss your intellect, leadership and collegiality. Since my appointment you have always been on hand to assist me, advise me and, on some occasions, cheer me up.
- 2 It is comforting to know that while you are entering a different jurisdictional universe, you are only moving a few floors away. Given your fondness for taking strolls around the building, at least we can be sure of seeing your face from time to time.
- 3 It is customary at swearing in and retirement ceremonies to highlight the major achievements of the judge's professional career. You were appointed as a judge of the Federal Court in 2001 and of this Court, and

as President of the Court of Appeal, in 2008. I do not intend to say anything about your professional achievements prior to your appointment as President. First, it would make the speech so long that no one else would have the chance to say anything. Second, your tenure on this Court provides more than enough evidence of the outstanding contribution you have made to judicial life and to the community generally.

- 4 Since your appointment in June 2008, you have provided exceptional administrative and intellectual leadership to the Court of Appeal. You have ensured that the Court operates efficiently and expeditiously, notwithstanding the ever increasing weight and complexity of matters before it, while maintaining the highest quality of judgments. In particular you have made exceptional use of what I will call the Court's intellectual resources, ensuring that benches are structured to take advantage of individual judges' expertise and making use of what one colleague described as "nano gaps" in listings, to in turn ensure sufficient out of court time for judgment writing. This practice has been to great effect and I note that you are ending your tenure on an "efficiency personal best", with 448 appeal judgments delivered in 2012.
- 5 You have brought absolute commitment to your leadership role and set high standards for yourself and the Court in upholding efficiency, accessibility and transparency in the administration of justice. Your annual trips to the Bar Association to explain the Court's operation and procedures are just one example of your diligence in this regard. You are also vigilant in ensuring that anything that has the potential to disrupt the working of the Court is dealt with firmly and quickly.
- 6 You have been able to maintain these high standards of efficiency and intellectual rigour while always exhibiting concern for the welfare of your colleagues. You have managed the Court of Appeal with great personalism and empathy. You are invariably attuned to everything that is going on, including any problems that your colleagues may be facing.

With quiet and unswerving attention, you are always able to get to the heart of the issue at hand and intervene supportively.

- 7 No doubt your personal touch has been assisted by your frequent prowls around the building and visits to each judge of the Court of Appeal. These visits are legendary. They generally begin with you appearing unexpectedly and silently in the doorway of Chambers – often to the great surprise of the relevant Judge and their staff. You then immediately embark on an explanation of some unusual factual scenario or matter of high legal principle. Unfortunately, you do not tend to preface these expositions with any form of context. The result is that the bemused judge often spends a very confusing few minutes working out if they sat on the case you are talking about, or even what the conversation relates to. Once that has been figured out, your visits are always welcome. However, they are also largely responsible for the popularity of the warning “the President is lurking in the corridors”. I believe your Honour prefers to refer to it as “carefully calibrated people management”. Jest aside, there is no doubt that the personal contact and intellectual engagement you maintain with each Judge of Appeal has immeasurably contributed to the high morale and productive collegiality which the Court enjoys.
- 8 Perhaps above all, the significance of your term as President will be measured in your intellectual leadership and your contribution to the clarification and development of the law. On your appointment to the role of Chief Justice of the Federal Court you were described as “brilliant” by the media. If anything, that is an understatement. Your Honour is one of the finest jurists in this country. Your quickness of intellect, depth of knowledge and rigorous judicial approach combine to produce judgments that are of the highest calibre.
- 9 Invariably, you incisively draw together the fundamental legal principles in a given area, articulating not only the relevant rules but their historical development, theoretical underpinnings, nuances and logical cogency. Your judgments demonstrate your genuine love and mastery of the law as

an intellectual discipline and a scholarly approach, no doubt partly informed by your early experience as a teacher.

- 10 Your judgments are also testament to your belief that the legal system must be based on more than rules and that – to steal one of your favourite quotes – “fundamental questions ...await a better answer than that we do as our fathers have done”.<sup>1</sup>
- 11 I have time to identify only a few of your Honour’s many formidable judgments. One example that springs to mind is *United Group Rail Services Limited v Rail Corporation NSW*,<sup>2</sup> in which you comprehensively explained the authorities and scholarship regarding whether a contract to negotiate in good faith is sufficiently certain to be enforceable. Views on this topic may differ, but your judgment was an exceptional contribution to the “pro good faith” team.
- 12 Other outstanding examples include your judgments in *Ford by his Tutor Beatrice Ann Watkinson v Perpetual Trustees Victoria Limited*,<sup>3</sup> in which you analysed the history and theoretical origins of the plea of non est factum and its relationship to defences of incapacity; *Bunnings Group Limited v CHEP Australia Limited*,<sup>4</sup> in which you distilled the elements of the tort of conversion; *Aboody v Ryan*,<sup>5</sup> in which you set out the governing principles in relation to unconscionable conduct, and your judgment only last week in *Karim v R*,<sup>6</sup> concerning the constitutional validity of the minimum mandatory sentencing regime for people smuggling.
- 13 Often, your decisions provide the final word in an area. I am thinking of judgments such as *Caltex Refineries v Stavar*,<sup>7</sup> in which you set out with

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<sup>1</sup> Oliver Wendell-Holmes, ‘The Path of the Law’ (1897) 10 *Harvard Law Review* 457 (1897)

<sup>2</sup> [2009] NSWCA 177

<sup>3</sup> [2009] NSWCA 186

<sup>4</sup> [2011] NSWCA 342

<sup>5</sup> [2012] NSWCA 395

<sup>6</sup> *Karim v R; Magaming v R; Bin Lahaiya v R; Bayu v R; Alomalu v R* [2013] NSWCCA 23

<sup>7</sup> *Caltex Refineries (Qld) Pty Ltd v Stavar and Others* [2009] NSWCA 258

great clarity and elegance the “salient features” which will inform whether a duty of care is imposed and the complex legal principles underlying that analysis.<sup>8</sup>

- 14 What these judgments and the myriad of other judgments you have delivered as President demonstrate, is that your passion for scholarship and high legal principle is equally balanced with great practicality, and compassion for the individuals caught up in the legal system. Throughout your career, you have taken the principles now encapsulated in s 56 of the *Civil Procedure Act* extremely seriously. You are emphatic in stressing that an efficient and affordable resolution of the real issues in dispute is essential to the integrity and relevance of the justice system. Your comments in *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd*<sup>9</sup> are an apt example of your views in this context.
- 15 You have also stressed that if a case involves no novel or unusual principle, judgments should be clear, economical and shorn of all unnecessary legal pretence,<sup>10</sup> or what the Lord Chief Justice of England and Wales, Lord Judge, has described as “APK”: “Anxious Parade of Knowledge”. You have practiced what you preach – your judgments are invariably as clear and concise in routine dispositive matters as they are comprehensive in novel ones.
- 16 This commitment was recognised recently by the award of an Order of Australia for your service to the judiciary and the law through reforms to equity and access. Your approach is borne from a deep empathy and strong awareness of the how the legal system affects the lives of litigants. As one of your former tipstaves put it: “Justice Allsop is always conscious that what might seem a routine case in legal terms represents the most significant and potentially catastrophic event in the lives of the people

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<sup>8</sup> see at [100]-[113]

<sup>9</sup> *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd and Ors* [2008] NSWCA 243 at [160]-[164]

<sup>10</sup> J. Allsop, “Appellate Judgments – the Need for Clarity” (36<sup>th</sup> Australian Legal Convention, Perth, September 2009) 4-5

involved”. This empathy and awareness is apparent in Court. You are invariably clear and courteous, and show particular consideration for self represented litigants.

- 17 Your diligent and respectful approach has suffused the culture of the Court of Appeal. Whilst it is safe to say that the profession does not regard an appearance in that court as equivalent to a summer holiday, from what I have been told it is today genuinely considered a stimulating and intellectually satisfying experience.
- 18 Your Honour’s real concern for the human impact of the law is a clue to the measure of your character. You are known to colleagues and friends for what your loyal and hard working Associate Marie Halliday has summed up as your “kind heart”. You are extremely generous: always willing to share knowledge, committed to unobtrusively nurturing the development of others and sincere in your desire to see everyone perform at their best. You show real concern and awareness of the needs of others, humility, and a wonderful, quirky, sense of humour.
- 19 Any reflection on your tenure as President of the Court of Appeal would be incomplete without considering your juristic contributions beyond judgment writing. Your publications are of extraordinary depth and breadth, spanning topics such as causation in commercial law, the place of good faith in contract, the history of bankruptcy, the importance of legal theory and the sources of Australian law. Your articles are informed not only by an array of comparative and international jurisprudence, but by classical philosophy, ancient history and political theory. You reference everyone from Aquinas to Austin and somehow seem to have committed to memory the vast number of books that line your Chambers’ walls – no small feat.
- 20 You are particularly fond of the great legal minds of American history and have even written a book chapter on Justice Joseph Story – although I suspect your particular passion for Justice Story may have something to



do with the fact that, amongst his many accomplishments, he wrote about Admiralty law.

- 21 Indeed as many colleagues have noted, you are no doubt looking forward to getting back to your beloved Maritime law. You have been known to summon your staff to the window of Chambers to point out the features of what you deem to be a particularly fine ship sailing into the harbour. From time to time, I understand that you receive top-secret phone calls from the Federal Court, tipping you off that a ship has been arrested and is about to be brought in to dock. I believe these are an occasion for particular excitement in your Honour's Chambers.
- 22 Harbour watching aside, during your tenure as President of the Court of Appeal, you have stayed closely connected to all matters maritime through contributions to legal education. You have been a governor of the World Maritime University in Malmö, Sweden; a board member of the Australian Maritime College in Launceston; and an Adjunct Professor of Law at the University of Sydney, where you teach a Masters Course in Comparative Admiralty and Maritime Law. I would counsel Federal Court judges sitting on the Admiralty and Maritime list to guard their work closely, lest an irresistible current draw it into the corner Chambers of Level 20.
- 23 Of course, while Maritime law may be particularly close to your heart, it is by no means your only contribution to legal education. For example you have been heavily involved in judicial education in the region, particularly in China. As if this wasn't enough, you also show dedication to your own continuing education. You have in recent years become a keen French student, and your staff report that a rare calm descends on your Chambers at four thirty on a Friday afternoon when your tutor Bruno arrives. Unsurprisingly, you are diligent in your homework and always keen to discuss the latest article in *Le Monde*. These conversations, it must be said, can be a little one sided. *J'essaye, mon ami, j'essaye.*

- 24 I understand that over the last few months, you have also become a student of the Sydney live music scene, going to watch your son Will's band perform at such illustrious venues as the Abercrombie and Lansdowne pubs. At times the responsibility for packing up after gigs has fallen to you and the other parents, so that amongst your many achievements you are now also a passable roadie.
- 25 Will is here today, as is your daughter Julia, and your wife Kate. Your love for your family is obvious to all, and I am sure that they are as proud of you today as you have always been of them.
- 26 On behalf of all the judges of this Court and all those who play a role in the administration of justice in this State, thankyou for all you have done over the past four and a half years. You are a truly remarkable judge, scholar, colleague and friend. You will be deeply missed.
- 27 **THE HONOURABLE GREG SMITH SC MP ATTORNEY GENERAL OF NEW SOUTH WALES:** Your Honours, it is my privilege to speak today not only as Attorney General of New South Wales but also on behalf of the New South Wales Bar Association.
- 28 Today we gather to farewell your Honour as President of the Court of Appeal and to thank you for your service over the past four years, in which you have distinguished yourself as being a man of both knowledge and principle.
- 29 Your wife, Katharine and two children, William and Julia, have been your anchor during your career. I understand that most of your family are here today, attending your farewell. I am sure they are all incredibly proud of your achievements, and rightly so, as your career thus far has been an illustrious one.
- 30 Born in Sydney in April 1953, you attended Sydney Grammar School and later the University of Sydney. We very nearly missed out on your legal

wisdom, as after your first year of law you abandoned your legal studies and completed a Bachelor of Arts. After graduating in 1974, you taught English and History for three years at Sydney Grammar School and Marist Brothers Kogarah.

- 31 However, the call of the legal profession beckoned, and you returned to the University of Sydney, where you graduated with a Bachelor of Laws in 1980. Already you showed great signs of promise, as you received the University Medal in Law.
- 32 After graduation, you worked as an articled clerk at Freehill Hollingdale and Page, articled to Mr David Gonski and the late Kim Santow. You later became the associate to the late Sir Nigel Bowen, who was then Chief Justice of the Federal Court of Australia.
- 33 You were admitted to the New South Wales Bar in 1981, and later admitted to practise in the Australian Capital Territory, South Australia and Western Australia. In 1994, you took silk and became a senior counsel. In 1998, you became Queen's Counsel in Western Australia.
- 34 It was in 2001 that you first joined the bench, as a judge of the Federal Court, where you served until 2008. During this time, you also served as an additional Judge of the Supreme Court of the Australian Capital Territory. In 2008, you were appointed as President of the Court of Appeal.
- 35 You have demonstrated throughout your career an impressive grasp of legal concepts, across a wide range of disciplines. You brought to the bench a strong background in commercial law, with expertise in a large number of areas, including tax, trade practices law and intellectual property. Despite your lack of exposure to criminal law while at the Federal Court, you are known for the excellent quality of your judgments in the Court of Criminal Appeal. And you would have got some experience on the ACT Supreme Court I'm sure.

- 36 You have also grown to appreciate the significance of administrative and constitutional law - despite once admitting that an introductory administrative law course you took, so failed to hold your interest that it caused you to give up the study of law altogether.
- 37 However, it is well recognised that the topic which rally puts the “wind in your sails” is admiralty and maritime law. You are regularly invited around the world to present papers at conferences and deliver lectures on admiralty law, commercial and maritime arbitration, and international trade law. You have also been a governor of the World Maritime University in Malmo, and have acted as Chair of the Admiralty Rules Committee. It is for this reason you have been referred to by the media as “The Admiral”, and described as “turning a tight ship in New South Wales.”
- 38 You are also known for your impressive research and communication skills, which have no doubt been developed by your experience as a teacher in your early years, and as a law lecturer at the University of Sydney. I expect your skills in keeping control of your courtroom have their origins in those Friday afternoons trying to keep a classroom full of teenage boys in order.
- 39 Your interest in history also continued after leaving the teaching profession. For example, your speech at the Maritime Law Association of Australia and New Zealand conference gave a rich account of the ancient history of international trade law. I imagine your great love of both maritime law and history would have married well on a recent trip to Turkey, the highlight of which was the opportunity it provided to visit the River Bosphorus.
- 40 But it is not just your significant legal skills for which you are recognised. During your swearing-in speech in 2008, you described hearing Federal Court immigration cases in the following way:

“I found the work of dealing with information about a multitude of countries and, in most cases, with the profoundly-felt fears and hopes of struggling, decent people both rewarding and important.”

- 41 It is this appreciation of the life-changing significance of judicial decisions which has served New South Wales well during your tenure as President of the Court of Appeal. Your colleagues describe you as a passionate believer in the humanity of the law. You are keenly aware of the impact the law has on individuals who come before the Courts, and how important it is that people are dealt with fairly.
- 42 Throughout your career, you have contributed significantly to the next generation of lawyers. You have lectured and tutored at the University of Sydney since the 1980s, and in 1987 you were appointed Challis Lecturer in bankruptcy. You have also written broadly on areas including torts in commercial law, discovery in intellectual property litigation, international commercial law and administrative law.
- 43 Your comments at the 2009 Australian Academy of Law Symposium Series demonstrated your keen interest in developing future lawyers. You commented on the importance of young lawyers recognising that they are part of an essential functioning institution of society of great importance. This recognition, you said, helps instil in the profession the required idealism, ethics and sense of justice essential to the administration of justice.
- 44 In another of your many addresses, you quote Voltaire as saying “with great power comes great responsibility”, although, on a whimsical note, you also commented that there was some dispute as to whether this was actually a quote from Spiderman.
- 45 As President of the Court of Appeal you have led by example, by embodying all of these principles of idealism, ethics, service, and responsibility while on the bench. You are known by lawyers who appear before you to be a fair presiding judge - although, God help any lawyer

who refers to a case which is not on their list of authorities, or worse, who has not filed their authorities in the approved format.

46 You have endeavoured to improve the Court system in both New South Wales and abroad, through your commitment to increasing the efficiency and affordability of accessing the courts. Your colleagues describe you as understanding the need for systems within the Court, in order to maintain its integrity and respect in the eyes of the public.

47 You have also shared your breadth of knowledge and experience with our neighbours in the Asia-Pacific, through engaging in judicial mentoring and forging bonds of friendship with judges overseas.

48 During your swearing-in speech you commented:

“I am conscious of the magnitude of the task before me to follow in the footsteps of the seven former Presidents of the Court of Appeal. In particular, I am conscious of the responsibility in following such a truly great judge and scholar as Keith Mason.”

Who I notice here today. You can take great pride that while you have been at the helm, the Court of Appeal has maintained the steady course set by its former Presidents.

49 For example, you continued the much-loved tradition started by your predecessor of holding a welcome and farewell for the tipstaves of the Court each year. Your personal touch, your genuine expressions of gratitude, and your enthusiasm for their future careers, always made the tipstaves feel integrated and valued within the Court.

50 Your contributions were recognised in the 2013 Australia Day Honours List, in which you received the Order of Australia for distinguished service to the judiciary and the law, as a judge, through reforms to equity and access, and through contributions to the administration of maritime law

and legal education. Despite these fantastic achievements, your colleagues describe you as a humble man and a good listener.

51 In 2008, we managed to poach you away from the Federal Court, but now they have poached you back again. You leave us to be appointed Chief Justice of the Federal Court. When announcing your upcoming appointment, then Attorney-General Nicola Roxon described you as “admired for your leadership in the New South Wales Court of Appeal.”

52 Your Honour, I wish you all the best now that you have set sail for the Federal Court, even though it’s moving upwards. I have confidence that you have embarked upon a course in which your skills, your knowledge and your ethics will serve justice in Australia well. Hopefully your new digs will give you an even better view of the Harbour, so that you can speculate which ships might soon be arrested and to come before your jurisdiction.

53 And I hope also that you don’t strain your back in your work as a roadie as I do part-time myself sometimes, for my band The Tokens. Your colleagues in the Court of Appeal - we are performing around St Patrick Day by the way - your colleagues in the Court of Appeal will greatly miss your presence - and you are all welcome.

54 On behalf of the State of New South Wales, I thank you for your contributions to the Court of Appeal and to justice. If the Court pleases.

55 **MR JOHN DOBSON PRESIDENT LAW SOCIETY OF NEW SOUTH WALES:** May it please the Court. On the occasion of your ceremonial welcome to this Court in 2008, your Honour remarked that you thought the speech you made at your swearing-in as a judge of the Federal Court in 2001 was a kind you would not have to repeat. Your Honour added that a repeat performance was indeed a daunting task but one that you were privileged to make.

- 56 Your Honour, I am similarly finding make a speech a daunting task but equally it is one that I feel privileged to make on behalf of the 26,000 solicitors of this State - and next week we will do it again.
- 57 I don't wish to repeat what has already been said today other than wholeheartedly support the comments of the Chief Justice and Attorney General with respect to your Honour's judicial leadership and your significant contributions to the operations of the Court of Appeal during your term. However, I do wish also to extend my personal congratulations on your recent appointment as an Officer of the Order of Australia in recognition of your distinguished service to the judiciary and the law.
- 58 I believe it was an English playwright and social philosopher George Bernard Shaw who asserted that "all professions are conspiracies against the laity" in that they seek to protect their status by devising convoluted and elitist vocabularies that are incomprehensible to the general public.
- 59 Such a criticism could not be levelled against your Honour. Your Honour is renowned for your ability and patience in presenting information in a format and language appropriate to your audience, whether they are solicitors, members of the Bar, law students or those who appear before you in the Court.
- 60 Indeed your Honour has gone out of his way to ensure litigants receive a full and fair hearing - on one occasion refusing to strike out a badly drafted notice of appeal for litigants about to be evicted from their home who were unable to afford a lawyer to draft their proper appeal notice.
- 61 This approach is reminiscent of your early mentor, the first Chief Justice of the Federal Court, the late Sir Nigel Bowen, similarly poached from this jurisdiction in 1976 to head up the new Federal Court. He once said, "The



one thing we have to learn is that justice needs mercy to make it more just.”<sup>11</sup>

62 Such mercy does not extend to members of the profession, your Honour, and in 2009 practitioners were left in no doubt that failure to follow the rules on written submissions, summaries of argument and chronologies would not be countenanced and indeed could result in them facing costs orders.<sup>12</sup>

63 Last year your Honour reinforced that message in an address to London’s Lincoln Inn entitled “Written Submissions - What Judges love (and hate)”. Your Honour warned that “dense, turgid, and structure-less written submissions turn sweet gentle and humane appellate judges into bad-tempered and rude enemies”.<sup>13</sup>

64 Time is of the essence in a busy court and as your Honour recalled at an address to the 36th Australian Legal Convention in Perth in 2009, time constraints do not support elegant judgment writing - a reference to advice received from former Chief Justice Spigelman that “elegance was difficult to maintain when drinking out of a fire hose”; advice which your Honour has found to be sound.

65 While on the subject of judgment writing, your Honour was explaining how case management works in the Court of Appeal to visiting Chinese judges last year. To expedite judgment writing your Honour shared two methods employed by you to address delays – one being the not so subtle process of pressure whereby a list of outstanding judgments is circulated to other judges, and secondly, by keeping a close watch on how other judges work.

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<sup>11</sup> Bob Ellicot QC, Attorney General, eulogy for Nigel Bowen

<sup>12</sup> <http://www.theaustralian.com.au/archive/business-old/judge-tells-barristers-to-shape-up-or-pay-up/story-e6frg95f-1225717636253>

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[http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/SCO2\\_judicialspeeches/sco2\\_speeches\\_current\\_judicialofficers.html#justice\\_allso](http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/SCO2_judicialspeeches/sco2_speeches_current_judicialofficers.html#justice_allso)

- 66 On weekends I am told, when not performing your constitutionals with your trusty King Charles Spaniel, your Honour can often be found walking around the Supreme Court floors checking which doors are unlocked to see who is working and to have a chat.
- 67 Your Honour is known to be a prodigious worker with a razor sharp intellect, a thinking and advocacy style that is much sought after both in domestic and international arenas as an educator, lecturer and mentor.
- 68 In addition to managing the Courts and writing judgments, your Honour has been working to re-acquaint yourself with the Federal Court judges and to acquaint yourself with your new role. This included presenting a paper at the recent judges' conference held in Adelaide.
- 69 Your Federal Court duties may curtail some overseas travel but on the bright side, that will also limit your chances of missing your flight, due to security concerns about your ticket showing Justice Allsop when your passport has James Allsop.
- 70 Much has changed since your Honour last sat on the Federal bench - the advent of new legislation; jurisdiction to hear, determine and mediate on native title claims; a major revision of Federal Court rules; the introduction of electronic court filing; and some new faces on the bench. Legislation also provides for the Court to take on the management, jurisdiction and administration of the new Military Court of Australia when it is set up.
- 71 As your predecessor noted in the media last week, these changes are aside from a twenty percent increase in the Court's workload since 2007/2008 and a reduction in both the number of serving judicial members and a Federal budget allocation during his time in office.<sup>14</sup>

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<sup>14</sup> <http://www.smh.com.au/opinion/political-news/top-judge-calls-for-urgent-calls-for-urgent-funds-20130210-2e611.html>

- 72 I have no doubt your Honour will not only rise to this challenge but continue to implement those reforms necessary to streamline the administration of justice and better serve our society, while facilitating and promoting a truly national legal profession and our international reputation, connections and capabilities.
- 73 To quote the words of the late Martin Luther King (Jnr):
- “The ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy.”
- 74 Your Honour, the lawyers of New South Wales wish you every success in your new role. May it please the Court.
- 75 **ALLSOP P:** Chief Justice, Chief Justice Keane, Justices Bell and Gageler, judges, former judges, colleagues, ladies and gentlemen.
- 76 Thank you Chief Justice, Mr Attorney and Mr Dobson for your kind words.
- 77 May I commence by thanking you all for honouring me by your presence.
- 78 It is with considerable regret and sadness that, next week, I leave the Court of Appeal. It may seem an odd phrase to use about a governmental institution, but I have come to love the Court. This is because of the unique mixture of qualities shown by all its members (permanent judges and acting judges) with whom I have had the privilege to work. Those qualities are the dedication to service through hard, uncomplaining work, brilliant skill and a sense of justice.
- 79 The identity of the members of the Court of Appeal has changed significantly and rapidly over the last four years, but the continuity of those essential qualities has been maintained.

80 On my arrival in June 2008, I was met with a welcoming warmth and cooperation that made my transition back to common law, equity and State authority seamless and enriching. The experience of moving from Commonwealth to State judicial power was fascinating. Today is not the occasion to compare the two functions and some of their important differences, except to say that a Constitutional structure that permits a proper and mutual degree of cross-fertilisation of experience would be a salutary public goal.

81 The work of the Court of Appeal is unremitting and potentially exhausting, but fascinating. As Mohammed Ali was reported to have said to George Foreman, at close quarters in the ring, after the latter had exhausted himself pounding the body, and breaking the ribs, of the former for 8 rounds in tropical heat in Kinshasa, Zaire, so it can be said to any Court of Appeal judge in Sydney:

“George, this ain’t no place to get tired.”

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- 87 The same challenges of work and life face the Common Law judges and Equity judges. It would be remiss of me not to pay tribute to the Judges of the Divisions in as fulsomely admiring terms as I am able to do on an occasion such as this. Much must necessarily be omitted, and I hope they understand how much is implied and unstated. Not only do they work under the same unremitting pressure as the Court of Appeal, but they deal more directly with the litigating public in trials, often without the same judgment writing time as Court of Appeal judges. The quality of work from the Court's Divisions, is, if I may respectfully be permitted to say, extraordinarily high. I have been reminded recently, while sitting alone in referrals for a number of weeks, of the strain on one's equanimity sitting at first instance. There should be an expression: the patience of a **good** trial judge.
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been derived partly from the pleasure, and privilege, of sitting with judges from the Common Law Division in an area where my experience was far less than theirs. I would like to thank them all for their help, friendship and patience. The reward was also partly derived from the need to respond to an intellectual and human challenge of bringing one's judgment to bear on the human conduct and failings of others. The Court's work regularly demands assessment of one's own values, attitudes and, sometimes, one's own weaknesses. The criminal appeal work is deeply challenging, because it confronts, at an everyday level, the essences of law and civil society – protection of members of the community through rule and order, fairness, justice, proportionate use of State power and mercy. I have been privileged to have been taught, in these respects, by all of the judges in the Common Law Division with whom I sat. I apologise for my inadequacies in the face of their experience and I regret that my time on the Court of Criminal Appeal has now come to an end.

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**FAREWELL SPEECH –  
SUPREME COURT OF NSW**

**22 February 2013**

- 1 Chief Justice, Chief Justice Keane, Justices Bell and Gageler, judges, former judges, colleagues, ladies and gentlemen.
- 2 Thank you Chief Justice, Mr Attorney and Mr Dobson for your kind words.
- 3 May I commence by thanking you all for honouring me by your presence.
- 4 It is with considerable regret and sadness that, next week, I leave the Court of Appeal. It may seem an odd phrase to use about a governmental institution, but I have come to love the Court. This is because of the unique mixture of qualities shown by all its members (permanent judges and acting judges) with whom I have had the privilege to work. Those qualities are the dedication to service through hard uncomplaining work, brilliant skill and a sense of justice.
- 5 The identity of the members of the Court of Appeal has changed significantly and rapidly over the last four years, but the continuity of those essential qualities has been maintained.
- 6 On my arrival in June 2008, I was met with a welcoming warmth and cooperation that made my transition back to common law, equity and State authority seamless and enriching. The experience of moving from Commonwealth to State judicial power was fascinating. Today is not the occasion to compare the two functions and some of their important differences, except to say that a Constitutional structure that permits a proper and mutual degree of cross-fertilisation of experience would be a salutary public goal.

7 The work of the Court of Appeal is unremitting and potentially exhausting, but fascinating. As Mohammed Ali was reported to have said to George Foreman, at close quarters in the ring, after the latter had exhausted himself pounding the body, and breaking the ribs, of the former for 8 rounds in tropical heat in Kinshasa, Zaire, so it can be said to any Court of Appeal judge in Sydney:

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City of Sydney Law Society annual dinner on 14 November 2012

**The importance of the relationship between the courts and the profession**

The title of my remarks this evening may seem well-worn and comforting. This may be so and I hope what I have to say this evening will not be discomforting.

One of my duties as President of the Court of Appeal is to stand in for the Chief Justice in various roles and tasks when he is away. One of those tasks is presiding over admission ceremonies for new practitioners, most of them young graduates embarking on a new career in the law.

Let me commence by referring to two parts of the speech I give to the newly admitted lawyers on the day of their admission. The first extract comes at a point where, having discussed the history of the Court and the well-known obligations of lawyers as officers of the court, I say something about the content of law and the legal system:

“The values of justice, truth and fairness are fundamental to the legal system; they are immanent within the law itself, its fabric and its practice. The faithfulness of the legal profession and the courts to the vindication of these values is the basis of the trust in, and loyalty to, the law, the courts and the administration of justice, which all in our society should have.”

At a slightly later point in the speech, developing some ideas taken from former Chief Justice Spigelman's otherwise consummate speech that I shamelessly plagiarise, I say the following:

“Lawyers who are part of this system (you) must be prepared to stand up for individuals and minorities, and against unfairness or injustice even at the risk of incurring the resentment and anger of others. If lawyers do not, courts cannot; if courts cannot, no one will; if no one will or can, unfairness and injustice lie where they fall, unremedied.”

This encapsulates the essence of our relationship. These are words not only for new practitioners but also for busy experienced professionals handling the variety of work that you do. No one expects lawyers to be the embodiment of St Francis; no one expects law firms to operate as public service charities. Nevertheless, these kinds of considerations cannot leave the professional and the conduct by her or him of her or his professional life, after the first glow of idealism fades with the daily grind of life.

A couple of years ago, I delivered a speech to the Australian Academy of Law and then a legal conference in Perth concerning the commercialisation of the profession. I do not wish to repeat what I said in that talk. It is published in the Australian Law Journal of 2010.<sup>1</sup> It was not an attack on the profession; but it raised questions as to how the current forces upon the profession can be incorporated, withstood and developed to make the profession both stronger and even better able to play its part

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<sup>1</sup> (2010) 84 ALJ 765

in the life of 21st century Australia. These commercial pressures that place corporate and individual professional duties under the strain cannot be ignored, and should be recognised, confronted and dealt with.

One sometimes hears, in the context of the discussion of modern day legal commercial practice, people speak of “mature markets” with cost pressures, the need to “consolidate practice areas” in order to bring a better return on the capital employed in the business; sometimes one hears of “greenfield markets” where much more significant margins can be made and market share developed more quickly. It is no doubt convenient, at times, to discuss legal practice in this fashion in order to convey essential ideas of behaviour and intention. It is, however, a fundamental mistake to view the purpose of the practice of law as the extraction of value from labour and capital. All legal professions around the world, at least ones we recognise, rest for their success and value upon trust of the communities they serve. From one perspective this can be seen if one recognises that much of the stable revenue of law firms and lawyers is based upon the protected confidentiality of what passes between them. If the legal profession is to be viewed as the delivery of service and the selling of information, why should its practice be protected by the publicly recognised right and immunity of legal professional privilege? The immediate answer is of course that legal professional privilege is the right of the client, and the public interest that lies behind the fundamental human right of legal professional privilege is to protect the client, not a lawyer. Nevertheless, if the lawyer is just a shopkeeper selling ideas, or a service provider, the notion of privilege, and the circumstances in which it applies, may need reconsideration.

I am not for a moment suggesting the abolition of legal professional privilege. I just want to make it clear that without it, legal practice as we know it could not function.

The reality is that the profession is part of an integrated legal system that begins with legal education. The strength of the relationship between courts and the profession is of the utmost importance. Many in the profession will not, of course, have day-to-day contact with the courts. Many engage in transactional work, and a visit to the courts, for whatever reason, is a mark of failure; but even for these practitioners the courts and the stability of the legal system and the ability of it to service all in the community is vital. All stable transactional work assumes a competent system of enforcement on known and expected legal interpretations.

The deep trust which clients (whether commercial or criminal) should and generally do place in their lawyers of choice arises from the profession's reputation of faithfulness, loyalty to ideal and skill. No court can operate without the selfsame trust in the exact same qualities as those relied upon by the client. The structure of the Australian judiciary and judicial system is one taken from English roots. In stark contrast to continental and other civilian countries we do not have a department of state of the judiciary with people coming to it as young graduates training to be judges. It is a matter which is often overlooked in the discussion of judicial education when judges from common-law countries are discussing the topic with judges from civilian countries. One has to explain patiently to Chinese judges, for instance, that Australian judges come almost fully formed onto the bench, as if moths emerging from the chrysalis. Having seen judges work for 20 years or more in their practice as

lawyers, it is not difficult to understand how to do what they do, (or how not to do, as the case may be).

This difference in structure highlights the great importance of the profession in our system of judicial and legal administration. Civilian countries have more judges proportionally than we do. The task of investigation (though it can be exaggerated) places upon the civilian judiciary and magistracy burdens which require a significant population of officials. Much of that work is undertaken in the common law system by the profession on behalf the parties who bring forward that which the court needs to consider. Once one understands this fundamental role of the profession, one understands immediately the reliance that the courts place on the profession. If the profession does not bring forward the case, if the profession does not bring forward the evidence, if the profession is ill-educated, if the profession is not trustworthy, a judiciary without resources to find things out for itself and to act as the primary instrument of investigation of a wrong will be powerless to remedy injustice. As I say to the newly admitted lawyers: if lawyers do not, courts cannot; if courts cannot, no one will; if no one will or can, unfairness and injustice lie where they fall, unremedied.

There are significant forces and developments bearing on the legal system in Australia. Some are more obvious than others. Let me mention a few and make some remarks about them. First, there is a growing internationalisation of legal practice. This is manifesting itself in a number of ways, including the growth of international commercial arbitration, in particular in our region, with the growing wealth and influence of business in India, Asia, China and the Pacific. Secondly, partly because of this growing internationalisation of practice, there is the entry of foreign firms into the Australian legal market. Thirdly, and I refuse to take this off any sensible agenda, there is the need for the development of a national profession. Fourthly, there is the response that must be given by society as a whole and the legal profession in particular, to the collapse of the legal aid system in this country, other than limited categories of cases, including, in particular, for serious criminal offences. Fifthly, there is the building of loyalty to the legal system and the laws of Australia in an increasingly diverse society. This is something we have always taken for granted (though it never should have been in relation to indigenous Australians). It is something we should think about as an independent goal or aim of the profession. It is this that I refer to in the admission speech when I discuss the faithfulness of the legal profession and the courts to the vindication of the values of justice, truth and fairness being the basis of the trust in, and loyalty to, the law, the courts and the administration of justice which all in our society should have. Ultimately, law is not rule it is ideas; it is held together not by the power of force but by the power of consent and loyalty. Sixthly, and perhaps most importantly for the development of the soul of this nation, is the just reconciliation of those who have come to this ancient land in the past 224 years, and their descendants, with the original inhabitants who lived here for tens of thousands of years, and their descendants. The courts and the profession, individually and together, have a central role in this process. That is perhaps not often appreciated.

Let me first say a couple of things about the last two matters: the binding of all in society to the law and its essential character, and a place of the courts and the profession in the central national task of reconciliation. Both reflect considerations that should always guide us in our work: that it is society's legal system, they are

society's courts, and you are society's profession. All Australians should understand and believe that it is their legal system that is operating (whether well or displaying some fault) and that it is not the legal system of the dominant group or of the groups that have been here longer, or of the white man. When one reflects upon these imperatives, one sees the need for the legal profession and the courts to meet the expectations of those whose loyalty they should have. This demands that the profession and the courts recognise and seek to fulfil those expectations. That is not a call to pander to the daily fluctuating whims or passions of ordinary people in the community when they are placed under stress by the pressures of life, whether mediated through newspapers, social media or radio commentators or not. Rather, it is for us to recognise that the trust placed in us to serve the ends of truth, justice and fairness, in a manner which will be recognised by all in our community, requires the profession to look upon its work as more than the fee for service and the billable hour and the courts to look upon their work as more than the mechanical infliction of the rule upon those unfortunate enough to be in the position of their lives in some way being subject to the jurisdiction of the court system. We have many people in our community who have no natural or intrinsic loyalty to a legal system with the trappings of former British colonialism. Of course, our legal system is truly independent and strong in its own identity and form, though having strong historical links to a common law system which Holmes once described as having the final title to respect because it was not an Hegelian dream, but part of the lives of men and women.<sup>2</sup> But many people in our society grew up in countries where lawyers and courts were either not independent or incompetent or corrupt. Why should they see our legal system as any different? This loyalty and trust is to be earned every day. It is vital and of the first importance to a diverse, democratic and tolerant civil society. It is one reason why the law cannot be just seen as rule or command, but as rule from principle that has its source in democratic legitimacy and intrinsic notions of justice and fairness. How we act and how we face the challenges of the century should always have these considerations in mind.

Let me say a few words about the first four matters to which I referred: the internationalisation of legal practice, the entry of foreign firms into the Australian market, the need for the development of a national profession and the disintegration of legal aid.

The development of international commercial arbitration should be viewed as one of the most exciting and profoundly important developments in the last 100 years. Some view arbitration as some fad driven by venal lawyers taking work from the honest commercial courts where it is done properly, into the darkened corrupt recesses of unaccountable arbitral tribunals. With respect to those who say or suggest this, it is wrong and misguided. International commercial arbitration is based on the New York Convention of 1958, which is one of the most successful and important conventions ever done. It makes enforceable a valid arbitral award in over 140 countries. It makes international arbitral dispute resolution work enforceably in a way that national courts simply cannot, not because good commercial judges and courts are not as speedy and effective (if not more so) than arbitrators, but because

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<sup>2</sup> "The Path of the Law" an address delivered by Mr Justice Holmes when a Justice of the Supreme Judicial Court of Massachusetts at Boston University School of Law on 8 January 1897, reprinted in Holmes Collected Legal Papers.

of the wider arbitral enforcement regime. Arbitration and not judicial hearing provides a practical worldwide structure for the enforceability of rights and duties in international commerce by peaceful, civilised means engaging the international rule of law. It is the system of dispute resolution chosen by merchants from different cultures and different legal systems who enter bargains on a daily basis. It provides a peaceful mechanism for the ordered and tolerably workable resolution of disputes.

Trust and enforceability are the keys to international dispute resolution. Commerce is ultimately based on trust, as is the strength of any legal system or structure of dispute resolution. The international commercial community has placed its trust in international arbitration. The Australian profession and the Australian court system together should recognise that.

The profession has an opportunity of a kind that comes rarely twice in a generation to take its place in the development and fostering of an international structure of dispute resolution vital to the international rule of law in contemporary international society. It is one of the reasons why international law firms have come to Australia. Not only is there, here, a mature and highly skilled profession, but also the markets have moved to this part of the world. The courts and the profession should recognise this and develop their skills in this area; and each should ensure that the other is not left behind in a puddle of miasmatic provincialism. As with many new developments the courts and the profession should strive to educate each other. I am not sure that that this mutual educative process is often recognised sufficiently. The courts have an obligation and an interest in the education of the bar and solicitors in how they conduct their work in the courts; the profession also has an obligation and an interest to educate the courts when they see the need, such as narrow-minded provincialism or limited vision being hinted at by judges. The mechanism for this education is the open and forthright discussion of issues between the profession and the courts.

There is a risk that the relationship between the profession and the courts will be made more distant by the internationalisation of practice. That tendency is almost inevitable when arbitration practitioners are moving all around the world in the furtherance of their clients' interests. Such practitioners are not practising before the courts, except when questions of supervision and enforcement arise. Nevertheless, those practitioners will, in all likelihood, form part of both a local profession and a wider international profession. They should be embraced and made part of the Australian legal system so that they can bring to it the perspectives and skills of international practice and we can bring to them the skill, resources and values of the Australian legal system, as well as the skill of Australian commercial courts, and thereby build a loyalty and trust between the international legal and commercial communities and the Australian legal system.

As to the national legal profession. I need to be diplomatic, because if I say too much about the collapse of the recent initiatives I may be criticised for intemperate language. I just find it astonishing and deeply depressing that it has failed. It can be readily accepted that one of the great strengths of our political structure is the flexibility of federalism. National bureaucracies are rightly feared for some things; also to be feared for its divisiveness and corrosiveness is narrow-minded provincialism. The reality of legal practice and life will no doubt deal with the issue in time, in another generation. The failure, however, of Australian governments after 13

years to rectify, if necessary by putting forward constitutional amendment, the destruction of the cross vesting system by the High Court in *Wakim* does not fill one with confidence that this matter will be successfully brought to fruition quickly.

Finally, may I say something about legal aid. I am not intending to be critical or politically controversial. I fully apprehend the financial pressures upon governments in Australia and the necessary limitation of public funds for legal assistance. Society cannot expect a socialised system of legal practice. I dare say also that it should not wish for it. The inability of many in our society to gain access to the legal system to vindicate their rights is not a new issue. That it is not new does not mean that it is not of significant contemporary importance. I do not have a sufficient familiarity with the legal aid system and the referral centres that exist in New South Wales run by various non-profit organisations to speak comprehensively and authoritatively. I am well aware that many firms and practitioners provide significant pro bono assistance to those who need representation. This is one of the most important and defining characteristics of the profession. How it is undertaken and the adequacy of the resources deployed to the benefit of the public have relieved government of the burden of providing legal aid. Whether that should have occurred I leave it to others to contemplate. But the undertaking by the profession of significant pro bono assistance is an essential part of the life of the profession. Many courts simply could not function with any thing like the efficiency that they do were it not for practitioners providing their time and skill for the benefit of unrepresented litigants.

In the Court of Appeal we have at any one time about 20 litigants in person (often from the possession list) who look to the Court of Appeal to remedy what they perceive to be wrongs inflicted upon them in life that have gone, in their eyes, unremedied by the lower courts. I recently refused to strike out an otherwise incompetently drafted notice of appeal because (as I said to counsel for the bank) if these people were to be thrown out of their home they should at least face that catastrophe with the knowledge that even though they did not have the money for a lawyer to draft a proper notice of appeal they had a full and fair hearing in court. Pro bono assistance is now being obtained from Salvos Legal and the bar.

One innovation that I have sought to introduce in the Court of Appeal is the expansion of the use of the *amicus curiae*. Sometimes litigants in person are of sufficient difficulty that it appears grossly unfair to inflict them on members of the bar or solicitors for no charge. In the Court of Appeal where the material should be able to be identified with precision (unlike evidence to be led at a future trial) the papers can be collected and delivered to someone who can be requested by the court to put every apparent point on behalf of the litigant that he or she can think of, perhaps in written submissions before the appeal. The court then gets a sense of assurance that there has not been a valuable point overlooked on behalf of the litigant. This kind of partnership is crucial to the court operating as an instrument of justice and not as an apparent instrument of injustice.

Let me throw out one more idea to you. The firm Salvos Legal operates under a model that should be considered by other firms, I suggest acting collectively. What if a number of firms pooled their pro bono efforts by setting up an entirely separate firm devoted to the provision of assistance to those who cannot afford it. It could be staffed by a mixture of paid and voluntary full time and part time employees. The

Bar would be encouraged to provide funds and the services of its members. Its funding would come from the sponsoring firms. If the firm could be set up as a charitable body tax effective status might be gained. This is the Salvos model. It gives organisational coherence and economic efficiency to the pro bono effort that is made at the moment. Given the effort that I know many solicitors make, which runs into millions of dollars per year, such a firm might perhaps be seen as a major, visible, professional structure addressing a critical social justice issue and emphasising the place of the profession in the strengthening of the administration of justice. The litigation funders who have been permitted to promote and participate in litigation as a commercial enterprise could assist in the funding of such an organisation both through their activity and by donation.

There are many challenges for the legal profession in the coming century. The legal profession faces those challenges in a partnership with the courts. The profession and the courts are two pillars of the rule of law. That rule of law will survive in a society if the society places loyalty and trust in the profession and in the courts. If the trust of society in the profession be lost, it is only a matter of time before the trust in the courts is lost. If the profession is viewed as the instrument only of those who can afford to pay for it, the courts may tend to become viewed as the instrument of those with money or power. In these circumstances, the rule of law will be seen as the exercise of power at the behest of those in the position to command. If people or groups view the legal system as someone else's, as not theirs, the rule of law under which they live is rule by someone else's law. A moment's reflection will reveal the oppression, and the danger lying therein. At that point, one recognises the importance of theory to everyday life and everyday legal practice; at that point, to paraphrase Holmes again, one understands that the law must be part of the lives of men and women, and when it is, one might just catch an echo of the infinite. In realising these things, one understands the importance of our relationship.

# The Central Role of Insurance in Modern Society and in the Development of the Law

James Allsop<sup>1</sup>

AILA National Conference, Hobart, 1 November 2012

We live in a world in which insurance is fundamental. It lies at the heart of commercial transactions and corporate organisation. Most individuals rely upon insurance to protect them personally, whether it be in the form of compulsory motor vehicle insurance, home and contents insurance, professional liability insurance, health insurance, life insurance or other. The prevalence of insurance today (as a consumer product) as a means of risk distribution is to be distinguished from the position of 100 years ago, when insurance was the exception not the norm. It was only in the last third of the 19<sup>th</sup> century that third party liability marine insurance began to be available from protection and indemnity clubs. Despite these developments, and particularly the growth of liability insurance, legal responsibility for the materialisation of risks continues to be determined primarily by reference to negligence. The orthodox position is that for the purpose of determining liability, the fact that the defendant is insured is irrelevant.<sup>2</sup> If the existence of insurance were not disregarded, so the argument runs, judges and juries would be unable to resist finding for the plaintiff, knowing that an insuring company and not the defendant would foot the bill. But, as is frequently identified in the literature on this topic, judges cannot be ignorant of the reality that many defendants are insured.

That judges are enjoined from considering, or at least commenting upon, the existence of insurance in determining liability makes evaluation of the nature and extent of any connection between the two difficult. What can be said is that throughout the common law world there has been a significant expansion of tortious liability since the mid-20<sup>th</sup> century, that this has affected insurance markets, and (although this last point is contested) the inability of insurance markets to absorb the costs of increased exposure led to strains on the insurance markets in the United States, the United Kingdom and Australia, which prompted legislative reforms aimed to limit both liability and quantum.

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<sup>1</sup> President, New South Wales Court of Appeal. I express my thanks to my Researcher, Ms Louise Dargan, for her assistance in the preparation of this paper.

<sup>2</sup> *Lister v Romford Ice and Cold Storage Co Ltd* [1956] UKHL 6; [1957] AC 555 at 576-577 per Viscount Simonds:

“As a general proposition it has not, I think, been questioned for nearly 200 years that in determining the rights *inter se* of A and B the fact that one or other of them is insured is to be disregarded.”



The extent to which insurance affects tort law and the extent to which it should supplant tort law is a matter that *has* divided lawyers, academics, judges and economists. Are the approaches to compensation for personal injury in the employment, motor vehicle and defective products contexts exceptional or should liability be founded more generally upon the “insurability” of risk? If so, who should bear the cost of insurance – plaintiff or defendant or the public? The debate is complex and, as Professor Jane Stapleton acknowledges, the issue is political.<sup>3</sup>

This paper will canvas the progression of academic opinion on the place of insurance and its relationship to liability throughout the last century, give examples of English and Australian cases that bring to light some of the complexities involved and conclude with some remarks about the future of tortious liability in Australia.

### **The development and operation of “no liability without fault”**

Although the early common law “displayed little concern”<sup>4</sup> with notions culpability,<sup>5</sup> by the middle of the 19<sup>th</sup> century fault had become the general basis of tortious liability. But, even as the law of torts grew into a cohesive and homogenous body of laws (rather than sets of rules about distinct torts) not all aspects of the law sat easily with the concept of negligence. Some limited forms of strict liability remained, such as responsibility for the escape of fire and dangerous animals, ~~there was the rule~~ in *Rylands v Fletcher*<sup>6</sup> and the concept of vicarious liability, none of which was easily reconciled with fault.<sup>7</sup> These aspects were, however, viewed as anomalies; the general position was that negligence was the touchstone of legal responsibility.<sup>8</sup>

At the end of the 19<sup>th</sup> century, a significant break with this position was effectuated with the *Workmen’s Compensation Act 1897* (UK), which imposed liability without fault in the employment context. In 1930, England, following the example of New Zealand, introduced a system of compulsory motor vehicle insurance. In these contexts policy considerations supported

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<sup>3</sup> Jane Stapleton, “Tort, Insurance and Ideology” (1995) 58 *Modern Law Review* 820-845.

<sup>4</sup> Donal Nolan, “Strict Liability” in Carolyn Sappideen and Prue Vines (eds), *Fleming’s The Law of Torts* (10<sup>th</sup> ed, Lawbook Co, 2011) 379 at 379.

<sup>5</sup> For a history of the development of tort law see Charles O Gregory, “Trespass to Negligence to Absolute Liability” (1951) 37 *Virginia Law Review* 359-397. See also Richard A Posner, “A Theory of Negligence” (1972) (1) *Journal of Legal Studies* 1-29 at 29.

<sup>6</sup> (1866) LR 1 Ex 265. Rejected in Australia in *Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13; 179 CLR 520.

<sup>7</sup> Nolan, above n 4 at 379.

<sup>8</sup> See eg G Edward White, *Tort Law in America: An Intellectual History* (Oxford University Press, 1985) at 108. The law has tended to incorporate these into fault-based analysis: *Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13; 179 CLR 520.

the introduction of insurance to ensure compensation to victims of accidents, whether caused by negligence or merely misfortune.

### **The United States and Fleming James Jnr**

One of the early American legal scholars in this field was Yale professor Fleming James Jnr. James was a legal realist. The influence of the realist school of thought on tort law was already perceptible by the 1930s, through the works of scholars such as Leon Green and Francis Bohlen,<sup>9</sup> but James was the first to concentrate on insurance as a means of providing compensation. His works contributed to the creation of the 1932 Columbia Committee to Study Compensation for Automobile Accidents, which recommended (unsuccessfully, ultimately) the introduction of a no-fault compensation scheme for motor vehicle accidents.

James later published a theory of compensation by risk distribution for all personal injury.<sup>10</sup> Writing in 1948, James discussed the effects of the mechanical age on liability.<sup>11</sup> In his view, accidents were the inevitable consequence of productive activity.<sup>12</sup> James argued that the best and most efficient way of dealing with the consequences of human failures was by social insurance – to distribute the losses over society as a whole or a very large segment of it.<sup>13</sup> He stated that judicial reasoning or rules of law that proceeded upon the basis that the judgment comes out of the defendant's pocket were based on a "complete unreality"<sup>14</sup>. James's argument was that reasoning in terms of tort law where parties were insured produced fictions – such as in the context of recovery by the unemancipated minor for a parent's negligence. Here, if there were insurance, no threat would be posed to the family unit to prevent recovery.<sup>15</sup> He argued that insurance was not necessarily inconsistent with the deterrence objective of tort law. There were, according to James, many reasons independent of legal liability that a person would wish to avoid

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<sup>9</sup> See generally White, above n 8 at 75-83.

<sup>10</sup> James's prominent works include the following: "Accident Liability Reconsidered: The Impact of Liability Insurance" (1948) 57(4) *Yale Law Journal* 549-570; "Social Insurance and Tort Liability: The Problem of Alternative Remedies" (1952) 27(4) *New York University Law Review* 537-563; "Contributory Negligence" (1953) 62(5) *Yale Law Journal* 691-735; "Products Liability" (1955) 34(1) *Texas Law Review* 44-77; "Products Liability II" (1955) 34(2) *Texas Law Review* 192-228; "General Products – Should Manufacturers be Liable without Negligence?" (1957) 24(7) *Tennessee Law Review* 923-927; "An Evaluation of the Fault Concept" (1965) 32 *Tennessee Law Review* 394-403; and "The Future of Negligence in Accident Law" (1967) 53(4) *Virginia Law Review* 911-918.

<sup>11</sup> A helpful analysis of the contribution of James on this topic is provided in an article by George L Priest. According to Priest, James was the dominant tort law academic of the 1940s and 1950s and was a key proponent of the legal reforms in the United States in the 1960s: George L Priest, "The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law" (1985) 14 *Journal of Legal Studies* 461-527 at 464-465.

<sup>12</sup> *Ibid* at 470.

<sup>13</sup> James, *Accident Liability Reconsidered*, above n 10 at 549-550.

<sup>14</sup> *Ibid* at 550.

<sup>15</sup> *Ibid* at 553.

commission of a tort, such as collateral costs, public relations and criminal liability. Insurance could also affect accident prevention as insurance companies were placed in a strategic position to carry out programmes to promote safety and adjust their rates to pass on the risk to the insured. James stated:

“The main job of accident law is, therefore, to promote the well-being of accident victims if this can be done without imposing too great a social cost in other directions. It is the writer’s conclusion that a system of social insurance can do this. The expressed doctrines of tort law are not well adapted to such an end. They are horse and buggy rules in an age of machinery; and they might well have gone to the scrap heap some time ago had not the tremendous growth of liability insurance and the progressive ingenuity of the companies made it possible to get some of the benefits of social insurance under – or perhaps in spite of – the legal rules.”<sup>16</sup>

*One can see in this quote a clear distinction between social insurance and liability insurance.*

Throughout the 1940s and 1950s James mounted a sustained attack on fault-based recovery. He was critical of contributory negligence, which he viewed as another means of denying compensation to victims. Rather than a system of contribution based on the risk of accidents generated by specific individuals or classes of persons, James advocated a system of general contribution.<sup>17</sup> (According to Priest, this was one of the reasons that his ideas did not take hold in the 1940s and 1950s, when the focus was very much upon attributing cost to specific activities.<sup>18</sup>) James was prolific in his writings and, whatever his contribution to legal reform, he is probably the most frequently cited academic on the topic.

### **Developments in the United States in the 1950s and 1960s**

It was not until the 1950s that the theory of liability without fault received more general attention. Criticisms of negligence became more pronounced during this period. There was, it was argued, little connection between the degree of fault and the penalty imposed on a tortfeasor because damages were particular to the plaintiff. At the same time, the growing strength of industry and its ability to insure against potential risks weakened arguments against strict liability.<sup>19</sup> Around the mid-1950s, academic attention was focused upon the problem of defective products.<sup>20</sup> That

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<sup>16</sup> Ibid at 569. See also James, Social Insurance and Tort Liability, above n 10 at 540:

“With increasing accumulations of capital and the coming of liability insurance, however, something of the philosophy of social insurance has crept into the thinking about tort liability, almost surreptitiously, so that the current philosophy of tort law is schizophrenic.”

<sup>17</sup> Priest, above n 11 at 472.

<sup>18</sup> Ibid at 483.

<sup>19</sup> Nolan, above n 4 at 379.

<sup>20</sup> Priest, above n 11 at 500.

attention followed the now famous concurring opinion of Judge Traynor in *Escola v Coca Cola Bottling Co*,<sup>21</sup> in 1944, in which he stated:

“Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.”<sup>22</sup>

In 1960, William L Prosser published an article entitled “The Assault upon the Citadel”<sup>23</sup> in reference to a quote by Cardozo J in 1931<sup>24</sup> concerning the development of exceptions to the doctrine of privity. For his part, Prosser was concerned with “cracks”<sup>25</sup> in the resistance to strict liability, which he identified in several judicial decisions. Prosser’s position was confirmed when Traynor became the Chief Justice of the Californian Supreme Court and, in 1963, Traynor’s Court introduced strict liability for injuries caused by products in *Greenman v Yuba Power Products, Inc.*<sup>26</sup> The following year the American Law Institute adopted s 402A of the Restatement (Second) of Torts, drafted by Prosser, which assigned liability to sellers for injuries from defective products, even where all possible care had been exercised.<sup>27</sup> These developments not only signalled a move away from negligence but also a move away from contract as the source of liability, with the limitations upon actions by consumers that privity imposed. It was, in a sense, an extension of James’s position, although James advocated strict liability on the basis of implied warranties and not tort. The rationale for the change in approach, partly evident in Judge Traynor’s opinion in *Escola*, was “enterprise liability theory”, the view that the manufacturers or sellers were in a better position strategically and economically than consumers to acquire insurance and pass the cost on in pricing the product. Thus, the costs of accidents could be “internalised”. Making manufacturers and providers of products liable was said to achieve the optimal control of accident rates, by providing incentives for injury prevention while also

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<sup>21</sup> 24 Cal 2d 453 (Sup Ct, 1944).

<sup>22</sup> Ibid at 461.

<sup>23</sup> William L Prosser “The Assault upon the Citadel (Strict Liability to the Consumer)” (1960) 69(7) *Yale Law Journal* 1099-1148.

<sup>24</sup> *Ultramares Corp v Touche* 255 NY 170, 180 (Ct App, 1931).

<sup>25</sup> White, above n 8 at 169.

<sup>26</sup> 59 Cal 2d 57, 377 (Sup Ct, 1963).

<sup>27</sup> Priest, above n 11 at 505.

providing compensation for injuries which could not be avoided,<sup>28</sup> without trammelling upon industry.

### **The end of negligence?**

The triumph of enterprise liability theory in relation to defective products led some to question whether negligence had any useful role to play in the future of legal liability. Apart from James, there were other academics who subscribed to this view, including Ehrenzweig and Friedmann.<sup>29</sup> As Professor Jane Stapleton notes, there was, until the late 1970s, a rise in the incidence of the insurance response and in reliance on the “socialisation of risk” across a number of fields.<sup>30</sup> Overall, however, negligence continued to be the primary foundation of liability. It was in New Zealand, rather than in the United States, that this was most radically challenged.

### **The Woodhouse Reports and the Pearson Report**

If one is to consider the shape of the law concerning compensation for accidents in the last century, the system in New Zealand cannot be ignored. It was, very nearly, the system adopted here in Australia. The overhaul of accident compensation in New Zealand in the 1970s was (and remains) the most drastic reform of injury compensation of the common law world. The reforms, passed between 1972 and 1975,<sup>31</sup> introduced a “no-fault” compensation scheme. The legislation followed the report of a Commission chaired by Arthur Owen Woodhouse (then a judge of the New Zealand Supreme Court and later President of the New Zealand Court of Appeal).<sup>32</sup> The pillars of the Woodhouse Report were community responsibility – in that every income earner should contribute – and comprehensive entitlement.<sup>33</sup> Actions in tort for injuries covered under the scheme were to be abolished.

In 1973, the Australian government appointed Woodhouse to chair a committee of inquiry into accident compensation in Australia. The Committee published its report in 1974.<sup>34</sup> The Australian Woodhouse Report pointed to the lack of a moral basis for the fault theory, and noted

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<sup>28</sup> See George L Priest, “The Current Insurance Crisis and Modern Tort Law” (1987) 96 *Yale Law Journal* 1521-1590 at 1534-1535.

<sup>29</sup> See W Page Keeton et al, *Prosser and Keeton on Torts* (5<sup>th</sup> ed, West Publishing, 1984) at 589.

<sup>30</sup> Stapleton, above n 3 at 820.

<sup>31</sup> The principal Act being the *Accident Compensation Act 1972* (NZ).

<sup>32</sup> Report of the Royal Commission of Inquiry on Compensation for Personal Injury in New Zealand 1967 (the “Woodhouse Report”).

<sup>33</sup> Report of the Royal Commission on Civil Liability and Compensation for Personal Injury 1978 at Vol III [849] (the “Pearson Report”).

<sup>34</sup> Report of the National Committee of Inquiry on Compensation and Rehabilitation in Australia 1974 (the “Australian Woodhouse Report”).

that “[t]he ... contemporary test of a plaintiff’s entitlement is therefore the fortuitous chance that he will be able to blame somebody else.”<sup>35</sup> There was, the Committee stated, “a plain discrepancy between legal negligence and personal blameworthiness that makes a sham of any notions of fairness and equity.”<sup>36</sup> As in New Zealand, the Committee recommended a comprehensive scheme of no-fault compensation. In October 1974, a National Compensation Bill to that effect was passed in the Lower House but was referred to a Senate Standing Committee which, having reviewed over 90 submissions, recommended the Bill be withdrawn.<sup>37</sup>

The developments in Australia and New Zealand were subsequently documented by the United Kingdom’s Royal Commission, chaired by Lord Pearson. The Pearson Report, published in 1978, did not recommend the abolition of tort law; it recommended a “mixed system” to strike a balance between no-fault recovery and tort. The Pearson Report stated that “social security should be regarded as the primary method of providing compensation”<sup>38</sup> but that tort should be retained. No-fault compensation was recommended for motor vehicle and industrial accidents, as was a scheme of strict liability for consumer protection.

### **The expansion of liability**

Since the 1980s opinion concerning the place of insurance as the primary compensatory mechanism has cooled somewhat. Stresses on the insurance markets in the United States in the 1970s and 1980s, in London in the 1990s and, more recently, in Australia have cast considerable doubt upon the viability of insurance as a complete response to liability for the materialisation of risks. Proponents of the “tort as insurance” view have, however, argued that the problems are a result of the expansion of tortious liability that insurance seemed to precipitate and not a result of preferring distributive methods over negligence.

One prominent academic in this field is George L Priest, another Professor of law from Yale. According to Priest, the “revolution” in tort law concerning enterprise liability theory expanded beyond the realm of product defects and affected areas of tort law still judged by the negligence standard. He argued that “A law concerned with internalising costs and providing insurance is vastly different from a law seeking only to penalize the abnormal”<sup>39</sup>. He said:

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<sup>35</sup> Ibid at Vol I [54].

<sup>36</sup> Ibid at Vol I [98].

<sup>37</sup> Pearson Report, above n 33 at Vol III [805].

<sup>38</sup> Ibid at Vol I [275].

<sup>39</sup> George L Priest, “The Modern Expansion of Tort Liability: Its Sources, Its Effects, and Its Reform” (1991) 5(3) *The Journal of Economic Perspectives* 31-50 at 38.

“Good evidence of the revolution is that, prior to the 1960s, no one thought to sue ladder manufacturers for injuries suffered from falls off ladders. No one thought that doctors or hospitals might be liable for negligence when children suffered birth defects or, given a difficult delivery, developed nervous or psychological problems at a later age. No one thought to sue a park service or a diving board manufacturer for an injury suffered from too deep a dive. Before the 1960s, there are no actions of this nature in the judicial records; today, they are a commonplace.”<sup>40</sup>

A like observation was made in the Pearson Report which stated that lawsuits had multiplied in the United States for defective products and medical malpractice, and “produced some spectacular awards.”<sup>41</sup> This tendency towards larger verdicts has been described as an “invisible” effect of insurance on tort law.<sup>42</sup> For this, judges are often blamed. John G Fleming, a most respected tort scholar in Australia and the United States, commented in 1984 that “the law of torts is being manipulated by compensation-minded judges and juries, looking more like handmaidens of collectivism than the traditional guardians of liberty.”<sup>43</sup>

Since the 1970s, the appropriateness of vicarious liability has been challenged,<sup>44</sup> as has the increased prevalence of third party as opposed to first party insurance<sup>45</sup> and the ability to recover for pure economic loss. If insurance is to be a viable, according to some, the scope of liability of the insured must be curtailed. One means of addressing these issues has been to introduce monetary caps on compensation. That was implemented in some of the American States in the 1980s. It has also been implemented in Australia in respect of personal injury, forming a key recommendation of the Ipp Report of 2002.<sup>46</sup>

## Jane Stapleton

Arguing against the proposition that tort should be approached in terms of the insurability of risk is Professor Jane Stapleton, who published an article to this effect in 1995.<sup>47</sup> Stapleton argued that insurance should *not* be relevant to the reach and shape of tort liability and that conflating

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<sup>40</sup> Ibid.

<sup>41</sup> Pearson Report, above n 33 at Vol III [146].

<sup>42</sup> Keeton et al, above n 29 at 590, although critical of this position. See also the commentary in Glanville Williams and B A Hepple, *Foundations of the Law of Torts* (Butterworths, 1976) at 143.

<sup>43</sup> John G Fleming, “Is there a Future for Tort?” (1984) 44 *Louisiana Law Review* 1193-1212 at 1195. See also Kenneth S Abraham, *Distributing Risk: Insurance, Legal Theory and Public Policy* (Yale University Press, 1986) at 101:

“Judges in insurance cases not only make insurance law; sometimes they also make insurance. This practice is part of a widely recognized but only dimly understood fact of legal life: courts seem consistently to favour policyholders in disputes with insurance companies.”

<sup>44</sup> See Alan O Sykes, “The Economics of Vicarious Liability” (1984) 93 *Yale Law Journal* 1231-1280.

<sup>45</sup> Priest, above n 28.

<sup>46</sup> Review of the Law of Negligence Final Report 2002 (the “Ipp Report”).

<sup>47</sup> Stapleton, above n 3.

insurance and tort would lead to the retrenchment of tort. One of the problems she identified with the “realities of insurance” argument is that it leads to a comparative analysis of who is better placed to insure against a risk: plaintiff or defendant, when such a comparison is difficult to draw. The plaintiff has a superior knowledge of his or her own position and the defendant a better knowledge of the probabilities of his or her commission of a tort; it is not self-evident that the plaintiff (or the defendant) is the better insurer. Further, such analysis ignores the other objectives of tort law: corrective justice and deterrence. Stapleton criticised the approach of a group of American jurists whom she called the “Yale lawyers” (including Priest) who approached tort as insurance. She argued that the insurability of a risk approach is flawed as it presumes the existence of a consensual bargaining relationship between the parties (and the ability of the parties to consider the allocation of risks). In fact, the majority of parties are strangers, as in *Donoghue v Stevenson*. There is also a danger that assuming a victim requires insurance can lead to the conclusion that there should be no legal entitlement to pursue a remedy through tort. According to Stapleton, although this method “masquerades” as apolitical, in reality it “generates a reform strategy which is radically redistributive whereby business is enriched and injured individuals are stripped of protection, yet neither of these consequences is squarely acknowledged.”<sup>48</sup>

### **Effects of insurance on legal expression of wrongs**

However one views the negligence versus insurability of risk debate, what does the prevalence of insurance mean in practical terms? Has negligence as a concept been emptied of content? To what degree does the existence of insurance influence liability? These are questions that cannot be answered easily. Not all judges have been unprepared to acknowledge insurance as relevant in determining legal responsibility, particularly those in England. ~~Lord Sir Alfred~~ Denning has on multiple occasions referred to the policy considerations leading to a finding of liability, both in his judgments and extra-curial writing. In 1949, Denning LJ stated in *White v White*<sup>49</sup> that “Recent legislative and judicial developments show that the criterion of liability in tort is not so much culpability, but on whom the risk should fall.”<sup>50</sup> Writing extra-curially in 1955 in *The Road to Justice*<sup>51</sup> Denning stated that in areas of new scientific processes there should be absolute liability in all cases “whenever the defendants can be protected by insurance.”<sup>52</sup> In considering

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<sup>48</sup> Ibid at 837.

<sup>49</sup> [1949] 2 All ER 339.

<sup>50</sup> Ibid at 351.

<sup>51</sup> (Stevens & Sons, 1955).

<sup>52</sup> Ibid at 113.



the duty of care on a learner driver in *Nettleship v Weston*,<sup>53</sup> a 1971 decision, Denning MR stated the high standard of care imposed (which did not take into account the inexperience of the driver) bore out the policy of the Road Traffic Act that a person injured should be able to recover from the fund.<sup>54</sup> (*Nettleship v Weston* was not followed by the Australian High Court in *Cook v Cook*.<sup>55</sup>) In 1973 in *Morris v Ford Motor Co Ltd*,<sup>56</sup> Denning MR went further, stating:

“The damages are expected to be borne by the insurers. The courts themselves recognise this every day. They would not find negligence so readily – or award sums of such increasing magnitude – except on the footing that the damages are to be borne, not by the man himself, but by an insurance company.”<sup>57</sup>

Lord Griffiths, in 1990, in construing an exclusion of liability clause stated the days when it was forbidden to refer to the existence of insurance in determining liability were “long past”<sup>58</sup> and that the availability of insurance “must be a relevant factor”.<sup>59</sup>

More recently, Lord Hoffmann, in considering third party benefits and the rejection of the position that they are *res inter alios acta* stated that the courts now recognise that:

“... virtually all compensation is paid directly out of public or insurance funds and that through these channels the burden of compensation is spread across the whole community through an intricate series of economic links. Often, therefore, the sources of ‘third party benefits’ will not in reality be third parties at all. Their cost will also be borne by the community through taxation or increased prices for goods and services.”<sup>60</sup>

A similar rationale can be seen to inform the reasons of the majority of the United Kingdom Supreme Court in the 2011 decision of *Jones v Kaney*<sup>61</sup> that an expert witness is not immune from suit. Kaney was a clinical psychologist who signed a joint report damaging to the plaintiff’s case. Their Lordships had to consider the possible damage that abolishing the immunity would do, in discouraging experts from testifying or in affecting the fullness and frankness of their testimonies. In finding that the immunity should be abolished, Lord Phillips of Worth Matravers referred to the fact that all professionals providing services involving a duty of care were at risk

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<sup>53</sup> [1971] EWCA Civ 6; [1971] 2 QB 691.

<sup>54</sup> *Ibid* at 700: “Morally the learner driver is not at fault; but legally she is liable to be because she is insured and the risk should fall on her.”

<sup>55</sup> [1986] HCA 73; 162 CLR 376.

<sup>56</sup> [1973] QB 792.

<sup>57</sup> *Ibid* at 798.

<sup>58</sup> *Smith v Eric S Bush* [1990] UKHL 1; [1990] 1 AC 831 at 858.

<sup>59</sup> *Ibid*.

<sup>60</sup> *Dimond v Lovell* [2000] UKHL 27; [2002] 1 AC 384 at 399.

<sup>61</sup> [2011] UKSC 13; [2011] 2 AC 398.

of being sued and “customarily insure against that risk.”<sup>62</sup> Lord Collins of Mapesbury also considered the fact of insurance meant that experts would not be dissuaded from testifying,<sup>63</sup> as did Lord Dyson.<sup>64</sup>

This is not the position in Australia, where expert witness immunity stands.<sup>65</sup>

In Australia, the courts have taken a different course. One area of Australian tort law where this is evident is cases where the vulnerability of the plaintiff to harm from the defendant’s conduct has been a factor giving rise to the imposition of a duty of care for pure economic loss. On this basis, in *Perre v Apand Pty Ltd*,<sup>66</sup> a company was held liable for economic loss to a potato farmer for causing a disease to be introduced on neighbouring land in circumstances where State law prohibited the sale of potatoes from land within a certain radius of contaminated land. Gleeson CJ stated that knowledge of an ascertainable class of persons who were vulnerable to loss was a significant factor in establishing a duty of care.<sup>67</sup> McHugh J stated that vulnerability was a “prerequisite” to finding a duty of care. His Honour said that “If the plaintiff has taken, or could have taken steps to protect itself from the defendant’s conduct and was not induced by the defendant’s conduct from taking such steps”<sup>68</sup> the law should not impose a duty. However, McHugh J expressly disavowed the connection between any found vulnerability and the availability of insurance for a particular risk. His Honour stated:

“Whether the plaintiff has purchased, or is able to purchase, insurance is, however, generally not relevant to the issue of vulnerability. In *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords*, I pointed out that courts often wrongly assume that insurance is readily obtainable and that the increased cost of an extension of liability can be spread among customers by adding the cost of premiums to the costs of services or goods. In *Caltex* Stephen J rejected the contention that the existence of insurance or the more general concept of ‘loss spreading’ were valid considerations in determining whether a duty of care existed. I agree with his Honour. They do not assist but rather impede the relevant inquiry. Loss spreading is not synonymous with economic efficiency - which will sometimes be a relevant factor in determining duty. Australian courts, however, have not accepted that loss spreading is the guiding rationale for the law of negligence or that it should be.”<sup>69</sup>

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<sup>62</sup> Ibid at 419.

<sup>63</sup> Ibid at 426.

<sup>64</sup> Ibid at 434.

<sup>65</sup> *Commonwealth v Griffiths* [2007] NSWCA 370; 70 NSWLR 268.

<sup>66</sup> [1999] HCA 36; 198 CLR 180 at 194 [10].

<sup>67</sup> Ibid.

<sup>68</sup> Ibid at 225 [118].

<sup>69</sup> Ibid at 225 [119] (citations omitted).

McHugh J's reference to *Esanda*<sup>70</sup> was to another High Court case in which a duty of care was not imposed on auditors of a borrower corporation to financiers who relied on the auditors' accounts and reports to enter into transactions. The financiers were a commercially sophisticated party and not "vulnerable" to the auditors' actions.

*Caltex*<sup>71</sup> was handed down in 1976, at the time when the new wave of literature concerning insurance had emerged urging that liability be excluded for pure economic loss. Stephen J expressly rejected consideration of this school of thought, and stated:

"The task of the courts remains that of loss fixing rather than loss spreading and if this is to be altered it is, in my view, a matter for direct legislative action rather than for the courts. It should be undertaken, if at all, openly and after adequate public inquiry and parliamentary debate and not worked towards covertly, in the course of judicial decision, by the adoption of policy factors which assume its desirability as a goal and operate to further its attainment.

...

An opposing view, that loss should, in the case of involuntary torts, lie where it falls, there to be spread by recourse to the relatively efficient device of loss insurance (more efficient, for various reasons, than liability insurance) may have much to be said for it. Particularly is this so in areas in which insurance of one sort or another in fact becomes universal, whether or not as a result of governmental intervention. But there is, I think, no justification for the courts, when deciding actions in tort between private litigants, to make use of such views as policy determinants in the absence of any independent opportunity to test their soundness and without parliamentary sanction for the departure from pre-existing goals of the law of torts which their espousal involves."<sup>72</sup>

## Conclusion

One problem underlying the discussion is the misconception or misunderstanding of what insurance does. Some insurance, for example medical expense insurance is a form of publicly and privately funded cost and risk distribution. Likewise income protection is privately funded risk distribution. Some insurance is an investment, such as life insurance. Liability insurance is for liability, which is determined by reference to legal rules of responsibility.

If one wishes to organise the funding of social payments for common or likely events causing harm or loss, one needs to make explicit the scope of the field for that process so that equitable and efficient funding mechanisms can be put in place. If one simply begins to view liability

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<sup>70</sup> [1997] HCA 8; 188 CLR 241.

<sup>71</sup> [1976] HCA 65; 136 CLR 529.

<sup>72</sup> Ibid at 580-581 [51]-[52].

insurance as a means of risk distribution for injured plaintiffs to those who can pay, the inevitable danger is the blurring of lines and confusion in the rules for liability. This is what happened in the 1980s in the practical application of law in Australia. Once *Wyong Shire Council v Shirt*<sup>73</sup> disaggregated negligence from a holistic concept of unreasonable behaviour to foreseeability of risk and available steps to alleviate risk,<sup>74</sup> the intellectualisation of a jury concept meant that it was rare that any accident could not be foreseen. Take the facts of *Nagle v Rottnest Island Authority*,<sup>75</sup> where the High Court held a statutory authority liable for injury to a plaintiff who dived into water at a reserve and hit a submerged rock. Liability was founded on the statutory authority's failure to have in place warning signs of such a danger, which was otherwise plain for all to see.

The Ipp Report of 2002 was a response to the problem of the expansion of tortious liability in Australia. The panel, chaired by David Ipp AO, was established to review the law at a time when it was acknowledged that the “award of damages for personal injury has become unaffordable and unsustainable”,<sup>76</sup> with the objective of limiting liability and quantum. Part of the panel's task was to assist government in “developing consistent national approaches for implementing measures to tackle the problems of rising premiums and reduced availability of public liability insurance”.<sup>77</sup> Despite this, the Ipp Report was expressly framed as not addressing the relationship between the law of negligence and insurance or its effect on insurance markets,<sup>78</sup> although it was noted at the outset that there existed widespread perceptions that the law of negligence was unclear and unpredictable, that it was too easy for plaintiffs to recover, and that awards of damages were too high.<sup>79</sup> Following the conclusion of an expeditious but comprehensive inquiry, the Ipp Report recommended the introduction of a national scheme for compensation, reflected in the *Civil Liability Act 2002* (NSW).

Though the Ipp Report did not deal with the relationship between the law and insurance markets,<sup>80</sup> its undertaking and its swift implementation were driven by the need to set firmer and more explicit limits to recovery based on fault. It did not deal with insurance directly because what was being attempted was a tightening of rules and disciplining of courts to be more precise

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<sup>73</sup> [1980] HCA 12; 146 CLR 40.

<sup>74</sup> See the comments in the Ipp Report, above n 46 at 105 [7.14].

<sup>75</sup> [1993] HCA 76; 177 CLR 423.

<sup>76</sup> Ipp Report, above n 46 at ix.

<sup>77</sup> Ibid at 26 [1.8].

<sup>78</sup> Ibid at 27 [1.16].

<sup>79</sup> Ibid at 25 [1.4].

<sup>80</sup> Ibid at 27 [1.16].

and clear, such that the liability insurance market had a more stable and consistent body of rules to which it could respond.

The influence of the existence of insurance is often invisible. More often than not, no reference is made to the existence of an insurance market able to make good a plaintiff's loss, which means it is difficult to be definite or clear about the influence of insurance. Take, for example, the radical changes to rules of causation in the United Kingdom brought about by asbestos and mesothelioma. Those changes really began in the 1970s with the decision in *McGhee v National Coal Board*,<sup>81</sup> albeit not a mesothelioma case. McGhee was employed as a cleaner of brick kilns and contracted dermatitis from the accumulation of coal dust on his skin. He relied on the employer's failure to provide showers as materially increasing the likelihood that he would contract the disease, although this was not causally determinative. (He was also in the habit of riding a bicycle home from work, causing him to sweat, which also increased the likelihood of dermatitis.) The mechanisms of the disease were not then fully understood and the House of Lords held that in the absence of complete medical knowledge, there was no distinction between a material increase in risk and a material contribution.

The reasoning in *McGhee* was applied in 2002 by the House of Lords in *Fairchild v Glenhaven Funeral Services Ltd*,<sup>82</sup> where it was held that a plaintiff who contracted mesothelioma could recover against his or her employers even though it could not be proved on the balance of probabilities that the negligent exposure of any one or all of them caused the disease (but probably at least one of them did). The exceptional approach to causation adopted in *Fairchild* was necessary because of the nature of mesothelioma and the accepted position in the United Kingdom that it may be caused by a metabolic sequence of events flowing from the inhalation of a single fibre. Thus, where, as is often the case for industrial claims, an employee has been exposed to asbestos over time and through a series of jobs, it cannot be proved on the balance of probabilities which employer's negligent exposure is to blame. *Fairchild* was followed by the House of Lords decision of *Barker v Corus*,<sup>83</sup> in which it was found that each tortfeasor was severally and proportionally liable for the contraction of mesothelioma, a position which was subsequently reversed by legislation establishing that each tortfeasor is responsible for the whole of the harm.<sup>84</sup> The effect of *Barker* and the subsequent legislation has been to extend the reasoning in *Fairchild* to apply to tortfeasors (and make them wholly responsible) where it is

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<sup>81</sup> [1972] UKHL 7; [1973] 1 WLR 1.

<sup>82</sup> [2002] UKHL 22; [2003] 1 AC 32.

<sup>83</sup> [2006] UKHL 20; [2006] 2 AC 572.

<sup>84</sup> *Compensation Act 2006* (UK), s 3.

shown that the exposure *may* have caused the mesothelioma – even though other causes (in *Barker* the plaintiff’s own exposure to asbestos whilst self-employed) cannot be discounted. In *Sienkiewicz v Grief*<sup>85</sup> the legislation was applied to hold an employer liable where the negligent exposure increased the risk of contracting mesothelioma by only 18 per cent. (The other contributing factor was environmental exposure.) This raises the question of what will qualify as a “material” increase in risk (a question of particular weight where the result is total responsibility). This uncertainty led Lord Brown of Eaton-under-Heywood to comment in *Sienkiewicz* that while defendant’s might now view mesothelioma cases as a “lost cause” there was, in his opinion, “a lesson to be learned from losing it: the law tampers with the ‘but for’ test of causation at its peril.”<sup>86</sup>

Most recently, this reasoning has been brought to bear on the *Trigger* litigation.<sup>87</sup> The issue in *Trigger* was how employment liability insurance policies worded to respond to a “disease contracted” or “injury sustained” during the relevant period of employment applied to cases of mesothelioma. Mesothelioma, as is well known, is a “long tail” disease, being one the symptoms and malignancy of which typically do not manifest for many years after the asbestos exposure. (A fact that makes the problem of causal indeterminacy all the more acute.) A number of insurers sought to argue that mesothelioma cases were thereby not covered by the policies. They relied on a recent decision of the Court of Appeal in *Bolton MBC v Municipal Mutual Insurance Ltd*<sup>88</sup> in which it was held in the context of public liability insurance that a policy did not respond to a claim in respect of mesothelioma where the policy was worded to cover an injury occurring during the relevant period. However, as noted in an address by English barrister Jeremy Stuart-Smith QC (now Stuart-Smith J), public liability insurance and employment liability insurance are different creatures. Public liability insurance is regarded as “short tail” insurance, whereas employment liability insurance is not, so any textual similarities between the policies in *Bolton* and *Trigger* only took the matter so far.<sup>89</sup> In the *Trigger* litigation, a matter which ran for some eight days in the United Kingdom’s highest court (and considerably more below), the Supreme Court held by majority that the policies did respond. To a significant degree, their Honours’ reasoning turned upon construction - a contextual appreciation of the particular words used (“sustained” and “contracted”) when considered in conjunction with other words in the insurance policies, which pointed to their being concerned with, and responding to injuries in respect of

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<sup>85</sup> [2011] UKSC 10; [2011] 2 AC 229.

<sup>86</sup> *Ibid* at 294 [186].

<sup>87</sup> *Employers’ Liability Insurance “Trigger” Litigation: BAI (Run Off) Ltd v Durham & Ors* [2012] UKSC 14.

<sup>88</sup> [2006] EWCA Civ 50; [2006] 1 WLR 1492.

<sup>89</sup> Jeremy Stuart-Smith, “The Malign Effects of Asbestos on English Law: A Comparative View”, address to the New South Wales Bar Association, Sydney, 20 September 2012.

persons employed at the time the policies were in force. “Sustained” and “contracted” were read in that light. But causation was the other live issue, and one in respect of which the Court was divided. Lord Mance (with whom Lord Kerr and Lord Dyson agreed), recognising the difficulty thrown up by *Fairchild*, said of the rule of liability:

“This legal responsibility may be described in various ways ... it is over-simple to describe it as being for the risk. Another way is to view a defendant responsible under the rule as an ‘insurer’, but that too is hardly a natural description of a liability which is firmly based on traditional conceptions of tort liability as rooted in fault. A third way is to view it as responsibility for the mesothelioma, based on a ‘weak’ or ‘broad’ view of the ‘causal requirements’ or ‘causal link’ appropriate in the particular context to ground liability for the mesothelioma. This third way is entirely natural.”<sup>90</sup>

Lord Phillips dissented. In his Honour’s view the effect of *Barker* and *Fairchild* was that a new cause of action was created for an increased risk of mesothelioma rather than for causing it (the approach rejected by Lord Mance). This “special rule”, which accepted that there could be no identification of a date or dates on which an injury was “sustained” or disease “contracted” did not apply to the policies, which responded on a causation basis.<sup>91</sup>

The operative consideration for the House of Lords in *Fairchild* was the injustice apparent in the law in refusing to see the plaintiff’s loss made good when the tortfeasor was before it, but as one (unidentified) of a number of possible causatively relevant negligent parties. The view that negligence causing an increased risk was sufficient to found liability against all such negligent parties (and on a rateable basis by reference to negligent exposure) would be difficult to sustain or would have less force if it were not in an industrial context, generally with available liability insurers. Indeed the last chapter thus far from the United Kingdom, the *Trigger* litigation, was all about how the new causal rule fits with the market.

Insurance is a vital, indeed essential, part of the organisation of modern commerce and civil society. People expect their injuries and losses to be compensated. It is beyond this paper to discuss the growth of concepts of entitlement by which many people axiomatically define their loss by reference to the fault of others. Loss has taken place therefore someone (someone else) must be to blame. Recognising the (overwhelming) place for private investment in insurance and reinsurance markets, it is fundamental for society and government (including courts) to understand that liability insurers operate by reference to civilised and stable rules. Likewise, property insurers operate by reference to contractual responsibility. The fair identification and

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<sup>90</sup> [2012] UKSC 14 at [66].

<sup>91</sup> *Ibid* at [133].

operation of those rules is of the utmost importance. Recognising all this, the temptation to view large pools of investment funds as available to redistribute loss, irrespective of liability rules or terms of fairly bargained contracts, is ever present. It should be resisted by government, both executive and judicial, as part of the rule of law. “Don’t they want to do business here?” as a substitute for good faith payments pursuant to contractual liability is a denial of legal rights and deeply inimical to the operation of the rule of law for a commerce-based society. Likewise, judicial conclusions in the teeth of evidence by reference to the slenderest available proof to see injured people funded by available insurance may undermine confidence in the judicial process. A judicial process which does not have the confidence of both plaintiffs and defendants ceases to fulfil its constitutional function in safeguarding the rule of law.

I have sought to give some history to the ebb and flow of the relationship between tort and insurance. That ebb and flow will continue as society develops and social forces change. As once said by a Greek philosopher, latterly made famous by Isaiah Berlin, while the fox knows many things, the hedgehog knows one big thing. The one big thing we know is that insurance binds the tissue and limbs of commercial and civil society. It needs to remain healthy, honest and founded on mutual good faith. How the law (statute and common law) responds to and is affected by insurance will remain a constant issue. It must. This only recognises the importance of insurance to the operation of society and development of legal rules.

It is crucial, however, to bear in mind at all times what is being required of insurance. If public policy requires actuarially calculated loss distribution, so be it. The markets can respond. If it requires liability insurance based on legal rules or property insurance based on fairly bargained contracts, the courts in their adjudication and development of rules, should respect the role of the liability insurance and property insurance and be cautious of the temptation to introduce social policy and loss distribution in areas where no informed public policy choice for such has yet been made.



**Some Reflections on the Sources of Our Law**

James Allsop\*

- 1 When the Chief Justice invited me to speak at this conference he employed the gracious tyranny of leaving the topic to me. I gradually came around to wanting to say something about the sources of our Australian law, largely because, over the last few years, I have been regularly butting up against problems that genuinely raise the question.
  
- 2 One of my more charming and wittier colleagues asked me whether the topic was “Sauces of Law”. I hope her comment, not meant to be hurtful, I am sure, does not anticipate any degree of superficiality in what I am about to say. Though, the expression of that concern by me perhaps betrays an Anglo-Celtic sourced view about sauce.
  
- 3 The sources of our law can be seen as a technical question, as a question of jurisprudence, and as a cultural question. Each is an important perspective for Australia today. John Chipman Gray<sup>1</sup> emphasised the need not to confuse law with sources of law. It is a point worthy of regular contemplation. Sources of law, perhaps uncontroversially, can be listed as English law (past and present), local statute, including constitutions (otherwise than as directly applicable), some international law, custom and usage, appropriately chosen foreign cases and learned authors or *La Doctrine*. More controversially, perhaps, one can identify language, legal theory, community values, public international law, applicable morality and religion.

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\* President, NSW Court of Appeal. I wish to express my appreciation to Dr Nicholas Carr for his assistance in the preparation of this paper.

<sup>1</sup> J C Gray, *The Nature and Sources of the Law*, 2<sup>nd</sup> ed (Boston: Beacon Press, 1963), especially Ch IV.

- 4 I cannot discuss all these. I only seek to reflect upon some of them, by reference to questions that I think are worthy of posing and addressing: How and whence we develop and articulate the common law of Australia?
- 5 By way of preliminary comment, it is to a point obvious that the sources for which we reach will depend, in significant part, upon the subject at hand. For instance, the process of sentencing for criminal offences will depend deeply on a judge's conception and perception of her or his own community's values. What is a vicious bashing or glassing worth? At one level of analysis, little assistance is gained from New York Court of Appeals decisions of the 1930s in that enquiry, as they may perhaps be of assistance in considering the norm of good faith in contracts or the law of construction and interpretation of contracts. Yet basal notions of punishment, justly proportionate responses of civil society, rehabilitation and mercy are universal values. Their expression by other judges in other societies may give insight to the criminal law.
- 6 One could become immediately bogged in a definitional excursus in defining law and sources of law. The nature of law is not just a theoretical question for speculative contemplation. It is a matter of theoretical application in a federal legal system with dispersal of law making power<sup>2</sup> and with judicial review of law making authority of Parliament.<sup>3</sup> For instance, is statute law or source of law, or both? Gray categorised statutes as sources of law because of the ultimate power of judicial interpretation of them, made good by the last word on the law and, most critically, on the basal law of the Constitution.

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<sup>2</sup> See the discussion by Gummow J of "What comprises 'a law of the Commonwealth' and 'a law of a State'" in *Momcilovic v The Queen* [2011] HCA 34; 280 ALR 221 at 292-294 [226]-[238].

<sup>3</sup> *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; 211 CLR 476 at 512-513 [102].

- 7 As Chief Justice John Marshall famously said, “*It is, emphatically, the province and duty of the judicial department to say what the law is.*”<sup>4</sup> The monopoly of sovereign judicial power over the interpretation of the Constitution and legislation is the fulcrum of judicial power. It is, however, no logical, practical or political certainty. The judicial authority embodied in judicial review of legislative acts was deeply controversial at the end of the 18<sup>th</sup> century and the beginning of the 19<sup>th</sup> century in the new Republic.<sup>5</sup> The doctrine now appears stable and uncontroversial in this country and in the United States. That stability is not one built on force or raw power (like the Pope in modern times, judges have no divisions). Rather, it is founded on common societal acceptance of the place of the courts and their instrumental power in society – that is, as a part of an integrated democratic society. The factors that support that acceptance are both social and legal.
- 8 The underpinnings of institutional independence are fundamental. *Kable*<sup>6</sup> was controversial in 1996 when handed down. It was expressed in strong language. Gaudron J said of proceedings contemplated by the relevant New South Wales Act<sup>7</sup> that despite the attempt to “*dress them up as legal proceedings*” they were the “*antithesis of the judicial process*” and made a “*mockery*” of the judicial process.
- 9 The ability of the courts at times to **speak** in a way that resonates with the norms, values, indeed soul, of a community is evanescent, but real. Language is the vehicle for the carriage of ideas over place and time. It can mask or illuminate subtlety and meaning. What courts say can also help to bind a society through consent and loyalty to a part of the

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<sup>4</sup> *Marbury v Madison* 5 US (1 Cranch) 137 at 177 (1803).

<sup>5</sup> See for example D F Melhorn, Jr, *Lest We Be Marshall'd: Judicial Powers and Politics in Ohio, 1806-1812* (Akron, OH: University of Akron Press, 2003); LW Levy, ed. *Judicial Review and the Supreme Court* (New York: Harper Torchbooks, 1967).

<sup>6</sup> *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; 189 CLR 51.

<sup>7</sup> *Community Protection Act 1994* (NSW).

governmental and power structure which permeates the lives of citizens. Three examples of courts speaking in this way will suffice to reveal language not only as the vehicle for the carriage of ideas, but also as the instrument of their illumination, and by that process as a source of law.

- 10 The rhetorical and intellectual power of the reasons of Deane and Gaudron JJ in *Mabo*<sup>8</sup> will long live in the public discourse of this nation. The language of that judgment was controversial. It produced some bitter, and at times vicious, criticism. Deane and Gaudron JJ said:<sup>9</sup>

“An early flash point with one clan of Aborigines illustrates the first stages of the conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame.”

- 11 Yet that confronting brutal honesty (by its expression, in contradistinction to the silence of unuttered truth) helped to open a chapter in the history of the law in this society that may lead one day to the true construction of the Australian soul, wholly embracing its indigenous roots.

- 12 The second example of judicial language directed to the norms and values of society also comes from Sir William Deane in a bankruptcy appeal, concerned with the curing of formal defects and irregularities under the *Bankruptcy Act 1966*, s 306(1). He was in dissent. He said:<sup>10</sup>

“It is true that the strictness of the above rules leaves open the possibility of abuse by unscrupulous debtors. That is, however, an unavoidable concomitant of the protection of ordinary people faced with the threat of being made bankrupt. Many, and possibly most, of the petitions in the bankruptcy lists of this country seek the bankruptcy of honest, albeit unbusinesslike or naive, people whose indebtedness springs from causes which evoke sympathy rather than indignation. For such people, bankruptcy does not represent a game to be played to the frustration of their creditors.

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<sup>8</sup> *Mabo v Queensland (No 2)* [1992] HCA 23; 175 CLR 1.

<sup>9</sup> *Mabo (No 2)* (1992) 175 CLR 1 at 104.

<sup>10</sup> *Kleinwort Benson Australia Ltd v Cowl* [1988] HCA 34; 165 CLR 71 at 82.

It represents a pronouncement of failure and humiliation attended by the fear of unknown consequences and the susceptibility to criminal punishment for what would otherwise be innocent conduct.”

13 This expression of the matter illuminates for later judges one of the intensely human consequences of the law of bankruptcy that assists in understanding its application, and so assists in understanding how the power and authority involved should be approached.

14 A third example of judicial language illuminating an idea so as to be a source of law is from the great Louis Brandeis when sitting on the Supreme Court. In dissent in *Olmstead v United States*<sup>11</sup> in dealing with the issue of the admission of illegally obtained evidence, he said:

“Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.”

Thirty years later, Frankfurter J wrote similarly eloquently on the same topic in *Sherman*.<sup>12</sup> These ideas found their place in Australian law in *Bunning v Cross*<sup>13</sup> and *Ridgeway v The Queen*.<sup>14</sup>

15 The importance of these kinds of expression is that they can tie the judicial task to the ultimate purpose it serves: the promotion of the happiness (using a Benthamite phrase) or the good of the community, and through the exercise of that power of a special kind, rooted in irreducible conceptions of fairness and justice, to enter the lives of people and bind them to *their* law.

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<sup>11</sup> 277 US 438 (1928).

<sup>12</sup> 356 US 369 at 380 (1958)

<sup>13</sup> [1978] HCA 22; 141 CLR 54.

- 16 This reflects what Oliver Wendell Holmes said in 1897 in a lecture at the Boston University School of Law. He was then a justice of the Supreme Judicial Court of Massachusetts, to become its Chief Justice, before becoming an associate justice of the United State Supreme Court. Holmes was a tough pragmatic skeptic, who had a veneration for the law and the common law system as, to use his words, “*one of the vastest products of the human mind*”. He said “*It [the common law legal system] has the final title to respect that it exists, that it is not a Hegelian dream, but a part of the lives of men.*”
- 17 This might be seen to be all the more important in a society that recognises diversity in its racial, religious and social composition but strives for coherence and harmony through co-existence and shared ideals.
- 18 Language itself can act as a source of insight and conception; language itself becomes a source of law. One should not encourage the vanity and self-importance that lurk in us all; but one should recognise the power and place of language as a source of ideas, not just as a vehicle for their transmission over place and time.
- 19 I will come back to theory a little later. It suffices for present purposes to recognise that the essential requirement in a free society for acceptance of, and loyalty to, its legal system and organs of judicial power will tell one something about the proper sources of law and the techniques for reaching and applying them.
- 20 Let me go back to law and source of law. Take a claim in tort, unaffected in its character by any Commonwealth or State statute, by a resident of Queensland against a resident of New South Wales brought in 1987; and the same claim brought in 1989. What was different about their resolution? The answer is s 41 of the *Law and Justice Amendment Act 1988* (No. 120

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<sup>14</sup> [1995] HCA 66; 184 CLR 19.

of 1988), which amended s 80 of the *Judiciary Act 1903* (Cth) in respect of proceedings instituted after the amendment of the section (being the date of Royal Assent, 14 December 1988). In the earlier filed case, the proceedings, being in federal jurisdiction by force of the Constitution, s 75(iii), were subject to the operation of s 80 as a choice of law provision and, by its terms, were to be decided by the **common law of England** as the default unwritten law. In the later filed case, the common law **in Australia**<sup>15</sup> was the default unwritten law. The common law of England had ceased, literally overnight, to be law, but had become a source of law for legal development.<sup>16</sup>

- 21 Leaving to one side the impacts of the *Australia Acts* of 1986, the common law of England was the common law to be applied in federal jurisdiction until December 1988. In the exercise of State jurisdiction, this had been the position at least while the Privy Council held sway over Australian law. In *Public Transport Commission (NSW) v J Murray-More (NSW) Pty Ltd*,<sup>17</sup> Barwick CJ and Gibbs J were of the view that the appellate courts of the States should generally follow (Barwick CJ) or were bound by (Gibbs J) decisions of the English Court of Appeal. In 1986 (the year of the *Australia Acts*) the High Court removed the binding nature of such statements in *Cook v Cook*.<sup>18</sup>
- 22 Of course, in 1963 in *Parker v R*<sup>19</sup> there had been a decisive rejection by the High Court of the common law of criminal intent in *DPP v Smith*.<sup>20</sup> A similar independence of the High Court from English authority was

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<sup>15</sup> Surely now interpreted as the common law of Australia: *Lipohar v R* [1999] HCA 65; 200 CLR 485 at 505-10.

<sup>16</sup> J S Douglas, "England as a source of Australian law: For how long?" (2012) 86 *ALJ* 333.

<sup>17</sup> [1975] HCA 28; 132 CLR 336.

<sup>18</sup> [1986] HCA 73; 162 CLR 376 at 390.

<sup>19</sup> [1963] HCA 14; 111 CLR 610.

<sup>20</sup> [1961] AC 290.

expressed a few years later in *Skelton v Collins*, most eloquently by Windeyer J.<sup>21</sup>

- 23 The common law can thus be seen to be both law in its binding form, and a source of law as a body of principles stemming from a common source, including its method, spirit and precepts, as well as its rules.
- 24 In *Cook v Cook*<sup>22</sup> Mason, Wilson, Deane and Dawson JJ said:
- “The history of this country and of the common law makes it inevitable and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of United Kingdom courts just as Australian courts benefit from the learning and reasoning of other great common law courts. Subject, perhaps, to the special position of decisions of the House of Lords given in the period in which appeals lay from this country to the Privy Council, the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning.”
- 25 These words are important because they emphasise: first, our historical roots and the thematic and doctrinal, not just historical and cultural, links with England; secondly, the assistance and guidance from courts in the United Kingdom (not just England, though especially so from such a centre

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<sup>21</sup> [1966] HCA 14; 115 CLR 94 at 134-5: “It is, of course, impossible for anyone to say that a decision of the House of Lords is wrong in the sense of not a correct decision according to the law of England prevailing in England. But how far the reasoning of judgments in a particular case in England accords with common law principles that are Australia’s inheritance is a matter that this Court may have sometimes to consider for itself. This Court is the guardian for all Australia of the *corpus iuris* committed to its care by the Imperial Parliament. The Constitution makes its judgments in its appellate jurisdiction final and conclusive. As the Court has said: ‘According to the ordinary course of the administration of justice in and for the Commonwealth of Australia, the judgment of this Court is final. The exercise of the prerogative to admit an appeal to Her Majesty in Council is an exceptional measure governed by special considerations: it would not be in accordance with the position which this Court occupies under the Constitution for it to proceed otherwise in the performance of its duties than as a final court of appeal’: *Ebert v. The Union Trustee Co. of Australia Ltd.* (1961) 105 CLR 327.

“This is not the place for an essay on jurisprudence or a full consideration of the theoretical problem of reconciling a common heritage of doctrine with the development of differing doctrines. It is enough I think to say that our inheritance of the law of England does not consist of a number of specific legacies selected from time to time for us by English courts. We have inherited a body of law. We take it as a universal legatee. We take its method and its spirit as well as its particular rules. A narrower view than this would put a sad strain upon allegiance. Here, as it is in England, the common law is a body of principles capable of application to new situations, and in some degree of change by development.”

<sup>22</sup> (1986) 162 CLR 376 at 390.



of international litigation as London); and thirdly, the importance of the learning and reasoning of other great centres of the common law.

- 26 What I wish to raise are the questions as to how and whence we develop and articulate the common law of Australia. Some of what I want to raise was said by Paul Finn in his powerful article “Internationalisation or isolation: the Australian *cul de sac*? The case of contract law”.<sup>23</sup> It is also helpful to pay close regard to the Wilfred Fullagar Memorial Lecture given by Sir Anthony Mason in 1987, entitled “Future Directions in Australian Law”.<sup>24</sup> In that seminal speech, Sir Anthony described the development of a distinct Australian law, the growing originality of Australian statute law, the freeing of Australian courts from the binding nature of English precedent, the shift away from legal formalism, the widening and deepening of legal reasoning upon its development towards decisions that were (to use the words of Sir Harry Gibbs, “human, practical and just”<sup>25</sup>), the resolution of the eternal antinomy of certainty and adaptability in the continuing life of a society, and the interplay between law, politics, public policy and fundamental rights.
- 27 However much one might want to keep the world and life stable and predictable, all, or most, of these matters should be recognised as perennial or regular forces affecting the law.
- 28 What cannot be denied, now, but only for somewhat over a quarter of a century, is the **complete** independence of Australian legal thought and law. Our intellectual independence, of course, goes far back beyond 14 December 1988. For instance, in 1861 in New South Wales in *Rusden v*

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<sup>23</sup> In Elise Bant and Matthew Harding, eds. *Exploring Private Law* (Cambridge: Cambridge UP, 2010); also published in M Hiscock and W van Caenegem, eds. *The Internationalisation of Law* (Cheltenham: Edward Elgar, 2010).

<sup>24</sup> Published in (1987) 13 *Monash UL Rev* 149.

<sup>25</sup> On the occasion of the swearing in of Gibbs CJ on 12 February 1981.

*Weekes*,<sup>26</sup> the Full Court<sup>27</sup> was called upon to consider the validity of a colonial taxing statute. Liberal recourse was made in that task to the commentaries of Chancellor Kent and of Justice Story.

- 29 The inhering demands of judicial technique and method require that most change to settled principle be incremental and that doctrine of a basal character not be overturned in a manner that would “fracture the skeleton which gives our overturned law its shape and consistency”.<sup>28</sup> The courts do not legislate, nor are they law reform agencies.<sup>29</sup> Judges apply judicial method and technique. Sir Frank Kitto in his luminous and oft referred-to judgment in *R v Spicer; Ex parte Australian Builders’ Labourers’ Federation*<sup>30</sup> spoke of power intended to be made upon considerations of general policy and expediency as alien to the judicial method, and thus non-judicial. That should not be misunderstood. In *Attorney-General (Cth) v Alinta Ltd*,<sup>31</sup> Gleeson CJ made clear that Kitto J was not propounding a mechanical application of inflexible rules, without regard to wisdom and expediency. The common law, Gleeson CJ said, was judge-made:

“ ... and its development and rationalisation necessarily involve attention to such questions. Furthermore, many of its settled principles, in their application to changing circumstances and social conditions, require judgment about what is wise and expedient”.

- 30 The need for courts to act incrementally building on the past using a judicial method of analysis is not inimical to the recognition of society’s

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<sup>26</sup> (1861) 2 Legge 1406.

<sup>27</sup> Stephen CJ, Milford and Wise JJ.

<sup>28</sup> *Mabo (No 2)* (1992) 175 CLR 1 at 45 (Brennan J)

<sup>29</sup> See the comments of Mason J in *State Government Insurance Commission v Trigwell* [1979] HCA 40; 142 CLR 617 at 633.

<sup>30</sup> [1957] HCA 81; 100 CLR 277.

<sup>31</sup> [2008] HCA 2; 233 CLR 542.

needs and the policy formulation that inheres in a role of adaption and development of law to contemporary society.<sup>32</sup>

- 31 Our history makes our place in the English common law world a legal and historical fact fundamental to the architecture of Australian law and to its understanding. That does not mean, however, that we are forever chained to English solutions for Australian problems. But it does mean that an appreciation of English and Australian legal history and English precedent is at times crucial to understanding the shape, texture and content of our law, and how it might be applied or changed, either to conform with its essence or to adapt to new societal demands. As Maitland said:<sup>33</sup>

“Today we study the day before yesterday, in order that yesterday may not paralyse today, and that today may not paralyse tomorrow”.

- 32 Let me illustrate with the law of bankruptcy. It helpfully illustrates at least two things: first, a proper understanding of the past may be essential to an understanding of modern law; secondly, that the historical development of the law reflects as Holmes put it<sup>34</sup> in relation to judge-made law, “*the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious and even ... prejudices*”.
- 33 The laws concerning bankruptcy can be seen to have three objects. The first object is the provision of a fair and orderly system of rules to regulate the assessment, collection and distribution of a debtor’s assets (whether an individual or corporate) between creditors where the assets are insufficient to satisfy all debts. Fundamental to this object is the principle of equality or rateability, being distribution of the assets in proportion to the

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<sup>32</sup> See eg, *Giannarelli v Wraith* [1988] HCA 52; 165 CLR 543 at 584-585; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* [1988] HCA 44; 165 CLR 107 at 160-162; *Mabo v Queensland (No 2)* [1992] HCA 23; 175 CLR 1 at 29-30 and 57-58; *Dietrich v R* [1992] HCA 57; 177 CLR 292 at 318-320.

<sup>33</sup> F W Maitland, “A Survey of the Century” in *Collected Papers*, Vol III, 432 at 439.

<sup>34</sup> O W Holmes, *The Common Law* (1881; Boston: Little, Brown, 1990), 1.

interest of each creditor. The second object is the prevention of fraud upon creditors, whether by the debtor or by particular creditors. The third object (with both moral and commercial rationales) is the rehabilitation of the debtor, finding expression in the provisions for discharge (i.e., release from future liability) of the debtor.<sup>35</sup>

- 34 Even a brief survey of the development of the modern law of bankruptcy from Tudor times and the Statutes of Elizabeth reveals these three objects in development and tension. The overwhelming desire to punish the debtor in pre-capitalist society, gives way to the need to recognise risk and the sometime consequences of financial risk coming home in the development and encouragement of capitalist society. In capitalist societies, debtors are not to be viewed necessarily as recalcitrant criminals, but as persons worthy of commercial and social rehabilitation. Further, the question of the proper policy response involving the role of private commissioners wielding power for creditors or of public sovereign courts reflecting the public interest in debt and rehabilitation of debtors remains as much alive today as it did in the 18<sup>th</sup> and 19<sup>th</sup> centuries.
- 35 By way of illustration, the proper content of the words of ss 60(4) and 116(1) of the *Bankruptcy Act 1966* (Cth) as to what property falls within an what falls outside the bankrupt estate is difficult to fathom without an appreciation of the changes in the 19<sup>th</sup> century English bankruptcy laws and judicial attitudes of common law and equity judges to the human rights of the bankrupt.<sup>36</sup>
- 36 Further, such conceptions as the act of bankruptcy, the voidable preference, the change of status of the bankrupt and the notion of “keeping house” cannot be understood without an understanding of legal history.

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<sup>35</sup> Australian Law Reform Commission, *General Insolvency Inquiry* (Report No 45, 1988), Vol 1 at [33]; *Report of the Committee Appointed by the Attorney General of the Commonwealth to Review the Bankruptcy Law of the Commonwealth* (1962) at [7].

<sup>36</sup> See *Moss v Eaglestone* [2011] NSWCA 404.

- 37 Thus, in some contexts, history (legal, social and political) is essential to appreciating the content of the law at the present, its journey to that point and its possible directions for the future. It is, in that sense, one of the sources of our law. That means that legal history (in a tolerably wide sense) should be taken seriously by the Academy, by practising lawyers and by judges. I doubt whether it is sufficiently.
- 38 Another example of history as source of law is in the law of restitution. Justice Gummow has recently written an important article, "*Moses v Macferlan: 250 years on*"<sup>37</sup> that illuminates the history of restitutionary actions and the action for moneys had and received. It identifies the influence of 19<sup>th</sup> century legal positivism (still deeply influential in Australia)<sup>38</sup> and the disfavour of equitable analogy in thinking thus influenced. It also reflects what is to be found in the decisions of *Roxborough*<sup>39</sup> and *Equuscorp v Haxton*<sup>40</sup> that in the development of restitutionary principle the equitable sources of the now common law remedy are to be recognised. The recent High Court cases do not involve a rejection of restitution or restitutionary principle. Rather, what can be perceived is a rejection of pre-analysed conceptual frameworks, developed outside the incremental common law method, and of a free standing judicially-constructed cause of action of unjust enrichment. Thus, in Australia, the five-staged approach to a cause of action in unjust enrichment utilised in England: the enrichment of the defendant, at the expense of the plaintiff, the unjustness of the enrichment, applicable defences and choice of remedy (personal or proprietary)<sup>41</sup> may presently have its doctrinal dangers. The danger arises not least because of the oft-

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<sup>37</sup> (2010) 84 ALJ 756.

<sup>38</sup> See *Momcilovic* [2011] HCA 34; 280 ALR 221 at [229]-[230] per Gummow J.

<sup>39</sup> *Roxborough v Rothmans of Pall Mall Ltd* [2001] HCA 68; 208 CLR 516 at 525 [15]-[16], 539-540 [62]-[63], 543 [71] and 548-555 [83]-[100].

<sup>40</sup> *Equuscorp Pty Ltd v Haxton* [2012] HCA 7; 86 ALJR 296 at [30] and [114].

<sup>41</sup> J Edelman and E Bant, *Unjust Enrichment in Australia* (Melbourne: Oxford UP, 2006) at 6.

stated proposition that unjust enrichment is a unifying legal concept and not a free standing cause of action.<sup>42</sup>

- 39 The recognition of the influence of equitable norms in restitutionary actions and the incipient differences between the Australian and English approaches leaves one to consider whence Australian lawyers facing restitutionary problems will obtain their inspiration. This leads one from history as source to foreign law (judicial decision and learned writing) as source. No equity lawyer in Australia, at least from the latter part of last century, surely, would puzzle over or attempt to solve a problem of equity or trust law without seeking guidance from Scott, Pomeroy, Story or the Restatement on the Law of Trusts. These would supplement Underhill, Lewin, Hanbury, Ashburner, Snell, Pettit, Keaton and Sheridan and perhaps Fonblanque and Spence, and, of course, Jacobs, Meagher Gummow and Lehane, Spry and Ford and Lee. Likewise, in restitution, the great works of Professor Palmer and the Restatements, provide the reader with deeply thought out, highly distilled, and beautifully expressed, commentary from jurisdictions which have always recognised the equitable source of the action.
- 40 American law has been called a “trackless jungle”. This is because of its size and diversity and the absence in the Supreme Court of common law appellate jurisdiction. At least since 1938 there has been no such thing as the common law of the United States, that is, no federal common law. But that does not mean that some of the finest academic and judicial sources of common law learning should remain so foreign in this country— Farnsworth, Corbin, Williston, Scott, Palmer, the Restatements, the New York Court of Appeals, the Supreme Judicial Court of Massachusetts, the Second Circuit Court of Appeals. References to them are rare. As

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<sup>42</sup> *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5; 162 CLR 221 at 256-257; *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation* [1988] HCA 17; 164 CLR 662 at 673; *Lumbers v W Cook Builders Pty Ltd (In Liq)* [2008] HCA 27; 232 CLR 635 at 665 [85]; *David Securities* at 378-379; *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; 208 CLR 516 at 543-545 [70]-[74]; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89 at 156 [151]; and *Equuscorp Pty Ltd v Haxton* [2012] HCA 7 at [29]-[30].

outsiders, Australian practitioners, academics and judges have no social or political obligation to be polite about, or deferential to, all American jurisdictions. We can seek our inspiration from the historically great common law courts of the Republic.

- 41 Practitioners do not know of the existence of many of these sources because, very often, they were never referred to at university. The march of legal realism in America, beyond its influence here, may make wholesale importation of American law unwise, but that is not to deny the great utility in approach and expression from, for instance, the great north-eastern courts of the first half of the twentieth century.
- 42 Let me take one example. A central concern in the operation of restitutionary claims for mistake is the stability of commercial payments. As Justice Edelman and Professor Bant say in their valuable work<sup>43</sup> one operative rationale for the defence of change of position is the legitimate interest in the security of the receipt. This can be derived from *David Securities*<sup>44</sup>. Few judicial expositions of the need for certainty in payment systems could have been better expressed than by Andrews J writing for a unanimous New York Court of Appeals in 1879 in *Stephens v Board of Education of Brooklyn*:<sup>45</sup>

“It is absolutely necessary for practical business transactions that the payee of money in due course of business shall not be put upon inquiry at his peril as to the title of the payor. Money has no ear-mark. The purchaser of a chattel or a chose in action may, by inquiry, in most cases, ascertain the right of the person from whom he takes the title. But it is generally impracticable to trace the source from which the possessor of money has derived it. It would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from considerations of public policy and convenience, and to give

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<sup>43</sup> *Unjust Enrichment in Australia* (Melbourne: Oxford UP, 2006) at 322.

<sup>44</sup> *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48; 175 CLR 353 at 385.

<sup>45</sup> 79 NY 183 at 186-188.

security and certainty to business transactions, adjudges that the possession of money vests the title in the holder as to third persons dealing with him and receiving it in due course of business and in good faith upon a valid consideration. If the consideration is good as between the parties, it is good as to all the world.”

- 43 There are significant areas of Australian restitutionary principle that will be developed in the years to come. The present intellectual framework demanded by the High Court calls for some familiarity with foreign law. The citations in *David Securities*<sup>46</sup> of United States and Canadian authorities should be understood as more than a hint in that direction.
- 44 Another example of the utility of American analogy is the place of good faith in the law of contracts. In Australia, the notion of good faith has been recognised at the level of intermediate courts of appeal in the performance of contracts,<sup>47</sup> in the negotiation of contracts<sup>48</sup> and in the settlement of disputes.<sup>49</sup> It is recognised as part of international trade by domestic statutes.<sup>50</sup> Its elements and its place as a concept are recognised throughout law, equity and statute.<sup>51</sup> Internationally, it is (as it has been for centuries) widely recognised as an operative legal norm.<sup>52</sup>

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<sup>46</sup> *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48; 175 CLR 353, especially at 385.

<sup>47</sup> *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349; *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (1993) 31 NSWLR 91; and *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558.

<sup>48</sup> *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1.

<sup>49</sup> *United Group Rail Services Ltd v Rail Corporation new South Wales* [2009] NSWCA 177; 74 NSWLR 618.

<sup>50</sup> By the incorporation of the *Vienna Convention (CISG)* into State and Territory *Sale of Goods Acts*.

<sup>51</sup> In public law, a member of the Executive or an administrator must exercise power in good faith, requiring an honest and genuine attendance to the power being exercised. This carries with it the need to act honestly and genuinely for the purposes of the power. The extent to which this carries an element of reasonableness may be debateable. Reasonableness (in the sense of in accordance with reason) may be seen to be a separate requirement, though its place as a necessary element of the exercise of public power is not finally established. Fairness is the central operative consideration of the rules of procedural fairness or natural justice. Here the exercise of the power is conditioned by the largely non-self interested context. The power has a public object.



- 45 English law eschews good faith as an implied contractual term and as a coherent informing norm.<sup>53</sup> The two things are very different; yet we obtain no intellectual assistance from English cases or texts, beyond the steadfast rejection of the thinking that informed much of Lord Wright's work in this area in the 1930s and that has been part of the *lex mercatoria* and over half the world's contract law for centuries.<sup>54</sup> What of the United States? Good faith has had a place in the law of contract for two centuries. One is assisted by great texts: Farnsworth, Corbin, Williston, the Restatements, and by coherent principle in great common law courts such as the New York Court of Appeals and the Supreme Judicial Court of Massachusetts.
- 46 In Australia, good faith is a topic that many view as one which gives an insight into the personality and politics of a person: if in favour of good faith, the person must be left of centre, a do-gooder, a liberal progressive, woolly thinking and lacking intellectual rigour; if against ... *und so weiter*. I am not sure why good faith should conjure such unmanly characteristics (if you will excuse the sexism in the aid of metaphorical effect). After all, no one could accuse Judge Posner of the 7th Circuit or Justice Scalia of the

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In company law directors are obliged to act in good faith and in the interests of the company as a whole. This is a fiduciary context, even though, in many practical circumstances, directors and those to whom they answer have an interest. That interest is to be subordinated to the beneficiary, the company as a whole.

Notions of good faith infuse equity whether in a fiduciary context or generally, such as in the law of mortgages, penalties, clean hands or unconscionability and many other areas. It takes its place in the remedial structure of orders for specific performance and injunctions.

<sup>52</sup> See, for example, M J Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*, 3rd ed (New York: Transnational Publishers, 2005) at 127 ff; and L Trakman, *The Law Merchant: The Evolution of Commercial Law* (Littleton, CO: Fred B Rothman, 1983)

<sup>53</sup> See *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 at 439.

<sup>54</sup> For reference to the literature on *lex mercatoria*, see N van Houtte, *The Law of International Trade* (London: Sweet & Maxwell 2002) at 24-28; M Pryles, "Application of the *Lex Mercatoria* in International Arbitration" (2004) 78 *Australian Law Journal* 396; and G Petrochilos, *Procedural Law in International Arbitration* (Oxford: Oxford UP, 2004) at 36 [2.04], fn 79.

Supreme Court of woolly thinking and lack of intellectual rigour, let alone of being unmanly do-gooders.

- 47 In 1984, in *Tymshare Inc v Covell*,<sup>55</sup> then Judge Scalia of the District of Columbia Circuit perhaps put his finger on one of the aspects of good faith that has deflected attention from its place in contract law and filled people with a fear of indeterminate content. The so-called “*modern doctrine*” of the “*obligation to perform in good faith*” was, he said, “*simply a rechristening of fundamental principles of contract law well established*”. After referring approvingly to Professor Summers’ notion of an excluder analysis (excluding bad faith), he agreed with Professor Alan Farnsworth that the significance of the doctrine is in “implying terms in the agreement”. Scalia J went on:

“When these two insights are combined, it becomes clear that the doctrine of good faith performance is a means of finding within a contract an implied obligation not to engage in the particular form of conduct which, in the case at hand, constitutes ‘bad faith.’ In other words, the authorities that invoke, with increasing frequency, an all-purpose doctrine of ‘good faith’ are usually if not invariably performing the same function executed (with more elegance and precision) by Judge Cardozo in *Wood v Lucy, Lady Duff-Gordon*, 222 NY 88, 91, 118 NE 214, 214 (1917), when he found that an agreement which did not recite a particular duty was nonetheless “‘instinct with [...] an obligation,’ imperfectly expressed,” quoting from *McCall Co v Wright*, 133 AD 62, 68, 117 NYS 775, 779 (1909), *aff’d*, 198 NY 143, 91 NE 516 (1910). The new formulation may have more appeal to modern taste since it purports to rely directly upon considerations of morality and public policy, rather than achieving those objectives obliquely, by honouring the reasonable expectations created by the autonomous expressions of the contracting parties. But it seems to us that the result is, or should be, the same.”

- 48 The point he was making was that expressing the obligation generally in terms of moral duty implies a source of authority and content from outside the contract. This Scalia J rejects.

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<sup>55</sup> 727 F 2d 1145 (1984).

49 So did Posner J in *Market Street Associates Limited Partnership v Frey*.<sup>56</sup> If I may respectfully say, this is a hugely rewarding judgment to read for any contract lawyer in the common law tradition. Posner J first warned against the morally directed content of the phrase confusing contractual obligation with fiduciary obligation. Secondly, he rejected that the duty supported a freestanding obligation of precontractual candour or disclosure. Thirdly, he noted that after formation the party is not required to be an altruist and loosen obligations when the other gets into trouble; but he did distinguish this from sharp practice by taking deliberate advantage of an oversight by the other about its rights. This is akin to theft and if it be permitted by the law, the production of over elaborate contracts will be necessitated. Once the contract is made the situation changes and a modicum of trust, co-operation and honesty is required – but (and this is what is essential to grasp) *in furtherance of the bargain*.

50 Judge Posner rooted the obligation in the agreement of the parties. He emphasised that contracts come in different forms and for different purposes. Some allocate risks in the participation in markets, some are concerned with family or social relationships, some are to regulate future co-operative ventures. He said that the office of good faith was to forbid opportunistic behaviour that would take advantage of the position of the other in a way un contemplated by the bargain and contrary to the substance of the bargain; thus, inferentially, to support the bargain as properly construed.

51 He said memorably:<sup>57</sup>

“The contractual duty of good faith is thus not some newfangled bit of welfare-state paternalism or (*pace* Duncan Kennedy, ‘Form and Substance in Private Law Adjudication,’ 89 *Harv L Rev* 1685, 1721 (1976)) the sediment of an altruistic strain in contract law, and we are therefore not surprised to find the essentials of the modern doctrine well established in nineteenth-century cases...”

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<sup>56</sup> 941 F 2d 588 (1991).

<sup>57</sup> 941 F 2d 588 at 595.

- 52 These views of Scalia J and Posner J may not represent the uniform United States application of the doctrine. The individual and separate existence of State law, and the non-existence of federal (at least non-maritime) common law since *Erie Railway Co v Tompkins*,<sup>58</sup> makes search for a uniform position in the United States elusive, notwithstanding attempts at uniformity.
- 53 An analysis of the decisions of the New York Court of Appeals from the 19<sup>th</sup> century reflects a consistent approach that was expressed by Scalia J and Posner J.<sup>59</sup>
- 54 Some sense of uniformity is brought by the two great modern attempts to unify and synthesise American law – The Uniform Commercial Code (UCC) and the Restatements of various branches of the law, including contracts.
- 55 The approach of Judges Scalia and Posner is supported by the UCC. The original UCC defined good faith as “honesty in fact in the conduct or transactions concerned” [1-201 (19)]. This was later revised to “honesty in fact and the observance of reasonable commercial standards of fair dealing” [1-201 (20)].<sup>60</sup> The 1994 commentary on the UCC by the

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<sup>58</sup> 304 US 64 (1938).

<sup>59</sup> *Northrop v Hill* 57 NY 351 (1874); *Uhrig v The Williamsburg City Fire Insurance Co* 101 NY 362; 4 NE 745 (1886); *Doll v Noble* 116 NY 230; 22 NE 406 (1889); *Genet v Delaware and Hudson Canal Co* 136 NY 593 (1893); 32 NE 1078; *New York Central Iron Works v US Radiator Co* 174 NY 331; 66 NE 967 (1903); *Industrial and General Trust Co v Tod* 180 NY 215; 73 NE 7 (1905); *M & E Solomon Tobacco v Cohen* 184 NY 308; 77 NE 257 (1906); *Patterson v Meyerhofer* 204 NY 96; 97 NE 472 (1912); *Brassil v Maryland Casualty Co* 104 NE 622 (1914); *Simon v Etgen* 213 NY 589; 107 NE 1066 (1915); *Wood v Lucy* 222 NY 88; 118 NE 214 (1917); *Wigand v Bachmann-Bechtel Brewing Co* 222 NY 272; 118 NE 618 (1918); *People ex re Wells and Newton Co of New York v Craig (City Comptroller)* 232 NY 125; 133 NE 419 (1921); *Sebring v Fidelity Phoenix Fire Insurance Co of New York* 255 NY 382; 174 NE 761 (1931); *Kirke La Shelle Co v Armstrong Co* 263 NY 79; 188 NE 163 (1933); *M O'Neil Supply Co Inc v Petroleum Heat and Power* 280 NY 50; 19 NE 2d 676 (1939); *Grad v Roberts* 14 NY 2d 70; 198 NE 2d 26(1964); *Van Valkenburgh, Nooger and Neville v Hayden Publishing Co* 30 NY 2d 34; 281 NE 2d 142 (1972); *Fold v Levy* 37 NY 2d 466; 335 NE 2d 320 (1975); *Rowe v Great Atlantic & Pacific Tea Co* 46 NY 2d 62; 385 NE 2d 566; *Dalton v Educational Testing Centre* 663 NE 2d 289 (1995).

<sup>60</sup> Similar wording appears in different parts of the UCC: e.g. sale of goods [2-103(1)(b)] and negotiable instruments [3-103(a)(4)].

Permanent Editorial Board stated that the good faith provision “does not support an independent cause of action for failure to perform or enforce in good faith ... [T]he doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.”

- 56 These excursions into the law of obligations exemplify the utility in understanding, where it is appropriate, the learning and reasoning of the other great common law jurisdictions.<sup>61</sup> They are illustrations of foreign cases as an embodiment of ideas useful for application by analogy: one sovereign law providing ideas or illustration of principle for adoption by another sovereign law.
- 57 This process can be seen as the not novel use of comparative materials in decision-making in Australia,<sup>62</sup> as part of the judicial method of drawing upon materials of logical or analogical relevance to the intellectual process engaged in.
- 58 There is, however, a broader concept at work in an increasingly globalised or transnationally operating world. Let me illustrate by making some

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<sup>61</sup> *Cook v Cook* [1986] HCA 73; 162 CLR 376 at 390.

<sup>62</sup> See S Kiefel, “Comparative Analysis in Judicial Decision-Making: The Australian Experience” (2011) 75 (2) *The Rabel Journal of Comparative and International Private Law* 354; G Davies and M Cowen, “The Persuasive Force of the Decisions of United States Courts in Australia” (1997) 15 *Aust Bar Rev* 51; P von Nessen, “The Use of American Precedents by the High Court of Australia 1901-1987” (1992) 14 *Adel Law Rev* 181; P von Nessen, “Is there anything to fear in transnationalist development of law? The Australian experience” (2006) 33 *Pepperdine Law Rev* 883; R Smyth, “Other than ‘Accepted Sources of Law’? A Quantitative Study of Secondary Source Citations in the High Court” (1999) 22 *UNSW Law Journal* 19; R Smyth, “Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-legal Periodicals in the High Court” (1998) 17 *U Tas Law Rev* 164; I Nielsen and R Smyth, “One Hundred Years of Citation of Authority on the Supreme Court of NSW” (2008) 31 *UNSW Law Journal* 189; R Smyth, “What do Intermediate Appellate Courts Cite? A Quantitative Study of the Citation Practice of Australian State Supreme Courts” (1999) 21 *Adel Law Rev* 51; M Kirby, “Precedent law, practice and trends in Australia” (2007) 28 *Aust Bar Rev* 243; M Gleeson, “Global influences on the Australian Judiciary” (2002) 22 *Aust Bar Rev* 184; R Lefler, “A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority by the US Supreme Court, the Supreme Court of Canada and the High Court of Australia” (2002) 11 *Southern California Interdisciplinary Law Journal* 165; T Allen and B Anderson, “The Use of Comparative Law by Common Law Judges” (1994) 23 *Anglo-American Law Rev* 435.

remarks on maritime law. I do so because of its established character as a globalised or transnational body of principles. There is nothing new about the international character of maritime law. The importance of this is not only the existence of international principle, but also maritime law's independent coherence as a body of law distinct, in many respects, from *terrene* law, and thus to be seen as sitting beside the common law and equity in the broad taxonomy of our law.

- 59 Many, if not most, of you will be familiar with what Lord Mansfield said in 1759 in *Luke v Lyde*<sup>63</sup> about maritime law as an integral part of the law merchant:

“The maritime law is not the law of a particular country, but the general law of nations.”

- 60 In 1828, Chief Justice John Marshall in *American and Ocean Insurance Co v 356 Bales of Cotton*<sup>64</sup> in explaining the content of the constitutional phrase “admiralty and maritime jurisdiction” in Art III Section 2 of the United States Constitution expressed the international source of such jurisdiction as follows:

“A case in admiralty cases does not arise, in fact, under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is supplied by our Courts to the cases as they arise.”

- 61 The debateability of the validity of this proposition, for all purposes, is visible immediately to the modern eye attuned to the place of national sovereignty. Yet, one might think, this would hardly have been lost on someone who had earlier in his adult life participated in his nation's revolutionary political liberation. The context and limits of the words of Marshall CJ can be recognised, however, by the expressions of view of Justice Bradley, almost 50 years later, on behalf of the Supreme Court in

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<sup>63</sup> (1759) 2 Burr 882 at 887; 97 ER 614 at 617.

<sup>64</sup> 26 US (1 Pet.) 511 at 545-46 (1828).

*The Lottawanna*,<sup>65</sup> which give content to the subtle, but real, relationship between the two bodies of law – the general maritime law and the particular municipal maritime law. In *The Lottawanna*, there is express recognition of the following six propositions: first, the existence, separate from municipal maritime law, of the general maritime law; secondly, this separate existence of the general maritime law being owed to its internationality; thirdly, the necessity for the adoption of the general maritime law by relevant sovereign act for it to be an enforceable municipal law; fourthly, the adoption in the United States of the general maritime law by the sovereign act of the creation of a nation and a Constitution which in its terms recognised the existence of maritime law as United States' law; fifthly, the content of the general maritime law not being fixed or uniform, but being capable of local particular adaption; and sixthly, the general maritime law being the basis or groundwork of municipal maritime law—the source of that law.

62 By the early 20<sup>th</sup> century, the Federal Courts and the Supreme Court had made clear that the Constitutional grant of admiralty and maritime jurisdiction carried with it the constitutional recognition of admiralty and maritime law, as a distinct branch of the law, for which the federal courts and Congress were responsible; and that this law owed its content and coherence to a non-national body of principle that was the recognised source of domestic principle through the Constitutional grant.<sup>66</sup>

63 This recognition of a general maritime law of the United States was doctrinally quite distinct from the existence of a separate federal common law in diversity cases established in 1842 by *Swift v Tyson*<sup>67</sup> and

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<sup>65</sup> 88 US (21 Wall.) 558; 1996 AMC 2372 (1874).

<sup>66</sup> See generally *De Lovio v Boit* 7 F Cas 418; 199 AMC 550 (CC Mass 1815; No 3776); *The Lexington* 47 US 344 (1848); *The Scotia* 81 US 170 (1871); *The Belgenland* 114 US 355 (1885); 2008 AMC 2977; *Southern Pacific Co v Jensen* 244 US 205 (1917); 1996 AMC 2076; *Panama Railroad v Johnson* 264 US 375 (1924); 1924 AMC 551.

<sup>67</sup> 41 US 1.

denounced as heretically unconstitutional in 1938 by Brandeis J in *Erie Railroad Co v Tompkins*.<sup>68</sup>

- 64 There were many illustrations of the development of the general maritime law of the United States distinct and different from the common law.<sup>69</sup> For example, in 1959, in *Kermarec v Compagnie General Transatlantique*<sup>70</sup> the Supreme Court refused to apply the existing common law rules governing occupiers liability in respect of an injury to a visitor to a crew member on board a ship. The Court held that the rights and liabilities of the shipowner were to be measured by the standards of the general maritime law freed from inappropriate common law concepts, having their history in terrene considerations.<sup>71</sup> The Court held that the shipowner owed a duty to exercise reasonable care for all those on board the vessel for purposes not inimical to the owner's legitimate interests.<sup>72</sup>
- 65 More recently, in 1970, in *Moragne v States Marine Lines Inc*<sup>73</sup> the Supreme Court recognised the separateness of maritime law from the common law in respect of wrongful death claims surviving the death of the injured party.
- 66 These views are not merely of comparative interest. The words of s 76(iii) of our Constitution were lifted directly from Article III Sec 2 of the United States Constitution. The relevance of United States principles cannot be

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<sup>68</sup> 304 US 64.

<sup>69</sup> J L B Allsop, "Maritime law: The nature and importance of its international character" (2010) 84 *Australian Law Journal* 681 at 682-687.

<sup>70</sup> 358 US 625 at 630-632; 1959 AMC 597 at 601-603 (1959).

<sup>71</sup> 358 US 625 at 631-632; 1959 AMC 597 at 602.

<sup>72</sup> *Ibid.*

<sup>73</sup> 398 US 375.



safely discounted, notwithstanding old High Court authority that stands in their way.<sup>74</sup>

- 67 Holmes J, a deep skeptic of any notion of non-sovereign law, emphasised that sovereign power being required to create enforceable rules. In *The Western Maid*,<sup>75</sup> Holmes, with his customary epigrammatic flair, derided the existence of any “*mystic overlaw to which even the United States must bow*”. The “*mystic over-law*” became the “*brooding omnipresence in the sky*” in his dissent in *Southern Pacific Co v Jensen*.<sup>76</sup> In that case, Holmes J. rejected the notion of the maritime law as a “*corpus juris*” saying “*it is a very limited body of customs and ordinances of the sea.*”<sup>77</sup> The majority in *Jensen*, however, in applying *The Lottawanna*, recognized the adoption of the general maritime law as United States’ municipal maritime law.<sup>78</sup>
- 68 The jurists of the English Admiralty Court and of its era also routinely referred to the law merchant and the general maritime law, though with different degrees of conviction.<sup>79</sup>

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<sup>74</sup> *The Kalibia* [1910] HCA 77; 11 CLR 689. See generally J L B Allsop, “Australian Admiralty and Maritime Law – Sources and Future Directions”, Second Richard Cooper Lecture 2006 (available online at <[http://www.fedcourt.gov.au/how/Richard\\_Cooper\\_lecture.html](http://www.fedcourt.gov.au/how/Richard_Cooper_lecture.html)>).

<sup>75</sup> 257 US 419 at 432 (1922). The important notions of sovereignty in *The Western Maid* were also present in the dissents of Holmes J in *Kuhn v Fairmont Coal Co* 215 US 349 at 370-372 (1910) and *Black & White Taxicab Co v Brown & Yellow Taxicab Co* 276 US 518 at 532-536 (1927) commenting critically on *Swift v Tyson* 41 US (16 Pet.) 1 (1842). In *Black & White Taxicab Co* at 533, Holmes J rejected the notion of a “transcendental body of law outside of any particular State but obligatory within it.”

<sup>76</sup> 244 US 205 at 222; 1996 AMC 2076 at 2088 (1917) (Holmes J, dissenting).

<sup>77</sup> 244 US 205 at 220; 1996 AMC 2076 at 2087.

<sup>78</sup> 244 US 205 at 215-216; 1996 AMC 2076 at 2083-2084 (majority opinion).

<sup>79</sup> Blackstone (2 Bla Comm 273; see 137 ER 788) recognised the law merchant, stating “that the affairs of commerce are regulated by a law of their own, called the law merchant or *lex mercatoria*, which all nations agree in, and take notice of; and, in particular it is held to be part of the law of England, which decides the causes of merchants by the general rules that obtain in all commercial countries”. There was recognition of the law merchant and the general maritime law by Sir William Scott (later Lord Stowell; see *The Gatitudine* (1801) 3 C. Rob 240 at 271; 165 ER 450 at 461), Sir John Nicholl (see *The Neptune* (1834) 3 Hagg 129 at 136; 166 ER 354 at 356 and *The Girolamo* (1834) 3 Hagg 169 at 185-186; 166 ER 368 at 374), Lord Campbell and Dr Lushington (see *The Segredo, otherwise Eliza Cornish* (1853) 1 Sp Ecc & Ad 36 at 44; 164 ER 22 at 26 and *The Bonaparte* (1850) 3 W Rob 298 at 306; 166 ER 973 at 976). See generally J L B Allsop, “Maritime Law: The Nature and Importance of its International Character” (2010) 84 *ALJ* 681.

- 69 The words of two judges living and working in an era in which international co-operation, shared principle and the recognition of the real authority of the law of nations were sharply in focus (at the time of the late hostilities) are worthy of consideration. The first is by Lord Justice Scott<sup>80</sup> in 1946 in the English Court of Appeal in *The Tolten*;<sup>81</sup> the second is by Justice Jackson in 1953 in the Supreme Court in *Lauritzen v Larsen*.<sup>82</sup>
- 70 In 1946, Lord Justice Scott was dealing with the question of whether “damage done by a ship” extended to damage caused by an allision of a ship with a wharf in a foreign country.<sup>83</sup> It was submitted that the principle in *British South Africa Co v Companhia de Moçambique*<sup>84</sup> applied, with the consequence that only the relevant foreign court had authority to deal with questions of ownership of foreign land (the plaintiff’s ownership of the wharf having been put in issue) and of the tort of damage to foreign land.<sup>85</sup> In the discernment and declaration of English admiralty and maritime law, Scott LJ recognised the need to resort to, and not depart unduly from, what he described as “the general law of the sea”.<sup>86</sup> He described the development of maritime law in terms which recognised, explicitly, the existence of the general maritime law and its place in influencing the development of contemporary municipal maritime law. To Scott LJ, the general maritime law was a living force in the development of contemporary municipal law.<sup>87</sup>

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<sup>80</sup> The Rt Hon Sir Leslie Scott was the Président d’Honneur of the Comité Maritime International (CMI) 1947, the delegate of His Majesty’s Government at the International Conferences on Maritime Law in 1909 (Collision), 1910 (Salvage), 1922 (Carriage of Goods) and 1926 (Liens).

<sup>81</sup> [1946] P 135 at 142.

<sup>82</sup> 345 US 571; 1953 AMC 1210 (1953).

<sup>83</sup> *The Tolten* [1946] P 135 at 139.

<sup>84</sup> [1893] AC 602.

<sup>85</sup> *The Tolten* [1946] P 135 at 140.

<sup>86</sup> *Ibid* at 142.

<sup>87</sup> *Ibid*. Scott LJ said:

71 In *Lauritzen v Larsen*, Justice Jackson, speaking for a Court which included one of the great judicial scholars of the 20<sup>th</sup> century, Justice Frankfurter, summed up both the nature and importance of the general maritime law. He referred to a “non-national or international maritime law of impressive maturity and universality”.<sup>88</sup> The terms in which he described the nature of this law are instructive. It had, he said, “the force of law, not from extra-territorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilised communities of rules designed to foster amicable and workable commercial relations.”<sup>89</sup> Maritime law derived from the common acceptance of principles at a level of generality sufficient to enable its local adoption and adaption. As such, it was a body of accepted principles capable of meaningful description as law.

72 In *The Tojo Maru*<sup>90</sup>, however, Lord Diplock in uncompromising terms sought to stamp on any notion of international principle.<sup>91</sup> The question

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“... The question is, however, one of far-reaching importance and calls for careful consideration of British admiralty law, and if there be doubt about that, then of the general law of the sea amongst Western nations, out of which our maritime law largely grew, and from which it is to the interest of maritime commerce that it should not unnecessarily diverge. Judicial action cannot of course reverse a definite departure from the general law of the sea once definitely taken by our own maritime law and expressed in the judgment of a court which binds: but where there is doubt about some rule or principle of our national law, and one solution of the doubt would conform to the general law and the other would produce divergence, the traditional view of our admiralty judges is in favour of the solution which will promote uniformity. For this there are two good reasons, first, because that course will probably be the true reading of our legal development, and, secondly, because uniformity of sea law through the world is so important for the welfare of maritime commerce that to aim at it is a right judicial principle – as many of our admiralty judges have said in the past.”

<sup>88</sup> *Lauritzen v Larsen* 345 US 571 at 581; 1953 AMC 1210 at 1218 (1953). For this proposition the citations included *De Lovio v Boit* 7 F. Cas 418; 1997 AMC 550 (C.C. Mass. 1815) (No 3776), *The Scotia* 81 US (14 Wall.) 170 (1872), and the scholarly article by Edwin D Dickinson, “The Law of Nations as Part of the National Law of the United States” (1953) 101 *University of Pennsylvania Law Review* 26 at 28-29, 792-803-16. *Lauritzen* 345 US at 581 n 12; 1953 AMC at 1218 n 12 (citing *The Sally* 12 US (8 Cranch) 382 (1814)).

<sup>89</sup> *Lauritzen* 345 US 571 at 581-582; 1953 AMC 1210 at 1218.

<sup>90</sup> [1972] AC 242.

<sup>91</sup> [1972] AC 242 at 290-91: “Outside the special field of ‘prize’ in times of hostilities there is no ‘maritime law of the world,’ as distinct from the internal municipal laws of its constituent sovereign states, that is capable of giving rise to rights or liabilities enforceable in English courts. Because of the

before the House of Lords was the nature of the obligations arising out of the performance of a salvage agreement. In particular, the question arose: whether salvors were liable in damages for negligence in circumstances where they were entitled to a reward for services? The particular concern of Lord Diplock was to reject what he saw as the heresy in Lord Denning's judgment in the Court of Appeal that the applicable law was the "maritime law of the world".<sup>92</sup> For the same reasons as expressed by Bradley J in *The Lottawanna* that way of expressing the matter may be taken to overreach the point.<sup>93</sup> Interestingly, both Lord Denning and Lord Diplock cited the same decision to support their respective, and opposite, views: *The Gaetano and Maria* in 1882, in which Lord Justice Brett (the future Lord Esher MR, a noted shipping lawyer of his day) said that English maritime law as administered in English courts, was the general or common maritime law, as adopted.<sup>94</sup>

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nature of its subject matter and its historic derivation from sources common to many maritime nations, the internal municipal laws of different states relating to what happens on the seas may show greater similarity to one another than is to be found in laws relating to what happens upon land. But the fact that the consequences of applying to the same facts the internal municipal laws of different sovereign states would be to give rise to similar legal rights and liabilities should not mislead us into supposing that those rights or liabilities are derived from a 'maritime law of the world' and not from the internal municipal law of a particular sovereign state."

<sup>92</sup> *Ibid.*

<sup>93</sup> *The Lottawanna* 88 US (21 Wall.) 558 at 576; 1996 AMC 2372 at 2381 (1874).

<sup>94</sup> (1882) 7 PD 137 at 143. Brett LJ said:

"Now the first question raised on the argument before us was what is the law which is administered in an English Court of Admiralty, whether it is English law, or whether it is that which is called the common maritime law, which is not the law of England alone, but the law of all maritime countries. About that question I have not the smallest doubt. Every Court of Admiralty is a court of the country in which it sits and to which it belongs. The law which is administered in the Admiralty Court of England is the English maritime law. It is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty either by Act of Parliament or by reiterated decisions and traditions and principles has adopted as the English maritime law; and about that I cannot conceive that there is any doubt. It seems to me that this is what every judge in the Admiralty Court of England has promulgated (Lord Stowell and those before him, and Dr Lushington after him), and I do not understand that the present learned judge of the Admiralty Court differs in the least from them. He says that this case must be determined by the general maritime law as administered in England – that is in other words by the English maritime law."

- 73 *The Tojo Maru* was applied by the High Court of Australia in *Blunden v The Commonwealth*,<sup>95</sup> in which case the issue was the applicable law concerning death and personal injury claims arising out of a collision of two Australian naval vessels in international waters. It was submitted that Australian law did not apply, but the maritime law of the world did. This was, unsurprisingly perhaps, rejected. Interestingly, however, a body of footnotes to the adoption of *The Tojo Maru* included a reference to *Moragne v States Marine Lines Inc*<sup>96</sup> where, at the relevantly cited pages from the opinion delivered by Justice Harlan, there was an express recognition of the separateness of maritime law from the common law in source and principle.<sup>97</sup>
- 74 This is not of mere antiquarian interest, nor is its importance restricted to maritime law. Of course Holmes J was correct to say that no supra-national law bound sovereign polities; and Lord Diplock was correct likewise to say as much. That, with respect, was not the point. Marshall CJ in *356 Bales of Cotton*, Bradley J in *The Lottawanna*, Scott LJ in *The Tolten* and Jackson J in *Lauritzen v Larsen* (and the many commercial and admiralty judges of 18<sup>th</sup> and 19<sup>th</sup> century) were making a different point. They were recognising a body of international principle as *the source* of municipal law. To deny its existence as a coherent body of principle, able

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<sup>95</sup> (2003) 218 CLR 330 at 337-38 [13].

<sup>96</sup> *Ibid* at 338 n 42.

<sup>97</sup> 398 US 375 at 386-387; 1970 AMC at 967-977. Harlan J stated:

“Maritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law; and, from its focus on a particular subject matter, it developed general principles unknown to the common law. These principles included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages. ... These factors suggest that there might have been no anomaly in adoption of a different rule to govern maritime relations, and that the common-law rule, criticized as unjust in its own domain, might wisely have been rejected as incompatible with the law of the sea.”

[footnotes omitted]

The opinion of Harlan J was a powerful rejection and overruling of *The Harrisburg* 119 US 199 (1886) which had exhibited an approach of assimilation of the common law and admiralty on this question.

to be described as “general law”, but acting as the source of legal development is to take a larger, and far more controversial, step.

- 75 That larger step was in fact taken by Lord Diplock. *The Tojo Maru* was followed by *United Scientific Holdings Ltd v Burnleigh Borough Council*,<sup>98</sup> in which case Lord Diplock sought to fuse not only law and equity, but also maritime law and the common law. The former has been controversial, at least in Australia. The latter has not brought contestants to the lists.
- 76 The influence of these views of Lord Diplock and his decisive rejection of the existence of an international general maritime law as the source of a separately coherent English maritime law remains to be analysed. Its effects may perhaps be (unless recognised and resisted) an increasing narrowness of English maritime law. In an age when the English merchant fleet is no longer substantial and its influence is in contract regulation and dispute resolution narrowness of or particularism in doctrine may not be a good idea.
- 77 To deny municipal maritime law’s international character by denying the relevant existence of the international general maritime law as its source, is ultimately to undermine its coherence and to make provincial what is international.
- 78 I have dwelt (perhaps overly so) on the general maritime law because it has (or should be seen to have), a long established pedigree of international influence as the source of municipal maritime law. Much as been written on the growing globalisation of law and its effects on legal theory and municipal law.<sup>99</sup> Twining<sup>100</sup> writes of rooted cosmopolitanism

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<sup>98</sup> [1978] AC 904 at 924-925.

<sup>99</sup> See, for example: N MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford UP, 1999); M Hiscock and W van Caenegem, eds. *The Internationalisation of Law* (Cheltenham: Edward Elgar, 2010); A Slaughter, “A Typology of Transjudicial Communication” (1995) 29 *University of Richmond Law Rev* 90; E Bodenheimer, “Doctrine as a source of the international unification of law” (1986) 34 *Am J of Comp Law Supp* 67.

and captures what Paul Finn has referred to as the “Janus-like” elements of national law and international sources. Such notions as “rooted cosmopolitanism” capture the ideas or approach inhering in *Cook v Cook*.

- 79 But this is more than mere influence of the content of national law by openness to ideas and analogy from elsewhere, though that is important. It is a challenge to the model of law as the rule of sovereign independent legal systems, what Twining refers to as the “black box” model. This challenge is important in all aspects of international order – both private and commercial and “ordre publique”.
- 80 One needs to distinguish between two developments: first the growing international recognition of a common body of legal principle and its effect on the development of legal doctrine in sovereign states; and secondly, the growth of non-sovereign, or qualified sovereign legal principles in the governance of transnational affairs and the resolution of international disputes.
- 81 The first development is in part a function of the explosion in the ready availability of legal information. The decisions of the highest courts of all common law countries are immediately available in free public sites. Sir Anthony Mason and others<sup>101</sup> have discussed international commonality of principle. The work of Patrick Glenn<sup>102</sup> from McGill University repays study in this regard and also in respect of the second development. His views on persuasive authority and the existence of common law as source of legal development are important. In *Premium Nafta Products Ltd v Fili*

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<sup>100</sup> W Twining, *Globalisation and Legal Theory* (Cambridge: Cambridge UP, 2000).

<sup>101</sup> AF Mason, “The Common Law in Final Courts of Appeal Outside Britain” (2004) 78 *ALJ* 183; R Cooke, “The Road Ahead for the Common Law” (2004) 53 *Int'l & Comp LQ* 273; R Goff, “The Future of the Common Law” (1997) 46 *Int'l & Comp LQ* 745.

<sup>102</sup> H Patrick Glenn, “A Transnational Concept of Law” in Cane and Tushnet, eds. *The Oxford Handbook of Legal Studies* (Oxford: Oxford UP, 2003); H Patrick Glenn, *On Common Laws* (Oxford: Oxford UP, 2005); H Patrick Glenn, “Persuasive Authority” (1987) 32 *McGill Law Journal* 261.

*Shipping Co Ltd*<sup>103</sup> Lord Hope of Craighead, referring to English, New York and Australian decisions, spoke of the “law of international commerce”.<sup>104</sup>

- 82 Lord Goff in an influential Wilberforce Lecture in 1997 conceptualised the common law as much a method as a substantive body of rules or principles. It was that method that explains or illuminates the necessary breadth of sources of any sovereign legal system: flexibility, incrementalism, pragmatism, empiricism, critical and explanatory reasoning and responsiveness to facts and analogy. Law is as much a question of ideas as rules. Ideas are the monopoly of no one. The common law involves judicial method which is not rigid or static, nor controlled by a committee at the apex of rule-making. As Holmes said the common law is not a system, it is part of the lives of people. Lord Goff calls the judicial process “an educated reflex to facts”. One wonders how educated the reflex will be without taking account of foreign experience.
- 83 The challenge to sovereign law is real. I leave to one side public international law and the regulation of international State action. The development of non-national principles of commercial conduct and the binding resolution of international commercial disputes by arbitration are two of the most profound legal developments of the last century.<sup>105</sup> The widespread growth of international commercial arbitration under the New

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<sup>103</sup> [2007] UKHL 40.

<sup>104</sup> *Ibid* at [31].

<sup>105</sup> R Goode, “International Restatements and National Law” in Swadling and Jones, eds. *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (OUP 1999); see also Part G of M Hiscock and W van Caenegem, eds, *The Internationalisation of Law* (Cheltenham: Edward Elgar, 2010); K Sono, “The Rise of Anational Contract Law in the Age of Globalisation” (2001) 75 *Tulane Law Rev* 1185; R Garnett, “International Arbitration Law: Progress towards Harmonisation” (2002) 3 *Melb J Int’l Law* 400; D Robertson, “The International Harmonisation of Australian Contract Law” (2012) 29 *Journal of Contract Law* 1; L J Priestley, “A Guide to a Comparison of Australian and United States Contract Law” (1989) 12 *UNSW Law Journal* 4; R J Mooney, “Hands Across the Water: The Continuing Convergence of American and Australian Contract Law” (2000) 23 *UNSW Law Journal* 1; L Spagnolo, “The Last Outpost: Automatic *CISG* Opt Outs, Misapplications and the Costs of Ignoring the *Vienna Sales Convention* for Australian Lawyers” (2009) 10 *Melb J Int’l Law* 141; R Goode, “Rule, Practice and Pragmatism in Transnational Commercial Law” (2005) 54 *Int’l & Comp LQ* 539; K P Berger, “Harmonisation of European Contract Law: The Influence of Comparative Law (2001) 50 *Int’l & Comp LQ* 877.



York Convention and Model Laws has nothing short of revolutionised world dispute resolution.

- 84 The formation and development of UNIDROIT (in 1926) and UNCITRAL (in 1966) fostered the development of conventions, model codes and model laws dealing with private law, especially commercial law, generally.<sup>106</sup>
- 85 The pace of development of international commercial law has been remarkable in the last 20 to 30 years. There are international restatements, model laws, principles, conventions, directives and other instruments on many aspects of law related to maritime commerce – contract law,<sup>107</sup> electronic commerce,<sup>108</sup> international sale of goods,<sup>109</sup> agency and distribution,<sup>110</sup> international credit transfers and bank payment undertakings,<sup>111</sup> international secured transactions,<sup>112</sup> cross-border

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<sup>106</sup> Some of what follows is taken from my F S Dethridge Memorial Address to the 2006 Maritime Law Association of Australia and New Zealand, “International Commercial Law, Maritime Law and Dispute Resolution”.

<sup>107</sup> As to international private law, see generally R Goode et al, *Transnational Commercial Law: International Instruments and Commentary* (Oxford: Oxford UP, 2004); the UNIDROIT Principles of International Commercial Contracts 2004, produced by a group of international scholars and practitioners under the direction of Prof Joachim Bonell (Part I of which was published in 1994); the Principles of European Contract Law completed in 2003 prepared by scholars from all member states of the European Community.

<sup>108</sup> UNCITRAL Model Laws on Electronic Commerce (1996) and on Electronic Signatures (2001); EC Directives on Electronic Commerce (2000) and on Electronic Signatures (1999); CMI Rules for Electronic Bills of Lading 1990; the Bolero (an acronym from Bill of Lading Registration Organisation) bill of lading prepared through the co-operation of the Through Transport Mutual Insurance Association (the TT Club) and the Society for Worldwide Inter Bank Financial Telecommunications (SWIFT) which operates through a joint venture company; and the ICC rules as to electronic presentation of documents.

<sup>109</sup> The United Nations Convention on Contracts for the International Sale of Goods done at Vienna 11 April 1980 (“CISG”) which superseded the Uniform Law on the Formation of Contracts for the International Sale of Goods, 1964 and the Uniform Law on the International Sale of Goods, 1964; and the ICC Official Rules for the Interpretation of Trade Terms (Incoterms 2000), replacing earlier versions.

<sup>110</sup> The First Company Directive (EEC) (1968); the EEC Directive on Commercial Agents (1986); the UNIDROIT Convention on Agency in the International Sale of Goods made at Geneva 17 February 1983; and the UNIDROIT Model Franchise Disclosure Law (2002).

<sup>111</sup> UNCITRAL Model Law on International Credit Transfers (1992); ICC Uniform Customs and Practice for Documentary Credits (1993) (UCP 500) and electronic supplement (EUCP); ICC Uniform

insolvency,<sup>113</sup> securities settlement and securities collateral,<sup>114</sup> conflict of laws,<sup>115</sup> international civil procedure,<sup>116</sup> and international commercial arbitration.<sup>117</sup>

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Rules for Demand Guarantees (1992); International Standby Practices (ISP 98) by the Institute of International Banking Law & Practice Inc; UN Convention on Independent Guarantees and Stand-by Letters of Credit made at New York 11 December 1995; ICC Uniform Rules for Contract Bonds (1993).

<sup>112</sup> The European Bank for Reconstruction and Development (EBRD) Model Law on Secured Transactions (1994); the Model Inter-American Law on Secured Transactions (2002); the various maritime conventions dealing with security: on Maritime Liens and Mortgages (1926 and 1993) and on Arrest (1952 and 1999); the Convention on the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft made at Rome on 29 May 1933; the Convention on the International Recognition of rights in Aircraft made at Geneva on 19 June 1948; the UNIDROIT Convention on International Financial Leasing made at Ottawa 28 May 1988; the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment and Protocol made at Cape Town on 16 November 2001; the UNIDROIT Convention on International Factoring made at Ottawa 28 May 1988; the UN Convention on the Assignment of Receivables in International Trade made at New York 12 December 2001.

<sup>113</sup> The UNCITRAL Model Law on Cross-Border Insolvency (1997); the European Union Convention on Insolvency Proceedings; and the EC Council Regulation NO 1346/2000 on Insolvency Proceedings.

<sup>114</sup> The EC Settlement Finality Directive (1998), 98/26/EC; and the EC Directive on Financial Collateral Arrangements (2002), 2002/47/EC.

<sup>115</sup> The Convention on the Law Applicable to Agency made at the Hague on 14 March 1978; the Convention on the Law Applicable to Contracts for the International Sale of Goods made at the Hague on 22 December 1986; the Convention on the Law Applicable to Contractual Obligations made at Rome on 19 June 1980; the Inter-American Convention on the Law Applicable to International Contracts made at Mexico on 17 March 1994; and the Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary made at the Hague in 2002.

<sup>116</sup> The European Convention on State Immunity made at Basle on 16 July 1972; European Community Council Regulation No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters; a MERCOSUR Convention and Protocol on jurisdiction in civil and commercial matters; the Buenos Aires Protocol to the Treaty of Asuncion signed on 26 March 1991, on International Jurisdiction in Contractual Matters made at Buenos Aires on 5 August 1944; the Convention on the Service Abroad of Judicial or Extra-Judicial documents in Civil or Commercial Matters made at the Hague on 15 November 1965; the European Community Council Regulation No 1348/2000 of 29 May 2000 on the service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters; the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters made at the Hague on 18 November 1970; European Community Council Regulation No 1206/2001 of 28 May 2001 on Cooperation of Courts of Member States in the Taking of Evidence in Civil or Commercial Matters; and the American Law Institute and UNIDROIT jointly developed Principles of Transnational Civil Procedure.

<sup>117</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Award adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its 24<sup>th</sup> meeting (the New York Convention); the Inter-American Convention on International Commercial Arbitration made at Panama City on 30 January 1975; the UNCITRAL Model Law on International Commercial Arbitration (1985); the UNCITRAL Arbitration Rules (1976); the ICC Rules of Arbitration (1998); and the London Court of International Arbitration Rules; UNCITRAL Notes on Organising Arbitral Proceedings; International Bar Association Rules on the Taking of Evidence; International Bar Association Guidelines on Conflicts of Interest; the International Centre for Dispute Resolution Arbitration Rules; International Centre for the Settlement of Investment Disputes Rules of Procedure

- 86 The debate as to the existence and nature of a new modern *lex mercatoria* is a fascinating one.<sup>118</sup> In a practical context, it can arise starkly in relation to international commercial arbitration.
- 87 The relevant law applicable to the resolution of a dispute by arbitration is not a straightforward topic.<sup>119</sup> There may be a number of different laws applicable: that governing the capacity to enter into the arbitration agreement; that governing the arbitration agreement itself and its performance; that governing the existence and proceedings of the tribunal; that governing the substance of the dispute; and that governing recognition and enforcement of the award.
- 88 Debate has proceeded between proponents and opponents of the view as to whether a *lex mercatoria* exists. What cannot be denied, however, is the utility to parties and arbitrators (and also judges) of understanding how the respected authors and proponents of model laws and principles, and how state parties in coming to agreement in international conventions, have addressed issues of relevance. For instance, the availability of relevant rules and principles may enable an arbitrator to choose an available body of rules about substance or procedure when the parties have failed to identify the relevant law. This choice might be made by reference to available unattached “soft” law, rather than by recourse to conflict rules to choose one particular municipal law. At its conference in Cairo in April 1992, the International Law Association expressed the view that the basing of an arbitration award on transnational rules rather than on municipal law

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for the Institution of Conciliation and Arbitration Proceedings; the London Maritime Arbitrators’ Terms 1997, 2002; the London Maritime Arbitrators Association Small Claims procedure.

<sup>118</sup> For reference to the literature, see N van Houtte, *The Law of International Trade* (London: Sweet & Maxwell 2002) pp 24-28; M Pryles, “Application of the *lex mercatoria* in international arbitration” (2004) 78 *Australian Law Journal* 396; and G Petrochilos, *Procedural Law in International Arbitration* (Oxford: Oxford UP, 2004) at 36 [2.04] fn 79; O Lando, “The *Lex Mercatoria* in International Commercial Arbitration” (1985) 34 *Int’l & Comp LQ* 747.

<sup>119</sup> A Redfern and M Hunter, *Law and Practice of International Arbitration* (London: Sweet & Maxwell, 2004), Ch 2; G Petrochilos, *Procedural Law in International Arbitration* (Oxford: Oxford UP, 2004) Chs 1, 2 and 3.

would not affect the validity of an award where the parties have agreed that the arbitrator can do this, or, when the parties have said nothing as to the applicable law. The French Court of Cassation, the Austrian Supreme Court and the English Court of Appeal have affirmed this approach.<sup>120</sup>

89 This transnational law is really a smorgasbord of available rules, principles and conventions, more or less relevant to any particular problem.<sup>121</sup>

Together with custom and usage, they also provide a principled basis for the application of equity and good conscience (*ex aequo et bono*) and a principled basis for the making of a decision by an *amiable compositeur*, if an arbitration is permitted to be approached in such ways.

90 These rules, principles and conventions also provide content to the application of clauses, which are not uncommon in international commercial agreements, that provide for a particular municipal law to govern, but only so far as it is common to, or conformable with, “principles of international law” or “general principles of law” as they may be applied by international tribunals.<sup>122</sup> In the early 1990s, a very large commercial dispute concerning the construction of the Channel Tunnel was submitted to arbitration with a clause that the contract would be governed by principles common to both English and French law, and in the absence of such common principles, by such general principles of international trade law as have been applied by national and international tribunals.<sup>123</sup> Whilst the court commented on the potential difficulties that such a clause might spawn, there was a recognition of the legitimacy and availability of such a choice by the parties. Such a clause, whether before an arbitrator or a

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<sup>120</sup> A Redfern and M Hunter, *Law and Practice of International Arbitration* (London: Sweet & Maxwell, 2004) at 113, fn 68.

<sup>121</sup> For a discussion of the practical uses of the UNIDROIT Principles of Contract, see M J Bonell, *An International Restatement of Contract Law*, 3<sup>rd</sup> ed. (New York: Transnational Publishers, 2004), Ch 6.

<sup>122</sup> See A Redfern and M Hunter, *Law and Practice of International Arbitration* (London: Sweet & Maxwell, 2004) at 103ff.

<sup>123</sup> *Ibid* at 106; and see *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1992] 1 QB 656 and [1993] AC 334.

judge, would require a decision as to the existence and content of non-municipal transnational law or principles.

- 91 These developments are a challenge to the monopoly of legal power in sovereign judiciaries. That is the idea that inheres in the process. Too many sovereign judiciaries cannot be, or are not, trusted. The growth of international commercial arbitration is not a fad; it is not some suspicious product of the venality of lawyers; it is a crucial component of the peaceful settlement of disputes of people from different countries. It is part of world government. It is a matter of high public policy – both international and national. It should not be treated with parochial suspicion, but with broad support recognising its crucial place in the international commercial order. That will require the recognition of the legitimacy of disputes being settled, and the consequences being enforceable, by reference to rules or principles that do not reflect national law, but reflect the interpretation of the governing rule by the person chosen by the parties to resolve the dispute. Law (in the sense of the rule to resolve the dispute) will be seen not to be the sole province of the judge or unidimensional through command.
- 92 There will be an inevitable impact on the sources of our law. As Australian commercial parties and lawyers participate in that system, inevitably they will bring the norms, ideas and principles that govern international commerce to the national legal system.
- 93 What does all this mean for us as judges? First the recognition of the common law judicial method and of the flexible and open-textured notion of the wider common law in the English speaking world makes any injunction to deny judicial doctrinal development below the apex of precedent of more than doubtful worth. The development and maintenance of the vast structure of the common law (that includes wide international influence) that is part of the lives of people is beyond the scope of one committee. It is a task that is common to academics, practitioners and judges.

- 94 Secondly, whilst the sources of our law are wide: language, legal history, text writers, local and foreign, foreign case law, internationally expressed soft law principle and practice, we should always begin by a thorough-going and coherent recognition of the responses in Australia to any problem of general law. It is the common law of Australia, after all, with which we deal. Comity, and we are now told<sup>124</sup>, precedent, require intermediate courts of appeal to follow each other unless viewed as plainly wrong. This may not, however, be as restrictive to the emergence of doctrinal differences and nuances as one might think. It depends on what “plainly wrong” means. The concept is not limited to a decision being *per incuriam* or to a decision being so obviously wrong that it stands out as wrong without detailed examination. It involves a question of persuasion of error.<sup>125</sup>
- 95 The Full Court of the Federal Court in *Grimaldi v Chameleon Mining NL (No 2)*<sup>126</sup> noted<sup>127</sup> that while persuasive authority from overseas is to be treated with respect “*we necessarily must adhere to the course of our own legal development*”. This remark was made in the context of both senior counsel beginning their arguments citing English cases on English provisions, and not commencing with an analysis of otherwise abundant Australian authority on the Australian provision. None of the members of that bench could ever be described in the least way as provincial or parochial. Rather, they were emphasising that foreign source influence is legitimate, but it is indigenous Australian common law that is the foundation.

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<sup>124</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89.

<sup>125</sup> *Gett v Tabet* [2009] NSWCA 76; 254 ALR 504 at [274]-[295].

<sup>126</sup> [2012] FCAFC 6; 287 ALR 22 (Finn, Stone and Perram JJ).

<sup>127</sup> *Ibid* at 42 [53].

- 96 Thus, the second point to be made is that coherence and structure to our law require coherence and structure to our collection, analysis and deployment of local authorities. We should demand it of our practitioners and of ourselves.
- 97 Thirdly, we should recognise the necessity of inspiration and ideas from international sources. This requires a thoughtful and coherent, not accidental and haphazard, recognition of the great intellectual wells of learning and reasoning of the common law world, past and present. This is as much a task for the Academy as for us. But when practitioners come to argue a case on restitution, armed with Goff and Jones, but not Mason and Carter nor Edelman and Bant and not Palmer nor the Restatement, it becomes a matter for us. We must demand a degree of international scholarship from our learned profession, that adheres to the importance of local precedent and relevant international sources.
- 98 Fourthly, all the above for the modern practitioner and judge pose huge challenges of information collection, retrieval and deployment. The digital age that brings courts from all around the world, including from nine intermediate courts of appeal in Australasia alone, to one's chambers poses huge challenges. We need to be practical and realistic, but we should not wilt under the crush of information by simply ignoring it. We can help to control the flow of information by only writing on legal principle when we have to; by writing less and with more sparing references and citations, unless broader legal analysis is truly called for. After all, it is principle and ideas, not rules upon which the common law is truly founded.
- 99 At our Supreme Court conference a couple of years ago in an open session on judgment writing led by Murray Gleeson, I said we should be trying in this digital age to make ourselves "less useful" in our judgments. I was not being anti-intellectual. I was seeking to discourage the constant repetition and collection of authority in case after case where there was no real doubt or argument about the principle, or where the only function of such recitation was to reveal the education of the judge on the point. A

degree of parsimony of expression is of vital importance to the coherent collection and development of our legal doctrine. We cannot clog the pipes with too much dross. We cannot keep making people read too much unnecessary recitation of well-known authority. If we do, we will stunt the sources of our law.

100 Finally, may I say something about theory. I do so because it is one, perhaps the most important of our sources of law. The construction, development and maintenance of a common law of Australia adapted to the needs of this society and harmoniously reflecting international norms and principles is not to be successfully undertaken only by access to relevant content, but also to an appreciation of legal theory.

101 It is not fashionable to theorise about legal principle. Theory is not inimical to the common law. It is one of its binding agents, if often unstated. Any express rejection of theory is only an embrace of theory of another kind: perhaps by a process Friedmann called “inarticulate self-delusion”.<sup>128</sup> To state law by reference only to rules, precedent or other precise articulation by standard is almost always to suppress the influence of a major premiss in the reasoning. That major premiss may be uncontroversial, but it will be present. When and how a rule is to be applied is more often than not a choice based on theory, rather than on anything else. Let me reach for Holmes again – in the same speech to which I have already referred in 1897. He was speaking at the height of technical legalism in American jurisprudence that eight years later led to the supposedly value-free legal reasoning in *Lochner v New York*<sup>129</sup>, over Holmes’ powerful dissent. Holmes told the Boston students that there was too little theory in the law rather than too much. Theory, he said, was not to be feared as

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<sup>128</sup> W Friedmann, *Legal Theory*, 5<sup>th</sup> ed. (New York: Columbia UP, 1967) at 436-437; cf the opening words of the opinion of Roberts CJ in *Miller v Alabama* 567 US (2012) (Docket No 10-9646), a case concerned with whether a statute that provided for the life imprisonment without possibility of parole for minors was “cruel and unusual punishment”: “Determining the appropriate sentence for a teenager convicted of murder presents grave and challenging questions of morality and social policy. Our role, however, is to apply the law, not to answer such questions.”

<sup>129</sup> 198 US 45 (1905).



impractical; it was going to the bottom of the subject. That theory is ever present can be seen in the regular citation of Professor Stone in the High Court.<sup>130</sup>

- 102 The world is governed ultimately by ideas, not by rules. Ideas are not the monopoly of judges, or of academics; they are not to be found only in precedents that bind or only in countries with which we have the strongest legal connection.
- 103 It is the ideas, the theory and the content of the Australian common law that must be built. That task is for the whole of the Australian legal community involving a coherent synthesis of its legal experience, illuminated and inspired, where appropriate, by an ordered and coherent examination of the great centres of legal thought.
- 104 It is not an undertaking for mere legal ciphers, or for drafters of rules that will somehow magically simplify or stabilise life. It is for those who understand, as Holmes said, that the common law has the final title to respect, not because it is an Hegelian dream, but because it is part of the lives of people. Its sources and development must always reflect that human and contemporaneous purpose.

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<sup>130</sup> *Martin v Osborne* [1936] HCA 23; 55 CLR 367 at 394, 397-8, 401; *Curwood v R* [1944] HCA 40; 69 CLR 561 at 568; *Hall v Braybrook* [1956] HCA 30; 95 CLR 620 at 657; *Dawson v R* [1961] HCA 74; 106 CLR 1 at 10; *Ramsay v Watson* [1961] HCA 65; 108 CLR 642 at 648; *Buck v Bavone* [1976] HCA 24; 135 CLR 110 at 134; *Matusevich v R* [1977] HCA 30; 137 CLR 633 at 659; *Jackson v Harrison* [1978] HCA 17; 138 CLR 438 at 462; *Wyong Shire Council v Shirt* [1980] HCA 12; 146 CLR 40 at 49; *Koowarta v Bjelke-Peterson* [1982] HCA 27; 153 CLR 168 at 218; *Jaensch v Coffey* [1984] HCA 52; 155 CLR 549 at 580; *Zecevic v DPP (Vic)* [1987] HCA 26; 162 CLR 645 at 677; *Gala v Preston* [1991] HCA 18; 172 CLR 243 at 284; *Carson v John Fairfax & Sons* [1993] HCA 31; 178 CLR 44 at 105; *Gray v Motor Accident Commission* [1998] HCA 70; 196 CLR 1 at [100]; *Perre v Apand* [1999] HCA 36; 198 CLR 180 at [186]; *Bull v R* [2000] HCA 24; 201 CLR 443 at [108]-[109]; *Jones v Bartlett* [2000] HCA 56; 205 CLR 166 at [205]; *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63; 208 CLR 199 at [99]; *Tame v NSW* [2002] HCA 35; 211 CLR 317 at [170]-[171], [176]; *Yorta Yorta v Victoria* [2002] HCA 58; 214 CLR 422 at [49]; *CSR Ltd v Eddy* [2005] HCA 64; 226 CLR 1 at [94]-[95]; *Travel Compensation Fund v Robert Tambree & Associates* [2005] HCA 69; 224 CLR 627 at [66]; *NSW v Ibbett* [2006] HCA 57; 229 CLR 638 at [35]; *HML v R* [2008] HCA 16; 235 CLR 334 at [160]; *Australian Crime Commission v Stoddart* [2011] HCA 47 at [19], [160]; *BBH v R* [2012] HCA 9 at [66], [97]; *PGA v R* [2012] HCA 21 at [245].

105 Twenty four years after the common law of England ceased to be law and became only a source of law in this country, we have yet, perhaps, to give coherence to the answers to the questions how and whence we develop and articulate the common law of Australia. For some, I am sure, the existence of the questions is not appreciated. For others, I am equally sure, the relevance of the questions would be rejected by a concentration on rule-based technique. I would suggest we need to pose these questions. The answers will come from the process of engagement with them.

## **The Nature of the Trustee's Right of Indemnity and Its Implications for Equitable Principle**

1 Justice Sackville's paper of a month ago clearly articulated the operation of the trustee's right of indemnity and recoupment. There are a number of cases, texts and articles which comprehensively set out the basic principles and references to supporting authorities.<sup>1</sup> I wish this evening to examine a number of aspects of the nature of the right in so far as they throw light upon the nature of the trust and equitable principle. The right is one of indemnity, recoupment and exoneration, not requiring the trustee to use its funds first.<sup>2</sup> Nevertheless, for ease of expression I will use the expression "right of indemnity". The paper is also not concerned with the trustee's companion right: that of personal indemnity by the beneficiaries.<sup>3</sup>

### **The nature of a trust**

2 It is necessary to consider the basic structure about which we are talking. Subject to statute,<sup>4</sup> the trust has no legal personality. It is an equitable institution developed by equity and cognisable by a court of equity.<sup>5</sup> It

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<sup>1</sup> *Octavo Investments Pty Ltd v Knight* [1979] HCA 61; 144 CLR 360; *Trim Perfect Australia v Albrook Constructions* [2006] NSWSC 153; *JA Pty Ltd v Jonco Holdings Pty Ltd* [2000] NSWSC 147; 33 ACSR 691; *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* [2008] NSWSC 1344; 74 NSWLR 550; B H McPherson, "The Insolvent Trading Trust" in P D Finn, ed. *Essays in Equity* (Law Book Co 1985), 142; J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (7<sup>th</sup> ed, LexisNexis Butterworths 2006), Ch 21; H A J Ford and W A Lee, *The Law of Trusts* (4<sup>th</sup> ed, looseleaf; Thomson Reuters), Ch 14; W F Fratcher, *Scott on Trusts* (4<sup>th</sup> ed, Little Brown 1987), Ch 7, secs 244-249 and 261-273.

<sup>2</sup> As Stirling J put the matter in *Re Blundell* (1888) 40 Ch D 370 at 376-377: "What is the right of indemnity? I apprehend that in equity, at all events, it is not a right of the trustee to be indemnified only after he has made the necessary payments ... but that he is entitled to be indemnified, not merely against the payments actually made, but against his liability .... It seems to me, therefore, that a trustee has a right to resort in the first instance to the trust estate to enable him to make the necessary payments to the persons whom he employs to assist him in the administration of the trust estate; that he is not bound in the first instance to pay those persons out of his own pocket, and then recoup himself out of the trust estate, but that he can properly in the first instance resort to the trust estate, and pay those persons whom he has properly employed the proper remuneration out of the trust estate."

<sup>3</sup> *Hardoon v Belilios* [1901] AC 118; *Jacobs' Law of Trusts*, n 1, at 567-568 [2105].

<sup>4</sup> See, for instance, the question of construction thrown up in this regard by the *Goods and Services Tax Act 1985* (NZ), s 51, discussed in *Commissioner of Inland Revenue v Chester Trustee Services Ltd* [2003] 1 NZLR 395 at 404 [37].

<sup>5</sup> *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* [1993] HCA 69; 178 CLR 145 at 175.

involves a relationship between a trustee, beneficiaries (or in limited circumstances, a purpose or purposes) and property; above all it is an equitable obligation binding on the person (the trustee) to deal with property for the benefit of the beneficiaries (or the purpose).<sup>6</sup> An institution, relationship or obligation does not have a capacity to contract.

### **The trustee's capacity to contract and incur obligations**

- 3 The relevant legal personality capable of entering contractual arrangements, or incurring liabilities, whether delictual or not, for the benefit of or in relation to the trust, is the trustee, not the beneficiary (unless the trustee is constituted as the agent of the beneficiary). The trustee is personally liable for debts or liabilities incurred in the course of transactions concerning the trust.<sup>7</sup>
- 4 The liability of the trustee is made out in accordance with ordinary principles of law, whether statute, contract, tort, equity or restitution. The rights of a creditor against the trustee personally are no less and no more than against any other entity. At least in Anglo-Australian law there is no direct access by the creditor to the trust assets.<sup>8</sup>

### **Limitation or exclusion of the trustee's liability**

- 5 The trustee is free, however, to the extent that an obligation is assumed consensually, such as in contract, to deal with third parties on a basis that his liability is limited or excluded. To a large degree that will be a function of contract and contractual interpretation. Nevertheless, legal policy, perhaps habit forming rules over time, intrudes. In Scotland, England and Australia the identification of the contracting party "as trustee" does not

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<sup>6</sup> D Hayton, *Underhill and Hayton: Law of Trusts and Trustees* (14<sup>th</sup> ed, Butterworths 1987) at 3; and see *Registrar of the Accident Compensation Tribunal* [1993] HCA 69; 178 CLR 145 at 165-166.

<sup>7</sup> *Re Johnson* (1880) 15 Ch D 548 at 552; *Vacuum Oil Co Pty Ltd v Wiltshire* [1945] HCA 37; 72 CLR 319 at 324; *Octavo Investments Pty Ltd v Knight* [1979] HCA 61; 144 CLR 360 at 367.

<sup>8</sup> *Vacuum Oil* [1945] HCA 37; 72 CLR 319 at 335; *Octavo* [1979] HCA 61; 178 CLR 360 at 367; *Savage v Union Bank of Australia Ltd* [1906] HCA 37; 3 CLR 1170 at 1186; *In re Morgan; Pillgrem v Pillgrem* (1881) 18 Ch D 93.

necessarily exempt it from personal liability.<sup>9</sup> That said, as Earl Cairns LC said in *Muir v City of Glasgow Bank*.<sup>10</sup>

“whether, in any particular case, the contract of an executor or trustee is one which binds himself personally, or is to be satisfied only out of the estate of which he is the representative, is, as it seems to me, a question of construction, to be decided with reference to all the circumstances of the case; the nature of the contract; the subject-matter on which it is to operate, and the capacity and duty of the parties to make the contract in the one form or in the other. I know of no reason why an executor, either under English or Scotch law, entering into a contract for payment of money with a person who is free to make the contract in any form he pleases, should not stipulate by apt words that he will make the payment, not personally, but out of the assets of the testator.”

- 6 The Lord Chancellor then speculated on the preference of the English courts against construction of contracts as entered by trustees or executors limiting their personal obligations to pay out of the assets of the fund. He said:<sup>11</sup>

“It may be (I will not say more) that, from the English system of judgments in actions at common law, and from the difficulty of obtaining a judgment *de bonis testatoris* founded upon an engagement made by the executor, the English Courts have leaned against a construction which would not result in a judgment *de bonis propriis*: whereas in *Scotland*, where law and equity were jointly administered, such a difficulty did not arise.” (emphasis in original)

- 7 The question whether there has been a limitation or exclusion of contractual liability is one of construction, but it is fair to say that, to be effective, drafting should have a modicum of clarity.<sup>12</sup> One aspect of this is the fundamental consideration that the common law (against the background of which one must construe the contract) does not recognise a

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<sup>9</sup> See *Muir v City of Glasgow Bank and Liquidators* (1879) 4 App Cas 337; J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia*, n 1, at 564.

<sup>10</sup> (1879) 4 App Cas 337 at 355; see also Lord Penzance at 369-371.

<sup>11</sup> (1879) 4 App Cas 337 at 355-356.

<sup>12</sup> *Re Anderson; ex parte Alexander* (1927) 27 SR (NSW) 296 at 298 (Long Innes J); *Helvetic Investment Corp Pty Ltd v Knight* (1984) 9 ACLR 773 at 774 (NSWCA); *Elders Trustee and Executor Co Ltd v EG Reeves Pty Ltd* (1987) 78 ALR 193 at 253-256 (Gummow J); *Re Interwest Hotels Pty Ltd* (1993) 12 ACSR 78 (Eames J); *In re Robinson's Settlement* [1912] 1 Ch 717 at 728-729 (Buckley LJ); *Watling v Lewis* [1911] 1 Ch 414 at 424; and *General Credits Ltd v Tawilla Pty Ltd* [1984] 1 Qd R 388.

trustee as having assumed an additional or qualified legal personality.<sup>13</sup> The American cases reveal the same underlying legal principle—that it is a question of contractual construction; but they also reveal a tendency to permit more easily the limitation of liability, though the jurisprudence is by no means uniform.<sup>14</sup> All agree, however, that the trustee can exclude his personal liability. What, however, is happening at law and in equity when this happens? In *Watling v Lewis*,<sup>15</sup> Warrington J<sup>16</sup> was dealing with a covenant which stated “as such trustees but not so as to create any personal liability”. He held it repugnant to the covenants creating obligations and thus void. That said, his Lordship recognised<sup>17</sup> that there was no objection to a proviso limiting the liability of the contracting party, such as by specifying the particular fund out of which payment has to be made. The clause was construed as an attempt to eliminate any personal liability and any liability out of the fund. Whether Warrington J was correct as a matter of construction is hardly important now, but the distinction he made is. While personal liability can be excluded, that was not repugnant to the provisions in the contract only by construing the contract (at common law) by recognising the contracting party’s capacity in equity (as a trustee) and binding him to liability but in a limited amount or by reference to a fund. In *Parsons v Spooner*<sup>18</sup> the argument that exclusion of liability of a trustee was illegal because it tended to undermine the trustee’s diligence was rejected. Thus whilst personal liability can be seen to be excluded, actual liability of the person, but in a capacity recognised in equity (trustee), is maintained by a contract for liability referable only to assets of the trust fund. This may be seen perhaps as an illustration of the common law recognising equitable title and relationships.<sup>19</sup>

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<sup>13</sup> *Elders Trustee v Reeves* (1987) 78 ALR 193 at 253.

<sup>14</sup> *Scott on Trusts*, n 1, Vol IIIA, sec 262-263.

<sup>15</sup> [1911] 1 Ch 414.

<sup>16</sup> A Chancery Judge and Bencher of Lincoln’s Inn.

<sup>17</sup> [1911] 1 Ch 414 at 422.

<sup>18</sup> (1846) 5 Hare 102; 67 ER 845.

<sup>19</sup> *Jacobs’ Law of Trusts*, n 1, at 668-670 [2702]; R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (4<sup>th</sup> ed, LexisNexis Butterworths 2002) at [1-205]; *Heperu Pty Ltd v Belle* [2009] NSWCA 230 at 263 [143].

- 8 As *Scott* says,<sup>20</sup> it is not so easy to state in conventional terms the nature of the liability thus imposed. The fund or trust estate, after all, is not to be personified. *Scott* refers to an action against the trustee to compel him to apply the trust property in accordance with his (non-personal, but institutional) liability. But that is not a judgment at law; the suit may be seen to be equitable in character. It is not easy to construct a formulation of “non-personal” liability that is referable to access to the trust estate that could be the subject of a verdict or judgment at common law.<sup>21</sup> The order will be one in equity for the payment of the debt out of trust assets.<sup>22</sup> *Scott* describes such an order as “a bill in equity against the trustee for equitable execution”.<sup>23</sup>
- 9 The question arises if it is to be posited that the only method of access to the trust property is by subrogation to the rights of the trustee for indemnity and recoupment. If personal liability of the trustee has been excluded, what is the right of indemnity or recoupment? After all, the trustee’s right of indemnity and recoupment was equity’s answer (flowing from the nature of the office) to the trustee’s predicament of personal liability in conducting the office and in administering the trust estate.<sup>24</sup>
- 10 It is to be recalled that an agreement for valuable consideration that a fund be applied in a particular way may be found to be a form of charge over the fund.<sup>25</sup> If the fund is designated as the source of responsibility for performance or breach of a contract, a question may arise as to creation of a fixed or floating charge. The inconvenience of this occurring on a regular basis with succeeding creditors can be readily recognised.
- 11 Alternatively, the exoneration of personal liability may be seen as a liability to pay only so much as the trustee can obtain from his right to indemnity or

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<sup>20</sup> *Scott on Trusts*, n 1, Vol IIIA at 430.

<sup>21</sup> See *Re Anderson* (1927) 27 SR (NSW) 296 at 300.

<sup>22</sup> See *Ford and Lee*, n 1 at [14.6030] and [14-405] and cases there cited.

<sup>23</sup> *Scott on Trusts*, n 1, Vol IIIA, sec 268.

<sup>24</sup> *Worrall v Harford* (1802) 8 Ves Jun 4 at 8; 32 ER 250 at 252.

<sup>25</sup> *Palmer v Carey* [1926] AC 703 at 706-707; *Hewett v Court* [1983] HCA 7; 149 CLR 639 at 666 (Deane J); and see *Ford and Lee*, n 1, at [14-105] footnote 2.

recoupment assuming for this purpose the existence of personal liability so as to engage the protective right. What the contractual rights and obligations of the trustee and creditor are will be a function of construing the contract and recognising the equitable context in which they are made and construed.

- 12 Thus, complexities in the relationship between legal and equitable rights may arise at the point of any attempt to exclude personal liability of the trustee.

### **A description of the right of indemnity**

- 13 An uncontroversial description of the right can be taken from the passage in *Scott*<sup>26</sup> approved in *Commissioner of Stamp Duties (NSW) v Buckle*:<sup>27</sup>

“Where the trustee acting within his powers makes a contract with a third person in the course of the administration of the trust, although the trustee is ordinarily personally liable to the third person on the contract, he is entitled to indemnity out of the trust estate. If he has discharged the liability out of his individual property, he is entitled to reimbursement; if he has not discharged it, he is entitled to apply the trust property in discharging it, that is, he is entitled to exoneration.”

### **Sources of the right of indemnity**

- 14 The sources of the right are threefold: equitable principle, the terms of the trust instrument and statute. As to equitable principle, Lord Eldon said in *Worrall v Harford*<sup>28</sup> that it was “in the nature of the office of a trustee, whether expressed in the instrument or not, that the trust property shall reimburse him all charges and expenses incurred in the execution of the trust.” This can be seen to be part of the Equity Court’s superintendence in the inherent jurisdiction. In a slightly different, but related context in *The Application of Sutherland*,<sup>29</sup> Campbell J discussed the inherent jurisdiction

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<sup>26</sup> *Scott on Trusts*, n 1, Vol IIIA, sec 246.

<sup>27</sup> [1998] HCA 4; 192 CLR 226 at 245 [47].

<sup>28</sup> (1802) 8 Ves Jun 4 at 8; 32 ER 250 at 252, cited in *Buckle* (1998) 192 CLR 226 at 245 [47].

<sup>29</sup> [2004] NSWSC 798; 50 ACSR 297 at [10]-[17].



in Equity to allow a trustee remuneration. That authority comes, as Campbell J said,<sup>30</sup> from the court's inherent jurisdiction in relation to trust funds.

- 15 As to the terms of any trust deed, they may, and often do, deal with the trustee's right of indemnity. This is not the occasion to discuss the approach to construction and interpretation of wills or trust instruments.<sup>31</sup> It is safe to say, however, that such instruments will be interpreted against the background of the place of the trust as an institution of Equity, as well as against the background of well-known statutory regulation. In this context, I will discuss in due course the excludability of the right.
- 16 As to statute, trustee legislation in all States and Territories provides for a trustee's reimbursement, recoupment and exoneration.<sup>32</sup> Undoubtedly, the relevant statutory provisions will be construed against the background and context of the equitable legal framework and of equitable principle. Thus, the equitable basis of the right giving a first charge over the property<sup>33</sup> is not affected by the absence of expression in the legislation of a right of that character.
- 17 The State and Territory Acts are substantially identical in the expression of the right.<sup>34</sup> Differences exist, however, in that in both Victoria and Western Australia the statutory right is expressly subject to the terms of the trust.<sup>35</sup> The Queensland Act says expressly that the trustee's indemnity cannot be excluded.<sup>36</sup> The New South Wales and Tasmanian Acts are silent on excludability of the right, though the structure of s 59 in the New South Wales Act (with the contents of sub-s (3) before subs (4)) may imply non-

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<sup>30</sup> *Ibid* at [10].

<sup>31</sup> See generally *Jacobs' Law of Trusts*, n 1, Ch 8.

<sup>32</sup> *Trustee Act 1925* (ACT), s 59(4); *Trustee Act 1925* (NSW), s 59(4); *Trustee Act 1980* (NT), s 26; *Trusts Act 1973* (Qld), s 72; *Trustee Act 1936* (SA), s 35(2); *Trustee Act 1898* (Tas), s 27(2); *Trustee Act 1958* (Vic), s 36(2); *Trustees Act 1962* (WA), s 71; also the *Trustee Act 1956* (NZ), s 38(2), which are all derived from the *Law of Property Amendment Act 1859* (UK), s 31(2), the *Trustee Act 1893* (UK), s 24, and the *Trustee Act 1925* (UK), s 30(2)..

<sup>33</sup> *Re Exhall Coal Co Ltd* (1866) 35 Beav 449 at 453; 55 ER 970 at 971.

<sup>34</sup> See the extracts from relevant legislation in the Appendix.

<sup>35</sup> *Trustee Act 1958* (Vic), s 2(3); *Trustees Act 1962* (WA), s 5(3).

<sup>36</sup> *Trusts Act 1973* (Qld), s 65.

excludability. In South Australia, the Act is also silent, but the statutory right has been held not able to be excluded.<sup>37</sup>

- 18 I will deal with some of these issues later, but for the present it suffices to say that there are issues as to the relationships between the statutory rights, the general equitable rights and the terms of the trust that are pregnant with complexity, especially if one considers complications possible by the operation of conflict of laws principles.
- 19 Statutes are important in another respect. Their terms, for different public purposes, in different contexts, may have to be accommodated to the extant contractual and proprietary rights and obligations of a trustee. Language taken from one sphere of discourse, e.g. revenue statutes, may or may not easily accommodate linguistically to the legal and equitable framework of the trust. That should be borne in mind in considering cases about how statutes mesh with equitable rights and trusts.

### **The nature of the right**

- 20 The first aspect of the right with important implications for equitable principle is the nature of the right. In *Re Exhall Coal Co Ltd*<sup>38</sup> Lord Romilly MR said that the right was a first charge on the property.<sup>39</sup> In *Vacuum Oil*<sup>40</sup> Dixon J described the right as “a lien over the assets which takes priority over the rights in or in reference to the assets of beneficiaries”. In *Octavo Investments Pty Ltd v Knight*<sup>41</sup> Stephen, Mason, Aickin and Wilson JJ described it as a “charge or right of lien”, saying:<sup>42</sup>

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<sup>37</sup> *Moyes v J & L Developments Pty Ltd (No 2)* [2007] SASC 261 (Debelle J).

<sup>38</sup> (1866) 35 Beav 449 at 452-453; 55 ER 970 at 971.

<sup>39</sup> Likewise the Earl of Selborne LC (with whom Cotton LJ and Lindley LJ agreed) in *Stott v Milne* (1884) 25 Ch D 710 at 715: “The right of trustees to indemnity against all costs and expenses properly incurred by them in the execution of the trust is a first charge on all the trust property, both income and corpus”; see also *In re Pumfrey* (1882) 22 Ch D 255 at 262 (Kay J); and *Scott on Trusts*, n 1, Vol IIIA at 328.

<sup>40</sup> [1945] HCA 37; 72 CLR 319 at 335.

<sup>41</sup> [1979] HCA 61; 144 CLR 360 at 367.

<sup>42</sup> *Ibid.*

“The charge is not capable of differential application to certain only of such assets. It applies to the whole range of trust assets in the trustee’s possession except for those assets, if any, which under the terms of the trust deed the trustee is not authorized to use for the purposes of carrying on the business: *Dowse v Gorton* [1891] AC 190.”

- 21 As their Honours said in the next paragraph, this is a beneficial interest in the trust assets.
- 22 In neither *Vacuum Oil* nor *Octavo* was the precise character of the proprietary interest of the trustee examined, save for its identification as of a proprietary character (in *Octavo*) such that it inured for the benefit of the personal estate of the trustee (in *Octavo* in insolvency). Once revenue statutes intrude, with the consequent necessity of understanding proprietary structure and form, greater focus is required, but always *for the purpose of the wording of the given statute*.
- 23 In *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties*<sup>43</sup> the Full Court of the Queensland Supreme Court<sup>44</sup> was concerned with the operation of the Queensland *Stamp Act 1894*. McPherson J (with whom Andrews SPJ agreed) said a number of important things about the right of indemnity. First,<sup>45</sup> he said that since the right was an incident of the office of trustee (referring to Lord Eldon in *Worrall v Harford*), it was “probably incapable of being excluded”. In Queensland that statement of the position was undoubtedly accurate by reason of s 65 of the *Trusts Act*, which provided that the provisions of Part 6 of the Act dealing with indemnities and protection of trustees could not be excluded or modified by the trust instrument. With respect, however, it is not immediately apparent why a right, principally for the protection of the trustee (and through him the creditors) can not be released or modified by the trust

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<sup>43</sup> [1984] 1 Qd R 576.

<sup>44</sup> Andrews SPJ, Campbell and McPherson JJ.

<sup>45</sup> [1984] Qd R 576 at 585; he affirmed his views in *Jessup v Queensland Housing Commission* [2001] QCA 312; [2002] 2 Qd R 270 at 275; *Kemtron* was followed by Santow J in *JA Pty Ltd v Jonco Holdings Pty Ltd* [2001] NSWSC 147; 33 ACSR 691 at [87].

deed if the trustee is prepared to act on that basis.<sup>46</sup> I will return to this question and to the position of the creditors later. Then, in discussing the character of the trustee's rights over or in respect of the property, McPherson J said:<sup>47</sup>

"It is often spoken of as a 'charge' over the assets; but this is really a conclusion deriving from the fact that in proceedings in court for administration of the trust, the claim of the trustee to be indemnified will be given effect by directing that liabilities properly incurred by him are paid out of the trust assets in priority to the claims of beneficiaries to their interests in the trust property: *Re Exhall Coal Company Ltd* (1866) 35 Beav 449, 453; 55 ER 970, 971; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367. It may in my view be doubtful whether the trustee's right in the course of administration proceedings to indemnity in priority to the claims of beneficiaries, or his right to retain the trust assets pending satisfaction of his right to indemnity, can properly be regarded as a charge in the nature of an encumbrance in the sense in which the word 'encumbered' is used in the phrase 'full unencumbered value' in para. (4) under the heading 'Conveyance or Transfer' in the First Schedule to the Act. Nevertheless, in *Octavo Investments Pty Ltd v Knight* (*supra*) the High Court held that the right to be indemnified out of trust assets conferred on the trustee an interest in the trust property which was in its nature a proprietary interest: see 144 CLR 360, 367, where in the joint judgment it is said that, once that interest arises, the trust property is 'no longer property held solely in the interests of the beneficiaries'."

24 After referring to passages from *Re Enhill Pty Ltd*<sup>48</sup> and *Re Suco Gold Pty Ltd*<sup>49</sup> (in respects not concerned with the points of disagreement in those cases) and *Daly v Union Trustee Company of Australia Ltd*,<sup>50</sup> McPherson J said:<sup>51</sup>

"in any case in which the trustee is entitled in respect of liabilities properly incurred to his indemnity and lien over assets vested in him as trustee, the trust property (which means the property to which the beneficiaries are entitled in equity) is confined to so much of those assets as is available after the liabilities have been discharged or at least provided for. There is an analogy with the interest of a partner in the partnership assets prior to winding up,

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<sup>46</sup> See also the doubts of Brooking J in *RWG Management Pty Ltd v Commissioner for Corporate Affairs* [1985] VR 385 at 395.

<sup>47</sup> [1984] 1 Qd R 576 at 585.

<sup>48</sup> [1983] 1 VR 561.

<sup>49</sup> (1983) 7 ACLR 873.

<sup>50</sup> (1898) 24 VLR 460.

<sup>51</sup> [1984] 1 Qd R 576 at 587.

as to which see *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440, 446. Obviously a matter of accounting and usually also of valuation may be involved; but it is the duty of a trustee to be constantly ready with his accounts: *Re Craig* (1952) 52 SR (NSW) 265, 267, and the fact that a valuation may be required for accounting purposes merely serves to emphasize that the right of the beneficiaries is limited to the balance remaining after the liabilities are paid or provided for out of the assets once their value is determined. It is therefore not correct to say, as Mr Davies QC submitted for the Commissioner, that the trustee's lien at all times attaches to all of the assets. That would have the consequence that the trustee could, as against the beneficiaries, insist upon retaining all the assets in the exercise of his right of indemnity even though the liability in respect of which that right was exercised was trivial in amount. Such a conclusion would be surprising particularly where, for example, the assets consisted entirely of cash and the liabilities were fixed and their amount capable of precise and immediate determination in money."

25 The consequence was that the property that had been transferred, being the undivided share in the trust fund, was no more than the existing balance after providing for the trustee's liability. Thus the "unencumbered value" was nil. The trustee's proprietary claim was not to be viewed as an encumbrance on the beneficiaries' interest, at least an encumbrance contemplated by the legislation.

26 *Buckle*<sup>52</sup> concerned the operation of ss 65 and 66 of the *Stamp Duties Act 1920* (NSW). Section 66 provided that for conveyances of property without consideration, ad valorem duty was to be charged on the greater of the "unencumbered value of the property" or the amount or value of all encumbrances. The Court<sup>53</sup> approved McPherson J's reasons in *Kemtron*; and whilst recognising the description of the interest as a first charge, said<sup>54</sup> that the trust assets (if there be an unsatisfied right of indemnity) are no longer held solely in the interests of the beneficiaries of the trust. The proprietary rights were, in order of priority, that of the trustee and, then, the beneficiaries. The interest of the latter was not "encumbered", rather,

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<sup>52</sup> [1998] HCA 4; 192 CLR 226.

<sup>53</sup> Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

<sup>54</sup> (1998) 192 CLR 226 at 246-247.

quoting Dixon J in *Vacuum Oil*,<sup>55</sup> the Court said that the right of exoneration or recoupment:<sup>56</sup>

“takes priority over the rights in or in reference to the assets of beneficiaries or others who stand in that situation”.

27 In one sense there is an equitable charge over the trust assets because it is enforced by a court of equity authorising a sale of assets to satisfy the trustee’s rights.<sup>57</sup> But this enforcement is not of a security interest or right created over the interests of the beneficiaries (at least one recognised by this taxing statute), it is an exercise of the prior rights of the trustee, as a prior ranking “preferred beneficial interest in the trust fund.”<sup>58</sup> The Court concluded:<sup>59</sup>

“It is not a security interest or right which has been created, whether consensually or by operation of law, over the interests of the beneficiaries so as to encumber them in the sense required by s 66(1) of the Act.”

28 It is not immediately, or easily, apparent why the proprietary or beneficial interest that the trustee acquires by the operation of equitable principle should not be described as a form of privilege or security to save harmless the trustee in the execution of its office. It can be accepted that it is not a security in support of the beneficiary’s personal obligation to indemnify, the right to indemnity out of the assets and the right of personal indemnity being separate. To that extent, the right to indemnity out of the assets is a right in or against property to satisfy a liability of office, rather than a

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<sup>55</sup> (1945) 72 CLR 319 at 335.

<sup>56</sup> (1998) 192 CLR 226 at 247.

<sup>57</sup> *Hewett v Court* (1983) 149 CLR at 639 at 663 per Deane J: “An equitable lien is a right against property which arises automatically by implication of equity to secure the discharge of an actual or potential indebtedness (see *In re Beirnsstein* [1925] Ch 12 at 17-18; *In re Bond Worth Ltd* [1980] Ch 228 at 251; *Snell’s Principles of Equity*, 28<sup>th</sup> ed (1982), pp 450-451). Though called a lien, it is, in truth, a form of equitable charge over the subject property (see *Landowners West of England and South Wales Land Drainage and Inclosure Co v Ashford* (1880) 16 Ch D 411) in that it does not depend upon possession and may, in general, be enforced in the same way as any other equitable charge, namely, by sale in pursuance of court order or, where the lien is over a fund, by an order for payment thereof”.

<sup>58</sup> The words of Sheller JA in the Court of Appeal: *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1995) 38 NSWLR 574 at 586, specifically approved by the High Court in *Buckle* (1998) 192 CLR 226 at 247.

<sup>59</sup> (1998) 192 CLR 226 at 247.

liability of someone. The sentence above cited from *Buckle*, and its concluding words “in the sense required by s 66(1) of the Act”, perhaps hold the key to the understanding of *Buckle*. It was, as indeed in *Kemtron*, a question of statutory construction. Though a charge or lien in one sense, it was not of the character of security contemplated by the taxing Act in question. In part that was to do with the character of the interest as proprietary and personal to the trustee, thus denying the whole of the property the character of trust assets, because of the inhering conflicting interests (of trustee and beneficiaries), brought about not by wrongful conduct, but by rightful conduct and equitable principle protecting the office of trustee. It would be a large proposition to say that the proprietary interest so often called a lien or charge<sup>60</sup> is not a form of security interest in the property.

- 29 The nature of the right arose, once again in the context of a taxing statute, the *Land Act 1958* (Vic), in *CPT Custodian Pty Ltd v Commissioner of State Revenue* (Vic).<sup>61</sup> Land tax was imposed in respect of the total unimproved value of all land of which a taxpayer was “the owner” at midnight on 31 December of the immediately preceding year. The word “owner” was defined in s 3(1) as to include “every person entitled to any land for any estate of freehold in possession”. Section 51 provided for liability and assessment of “the owner of any equitable estate or interest in the land” as if the estate were legal; s 52(1) provided that a person in whom land was vested as a trustee was assessable and liable as if he were beneficially entitled to such land. There were provisions for assessment of joint owners. Two companies (CPT and Karingal) held land as registered proprietors but also held units in unit trusts, the trustees of which owned land. In all but one of the unit trusts the companies held all units; in the one trust one of the companies held 50 per cent of the units. The terms of the unit trust deeds provided for the trustees to hold the trust fund for the unit holders in equal shares but that no unit conferred an interest in any particular part of the fund. Management of the trusts was

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<sup>60</sup> See [20] above.

<sup>61</sup> [2005] HCA 53; 224 CLR 98.

exclusively vested in a manager and both trustee and manager were entitled to be paid fees from the fund and indemnified for liabilities incurred. The deeds contained a covenant between trustee and manager to ensure that at all times there would be readily realisable assets to meet fees as they fell due. The two unit holding companies were assessed for land tax in respect of the lands held by the trustees. An appeal to the Victorian Supreme Court<sup>62</sup> was successful on the basis that neither company was the “owner” of land within s 3. The appeal to the Court of Appeal was allowed in respect of the units held by the two companies as sole unit holders,<sup>63</sup> the Court holding that a sole unit holder was entitled to a present equitable estate of freehold in possession of the land. The High Court<sup>64</sup> upheld the appeal from the Court of Appeal.

- 30 Not all of the reasoning of the Court is directly relevant to the question of the trustee’s indemnity.
- 31 The Court made some important introductory remarks<sup>65</sup> of the kind to which I have already made reference. The task was to ascertain the terms of the trust and then to construe the statute to see whether the rights ascertained fell within the definition. It was not helpful, and likely to mislead, to make generalised assumptions about the nature of unit trusts.
- 32 The argument of the Commissioner was that since the deeds conferred on each unit holder fixed and ascertainable rights, in relation to the distribution of periodic income and capital (on termination) there was conferred upon each holder an equitable estate or interest in each asset from time to time comprising the trust fund, that no one else had such rights and interests, and that these rights answered the statutory description of “owner”. To a degree the argument was founded on the

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<sup>62</sup> Nettle J; *Karingal 2 Holdings Pty Ltd v Commissioner of State Revenue (Vic)* [2002] VSC 431; 51 ATR 190.

<sup>63</sup> Phillips, Buchanan and Eames JJA; *Commissioner of State Revenue (Vic) v CPT Custodian Pty Ltd* [2003] VSCA 214; 8 VR 532.

<sup>64</sup> Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ.

<sup>65</sup> [2005] HCA 53; 224 CLR 98 at 109-110 [14]-[17].



rejected “dogma” that if property was held by a trustee, equitable ownership *must* exist in someone else.<sup>66</sup>

- 33 Again<sup>67</sup> the Court emphasised the lack of precision in words such as “interest” and “property” which lack a universal contemporary or historical meaning, especially if there is a particular statutory context. *Charles v Federal Commissioner of Taxation*<sup>68</sup> was distinguished, by reference to the terms of the trust, in dealing with rights to income.
- 34 The companies had lost in the Court of Appeal by reasoning from the facts: that the trust deed declared that the trust fund as a whole was vested in the unit holders together (albeit that no unit conferred any interest in any particular part of the fund or investment) and that there was only one person holding all units meant that that person must be regarded in equity as entitled to an interest, vested in possession, in all of the trust assets. This was in part concluded because as the only person beneficially interested in the assets, the person has the power to bring the trust to an end at will and require transfer of the assets, even if only after satisfying the trustee’s right of indemnity, relying on *Saunders v Vautier*.<sup>69</sup>
- 35 As the Court said,<sup>70</sup> one of the difficulties with this view was that it overlooked the complex stipulations of the deed respecting its termination and that because there was an unrealised potential for the unit holder to put an end to the trust, that entitled it to an estate of freehold in possession within the meaning of the Act. After a discussion of the “rule” in *Saunders v Vautier*, the Court stated its modern formulation:<sup>71</sup>

“Under the rule in *Saunders v Vautier*, an adult beneficiary (or a number of adult beneficiaries acting together) who has (or

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<sup>66</sup> *CPT Custodian* [2005] HCA 53; 224 CLR 98 at 112 [25]; *FCT v Linter Textiles Australia Ltd* [2005] HCA 20; 220 CLR 592 at 606 [20]; *Commissioner of Stamp Duties (Qld) v Livingston* (1964) 112 CLR 12; [1965] AC 694; and *Glenn v Federal Commissioner of Land Tax* [1915] HCA 57; 20 CLR 490 at 497.

<sup>67</sup> *CPT Custodian* [2005] HCA 53; 224 CLR 98 at 114 [31].

<sup>68</sup> [1954] HCA 16; 90 CLR 598, and through it *Baker v Archer-Shee* [1927] AC 844.

<sup>69</sup> (1841) 4 Beav 115; 49 ER 282; aff’d (1841) Cr & Ph 240; 41 ER 482.

<sup>70</sup> *CPT Custodian* [2005] HCA 53; 224 CLR 98 at 118 [42].

<sup>71</sup> Taken from Geraint W Thomas, *Thomas on Powers* (1<sup>st</sup> ed, Sweet & Maxwell 1998) at 176.

between them have) an absolute, vested and indefeasible interest in the capital and income of property may at any time require the transfer of the property to him (or them) and may terminate any accumulation.”

- 36 There was no entitlement to call for the transfer of the property, because until satisfaction of the trustee’s rights of indemnity it was impossible to say what the trust fund in question was, citing *Buckle*.<sup>72</sup>
- 37 Thus, the character or nature of the right being proprietary or beneficial, though not “ownership” itself, may prevent (in a particular context) the beneficiaries’ rights meeting a defined conception of ownership. A helpful discussion of the place of the trustee’s right of indemnity in tax analysis can be found in the article of Mr John Hyde Page last year.<sup>73</sup>
- 38 Recently, in *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd*,<sup>74</sup> Brereton J said that the starting point of any analysis was “that it is universally accepted that the nature of the trustee’s interest is that of an equitable lien.” The view (which, with respect, must be right) that the interest is not one of ownership but a form of security must, however, be reconciled with *Buckle* and *CPT Custodian*. Mr Hyde Page in his article suggests that *Buckle* is only authority for the right not being an encumbrance under the former *Stamp Duties Act*; and that it was directed to the value of the beneficiaries’ right, not its character. It is perhaps sufficient to say that how the equitable interest arising under equitable principle and statute operates to qualify the interest or value of the interests of beneficiaries will be affected by the terms of any relevant statute and by the recognition that the trustee’s right is in priority to that of the beneficiaries, proprietary in nature, enforceable in execution by action of a court of equity and not otherwise and in the nature of a protective security interest.

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<sup>72</sup> *Buckle* (1998) 192 CLR 226 at 246 [48]; see also *Hayman v Equity Trustees Ltd* [2003] VSC 353; 8 VR 557.

<sup>73</sup> “*CPT Custodian* and the effect of trustee recoupment rights on the taxation of beneficiaries” (2011) 40 *AT Rev* 165; see also A Slater, “Unit Trusts: Law and Love” (2006) 35 *AT Rev* 185; D Raphael “Caveats and Unit Trusts” (2007) 81 *ALJ* 881; and see *Dwight v FCT* (1992) 37 FCR 178 (Hill J); *Cajkusic v FCT* (2006) 155 FCR 430 at [37].

- 39 The trustee is not bound to pay out of his or her own money and then, later, recoup. The trustee may put himself or herself in funds from the trust to discharge the liability.<sup>75</sup> The lien or charge is enforceable by court order, and not by foreclosure. The right will be set off against any debt of the trustee to the trust. The right accrues at the time of incurring the obligation. Upon insolvency of the trustee the right forms part of the estate of the insolvent. The lien survives the retirement of the trustee.<sup>76</sup> The trustee is entitled to retain possession as against the beneficiary until satisfaction; but not against a succeeding trustee, though the latter can be prevented from taking steps to prejudice or impair the old trustee's rights.<sup>77</sup>
- 40 Trustees can be compelled to wait, however, in some circumstances, if the trust might be defeated or impaired.<sup>78</sup>

#### **The scope of the indemnity: What expenses and liabilities are picked up?**

- 41 The terms of the relevant statutory provisions have been referred to. I doubt whether the word “reasonably” would work any substantive change of meaning. The expression “in or about the execution” reflects the expression of the right in equity, “in the administration of the trust”: *Octavo*.<sup>79</sup> The trustee must be “acting within his powers”.<sup>80</sup> The usual expression of the matter is that the indemnity is limited to liabilities or expenses that have been properly incurred in the execution of the trust,<sup>81</sup> a

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<sup>74</sup> [2008] NSWSC 1344; 74 NSWLR 550.

<sup>75</sup> *In re Blundell* (1884) 40 Ch D 370 at 376-377; *Johnston v Salvage Association* (1887) 19 QBD 458 at 460; *Savage v Union Bank of Australia Ltd* [1906] HCA 37; 3 CLR 1170 at 1197.

<sup>76</sup> Though *quaere* the position of the bona fide purchaser: *Octavo* [1979] HCA 61; 144 CLR 360 at 367; *Buckle* (1998) 192 CLR 226 at 246; *Re Exhall* (1866) 35 Beav 449; 55 ER 970; and *Scott on Trusts*, n 1, Vol IIIA at 332.

<sup>77</sup> See generally the very helpful statements and discussions of principle in *Trim Perfect Australia Pty Ltd (In Liq) v Albrook Constructions Pty Ltd* [2006] NSWSC 153 at [20] (Austin J); *Lemery Holdings* [2008] NSWSC 1344; 74 NSWLR 550 (Brereton J) and *JA Pty Ltd v Jonco Holdings* [2000] NSWSC 147; 33 ACSR 691 (Santow J).

<sup>78</sup> *Darke v Williamson* (1858) 25 Beav 622; 53 ER 774; and see *Scott on Trusts*, n 1, Vol IIIA at 329-333 [244.1].

<sup>79</sup> [1979] HCA 61; 144 CLR 360 at 371.

<sup>80</sup> *Scott on Trusts*, n 1, Vol III A, sec 246, approved in *Buckle* (1998) 192 CLR 226 at 245; see [13] above.

<sup>81</sup> *RWG* [1985] VR 385 at 396, citing *Stott v Milne* (1884) 25 Ch D 710 at 715 and *Re Beddoe* [1893] 1 Ch 547 at 558; *National Trustees Executors & Agency Co of Australasia Ltd v Barnes* [1941] HCA 3; 64 CLR

phrase which Lindley LJ said was equivalent to “not improperly”.<sup>82</sup> Thus, if it can be shown that the act was unauthorised and exceeds the power of the trustee, there is no right of indemnity.<sup>83</sup> Likewise, if conduct is in breach of duty in that it reflects a failure to execute the trust with reasonable diligence, the indemnity will be denied.<sup>84</sup> An important qualification, however, is that a trustee is entitled to an indemnity even if the liability or expense was not properly incurred if done in good faith and it has benefited the trust estate, but only to the extent of that benefit.<sup>85</sup> The relevant sections in *Scott*<sup>86</sup> are illuminating and repay reading and re-reading.

- 42 When is the expense or obligation “properly incurred”? The focus should be on the trustee’s duty to the trust estate and beneficiaries. That is the essence of his responsibility. So exceeding power will be improper; as will sufficient neglect to be in breach of the trustee’s obligation.<sup>87</sup>
- 43 Contractual obligations or expenses are generally straightforward; they will either be authorised or not and be entered in good faith or not. Tortious or quasi-tortious liability is more difficult. Activity of a class, such as promoting the business carried on by the trust, may be generally within power. The trustee may incur a tortious liability or liability under a statute such as the *Fair Trading Act* or *Trade Practices Act* for misleading or deceptive conduct in so doing. In what circumstances will the trustee be entitled to or denied its indemnity?
- 44 *Scott* answers that question with the following proposition:<sup>88</sup>

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268 at 274; *Vacuum Oil* [1945] HCA 37; 72 CLR 319 at 335; *Octavo* (1979) 144 CLR 360; and *Buckle* (1998) 192 CLR 226.

<sup>82</sup> *Re Beddoe* [1893] 1 Ch 547 at 558.

<sup>83</sup> *RWG* [1985] VR 385 at 396, citing *Leedham v Chawner* (1858) 4 K & J 458; 70 ER 191 (Sir William Page Wood VC).

<sup>84</sup> *RWG* [1985] VR 385 at 396, citing *Ecclesiastical Commissioners v Pinney* [1900] 2 Ch 736 at 742-743; *Benett v Wyndham* (1862) 4 De GF & J 259; 45 ER 1183; *Re Raybould* [1900] 1 Ch 199.

<sup>85</sup> *RWG* [1985] VR 385 at 396, citing *Vyse v Foster* (1872) LR 8 Ch App 309; (1874) LR 7 HL 318; and *Jesse v Lloyd* (1883) 48 LT 656.

<sup>86</sup> *Scott on Trusts*, n 1, Vol IIIA, sections 244-248 and 268.

<sup>87</sup> See *Re Just Juice Corporation Pty Ltd* (1992) 37 FCR 445 at 447 (Gummow J).

<sup>88</sup> *Scott on Trusts*, n 1, Vol IIIA, sec 247.

“A trustee who has incurred a liability in tort to a third person is entitled to indemnity out of the trust estate if the liability was incurred in the proper administration of the trust and the trustee was not personally at fault in incurring it.”

45 The above proposition was supported by the author by reference to *Benett v Wyndham*<sup>89</sup> and *Re Raybould*.<sup>90</sup> In *Benett* trustees employed woodcutters to fell trees. In doing so, the woodcutters caused a bough to fall on a passer by. The trustees were held liable in damages for the actions of the woodcutters. Knight Bruce LJ, with whom Turner LJ agreed, said the following:<sup>91</sup>

“The trustee in this case appears to have meant well, to have acted with due diligence, and to have employed a proper agent to do an act the directing which to be done was within the due discharge of his duty. The agent makes a mistake, the consequences of which subject the trustee to legal liability to a third party. I am of opinion that this liability ought, as between the trustee and the estate, to be borne by the estate.”

46 In *Re Raybould*, the trustee in management of the estate carried on a colliery business. In doing so the surface of the land subsided, damaging an adjacent owner’s building. The trustee was held liable. He was entitled to an indemnity. Byrne J found that the damage flowed from the ordinary and reasonable management of the colliery, and not by “reckless or improper” working. The trustee had acted “with due diligence and reasonably.”

47 *Scott* notes<sup>92</sup> various American cases which focus the point of distinction upon whether the liability that has arisen was imposed because of the personal fault of the trustee (in which case the indemnity is denied) or of

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<sup>89</sup> (1862) 4 De GF & J 259; 45 ER 1183.

<sup>90</sup> [1900] 1 Ch 199.

<sup>91</sup> (1862) 4 De GF & J 259 at 263; 45 ER 1183 at 1185; note that Mason P (with whom Spigelman CJ specifically agreed on this point) in *Gatsios* [2002] NSWCA 29 (see below) rejected the argument that the reference to a “proper agent” was critical in the non-personal fault of the trustee, saying that the “reference to the agent was no more than a recital of one of a group of facts that rendered it appropriate that the trustees should be entitled to indemnity in the particular case.”

<sup>92</sup> *Scott on Trusts*, n 1, Vol IIIA at 348.

an agent of the trustee (in which case the indemnity is not denied). But, as the case of *In re Hunter*<sup>93</sup> reveals, it is not merely the identification of the locus of the fault in the trustee personally, but the fault (vis a vis the third party) must also be sufficient to amount to a breach of trust (vis a vis the trust estate and beneficiaries). There the trustee was entitled to indemnification for liability to a lessor for holding over notwithstanding the deliberate decision to do so (wrongfully as between the trustee and the landlord) because it was done to benefit the trust. So the commission of a tort or contravention of a statute might occur in the ordinary course of human affairs without a conclusion that the trustee had failed to show a proper standard of care for the trust estate.

48 The question of the right to the indemnity in the context of tort or quasi tort has caused recent controversy and apparent disagreement between the Courts of Appeal of New South Wales and Victoria. In *Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (In Liq)*,<sup>94</sup> the question was whether the plaintiff as trustee of a trading trust was entitled to an indemnity for found liability in Federal Court proceedings<sup>95</sup> by reason of contravention of the *Trade Practices Act*, ss 52 and 59. The trustee ran a franchise business. The liability was for misleading or deceptive conduct in the making of representations about profitability and various commercial aspects of the business to prospective franchisees. Dishonesty had been pleaded; but it was not proved on the evidence. The learned primary judge (Hamilton J) referred to *Benett v Wyndham* and *Re Raybould*, set out all relevant sections of *Scott* and cited *Octavo Investments*, to discern the principle that the indemnity was available when the trustee was not personally at fault. The trust deed exonerated the trustee from personal liability unless in personal, conscious, fraudulent bad faith. The judge rejected the submission that this protection did not affect the trustee's right of indemnity. His Honour concluded:<sup>96</sup>

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<sup>93</sup> 151 F 904 (ED Pa 1907), referred to by *Scott on Trusts*, n 1, Vol IIIA at 349.

<sup>94</sup> [2001] NSWSC 343 (Hamilton J); and [2002] NSWCA 29 (Court of Appeal: Spigelman CJ, Mason P and Meagher JA).

<sup>95</sup> *ACCC v Top Snack Foods Pty Ltd* [1999] FCA 752 (Tamberlin J).

<sup>96</sup> [2001] NSWSC 343 at [19].

“on a fair reading the true meaning of the provisions is that the trustee should be absolved of liability in the sense of being freed from actions brought by or on behalf of the beneficiaries and also by having its right of exoneration and indemnification extended to all circumstances arising out of its conduct of the trading operation, save only in the case of fraud of the specified kind.”

Thus, given the personal involvement of the director in the acts in question, Hamilton J decided the right to indemnity not on the general law or the NSW Act, s 59(4), but on the terms of the deed.

49 As long as one understands personal fault in the way that I have identified (fault amounting to a breach of trust) there could be no quarrel with Hamilton J’s approach (although questions were unanswered about the general law right and s 59(4)). If, however, it was an expression of a more mechanical analysis – was the trustee personally involved in the wrong to the third party? If so, no indemnity; if not, indemnity, criticism could legitimately be made. Further, his rejection of the argument that the terms of the deed exonerating the trustee for personal liability except for fraud or bad faith only affected the beneficiaries’ rights to sue, and not the trustee’s right of indemnity, seems fundamentally correct.

50 The Court of Appeal dismissed the appeal, but approached the matter somewhat differently to Hamilton J. Three judgments were written. Meagher JA appears to have had “the star”. His reasons were, however, short and terse. He said, among other things, the following:<sup>97</sup>

“[46] It is well settled that this right to indemnification extends to reimbursement of the trustee for damages awarded against him for torts committed by him in the course of carrying on the trust business. The cases most usually cited for this proposition are *Benett v Wyndham* (1862) 4 DF&J 259; 45 ER 1183 and in *Re Raybould* [1900] 1 Ch 199. In the present case the trustee argued successfully that damages under the consumer protection provisions of the *Trade Practices Act* should, for this purpose, be equated with damages for common law torts. I quite agree with this submission.

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<sup>97</sup> [2002] NSWCA 29 at [46]-[47].

[47] What are the limits to be placed on this right to indemnification? This is a matter which has rarely engaged the attention of either the Australian or the English Courts. Presumably if the activity which generated the liability in question were a breach of trust, the right to an indemnity under the general law would no longer exist; similarly if it were criminal in nature, but no criminal offences were charged against NKH, its associates or officers. Again, one must in principle incline to the view that if the activity in question had been fraudulent the law would withhold the right to indemnification; but in the present case Tamberlin J expressly negated fraud. I find it difficult to formulate any other limitations. United States authorities, to which Hamilton J refers, might be read as establishing either or both these propositions: (a) that the activity in respect of which indemnity is claimed must be “reasonable”, and (b) that the activity must be “proper”. In my view, neither such limitation exists in Australian law. As to the former, it is in the circumstances, meaningless; no conduct has to be castigated as “unreasonable” unless one has a clear criterion of what constitutes reasonableness, and here there is none. As to the latter, it is almost as meaningless to endeavour to apply some hypothetical standard of propriety in ordinary commercial life, absent fraud and crime. I find it difficult to view occasional breaches of Trade Practices legislation as anything other than incidental aspects of ordinary commercial life.”

51 Not only with respect, but with trepidation, I would raise the question whether this was a correct appreciation of what *Scott* (and Hamilton J) were saying. *Scott* uses *Benett v Wyndham* and *Re Raybould* in its analysis. The notion of “reasonableness” and “proper” are embedded within the expression of the matter in the English cases, and, as long as the focus is upon such conduct as would be a breach of trust, little complaint can be made of their use or content.

52 Spigelman CJ substantially agreed with Meagher JA and made further comments in which he engaged with the English and Australian cases that referred to “proper” performance of duties or “reasonable diligence” and “reasonableness”.<sup>98</sup> He too appears to see these expressions as divorced from the performance of the trust obligations and thus found them unhelpful, saying:<sup>99</sup>

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<sup>98</sup> *Vacuum Oil* [1945] HCA 37; 72 CLR 319 at 335; *Stott v Milne* (1884) 25 Ch D 710 at 715; *In re Beddoe* [1893] 1 Ch 547 at 558; *In re Grimthorpe* [1958] 1 Ch 615 at 623; *RWG* [1985] VR 385 at 396; *Ron Kingham Real Estate Pty Ltd v Edgar* [1999] 2 Qd R 439 at 442; *Benett v Wyndham* (1862) 4 De GF & J 259; 45 ER 1183; and *Re Raybould* [1900] 1 Ch 199.

<sup>99</sup> [2002] NSWCA 29 at [8].



“The use of such terminology as conduct being ‘proper’ or ‘reasonable’, cannot be regarded as a test of when a trustee is entitled to receive indemnity for outgoings incurred in the course of execution of the trust. Such terminology generally records a conclusion which has been reached on other grounds. Rather than constituting a statement of the relevant test it is ‘the end of the inquiry and not the beginning’.”

- 53 With respect, the statements in *Scott* are not too wide<sup>100</sup> if they are understood to be referable to personal fault of a character that would evidence breach of trust. “Proper”, “reasonable diligence” and “not improper” are all embedded within a trustee’s duty in equity that is encapsulated in s 59(4) of the *Trustee Act*, which does not work any change to pre-existing equitable principle.
- 54 Mason P rejected the distinction between personal fault and vicarious liability for agents.<sup>101</sup> He agreed with Meagher JA and added the following:<sup>102</sup>

[40] A right of indemnity is not lost merely because the loss to the estate is caused by the trustee’s personal default. Byrne J recognised this expressly in *Re Raybould* [1900] 1 Ch 199 at 201 (“*either by himself or his agent*”) and this is entirely consistent with the general principle embodied in the maxim *qui facit per alium facit per se*.

[41] The corporate trustee had power to carry on a business (Deed of Discretionary Trust, cl 7(i)). It obviously had to use agents. The conduct that attracted the award of damages in the Federal Court was hardly commendable, but unremarkable in its heinousness. The individual agents were acting in the course of their employment in the trust enterprise. In these circumstances, it is not unjust for the trust assets to take the burden of the consequences of the respondent’s conduct, just as it would have taken its benefit (cf generally *Balkin v Peck* (1998) 43 NSWLR 706 at 712).

[42] I prefer to express no view on the broader issue whether a trustee’s conduct must be “reasonable” and/or “proper” before the right of indemnity will be upheld (cf IIIA *Scott on Trusts* (4th ed

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<sup>100</sup> As Spigelman CJ said at [2002] NSWCA 29 at [13].

<sup>101</sup> See n 91 above.

<sup>102</sup> [2002] NSWCA 29 at [40]-[42].

1988) at §§244-247). The terms are notoriously open-ended, but I would need to be persuaded that they are [sic: not] meaningless in the present situation. Like all such terms, they embody judgments to be made in context. Some outer limit needs to be drawn in order to recognise that certain types of grossly improper frolics by trustees will put them outside the presently uncertain boundary of the right now in question.”

55 In *Nolan v Collie*,<sup>103</sup> Ormiston JA (with whom Batt JA and Vincent JA agreed), was critical of *Gatsios*. The reasons of Ormiston JA demonstrate the traditional and precedentially stable uses of the words “properly incurred”, “proper” and “reasonable” as “successfully expressing the notion of propriety as underpinning a trustee’s relationship with the trust estate and the beneficiaries”.<sup>104</sup> With respect, I agree. There is a standard; the words carry normative or evaluative content – the standard is by reference to the carrying out of the trust. The fault or impropriety or proper incurrence or diligence or lack of diligence is by reference to well known standards of good faith and reasonable diligence in carrying out the administration of the trust. When liability is tortious or quasi-tortious the enquiry may be evaluative; but the question is clear: was what was done or not done a lack of proper conduct and reasonableness in carrying out the trust? That is not answered by saying that a tort has been committed, even one in which the trustee was implicated. The evaluation of the conduct will have to be assessed by reference to the trust deed and the purpose of the trust business. *In re Hunter*<sup>105</sup> is an example.

### **Limiting the responsibility of the trustee**

56 The trust deed in *Gatsios* sought to limit the trustee’s obligations to the estate and the beneficiaries to circumstances of personal fraud. On the approach of Hamilton J, this opens up to creditors access to the trust assets, except in cases of fraud.

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<sup>103</sup> [2003] VSCA 39; 7 VR 287 at 303-306 [44]-[49].

<sup>104</sup> [2003] VSCA 39; 7 VR 287 at 304 [46]; as to *Gatsios* and *Nolan*, see L Aitken, “A liability ‘properly incurred’? The trustee’s right to indemnity and exemption from liability for breach of trust” (2011) 35 *Aust Bar Review* 53. In *Kirwan v Cresvale Far East Ltd* [2002] NSWCA 395; 44 ACSR 21 at [259] and [423] the Court of Appeal equated “properly incurred” with “reasonably and honestly”.

<sup>105</sup> 151 F 904 (ED Pa 1907); see [47] above.

57 The question arises to what extent a trust instrument can alleviate the rigours of office and make the trustee not chargeable for conduct that would without the alleviation be a breach of trust? This is a large question and worthy of a paper in itself. Indeed the UK Law Commission published a report on the question of trustee exemption clauses in 2006,<sup>106</sup> in addition to the 1992 consultation paper entitled *Fiduciary Duties and Regulatory Rules*.<sup>107</sup>

58 The leading English case is *Armitage v Nurse*.<sup>108</sup> The decision is a strong one. The judgment of the Court of Appeal was that of Millett LJ; it confronted head on the argument that an exclusion of all liability except *actual* fraud was void for repugnancy to the institution of the trust or as contrary to public policy. The argument had support, not only from academics,<sup>109</sup> but also from the 1992 consultation paper of the Law Commission<sup>110</sup> cited by Millett LJ:

“Beyond this, trustees and fiduciaries cannot exempt themselves from liability for fraud, bad faith and wilful default. It is not, however, clear whether the prohibition on exclusion of liability for ‘fraud’ in this context only prohibits the exclusion of common law fraud or extends to the much broader doctrine of equitable fraud. It is also not altogether clear whether the prohibition on the exclusion of liability for ‘wilful default’ also prohibits exclusion of liability for gross negligence although we incline to the view that it does.”

59 Millett LJ accepted that there was an “irreducible core of obligations” owed by a trustee to beneficiaries which is fundamental to the concept of a trust.<sup>111</sup> He rejected the proposition that these obligations included skill, care, prudence and diligence. The minimum necessary in performance

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<sup>106</sup> Law Comm, No 301; Cm 6874; available online at <<http://www.lawcom.gov.uk>>.

<sup>107</sup> Law Comm, Consultation Paper No 124.

<sup>108</sup> [1998] Ch 241.

<sup>109</sup> P Matthews, “The Efficacy of Trustee Exemption Clauses in English Law” [1989] *Conv* 42; H G Hanbury and J E Martin, *Hanbury & Martin: Modern Equity* (14<sup>th</sup> ed, Sweet & Maxwell 1993) at 473-474; and D J Hayton, *Underhill and Hayton’s Law of Trusts and Trustees* (15<sup>th</sup> ed, Butterworths 1995) at 560-561.

<sup>110</sup> Above, n 107 at [3.3.41]; note Millett LJ’s clear explanation of the different meanings of the expression “wilful default”: [1998] Ch 241 at 252.

<sup>111</sup> [1998] Ch 241 at 253.

was to act “honestly and in good faith for the benefit of the beneficiaries.”<sup>112</sup> He rejected the distinction between negligence and gross negligence, and said that what could be done in contract could be done in a trust deed.

60 *Jacobs’ Law of Trusts* concludes<sup>113</sup> that a trust instrument cannot exonerate a trustee from the consequences of fraud in the sense of conduct carried out either in the knowledge that it is contrary to the interests of the beneficiaries or with reckless indifference as to whether it is contrary to their interests.<sup>114</sup> So, a trustee who relied on his exemption consciously to justify what he is about to do will in all likelihood have no protection.

61 Further, in any discussion of trustees’ powers and protections one must never forget that the foundation of the institutional character of the trust is the Court’s supervision. Speaking for the Privy Council recently, Lord Walker, citing Australian authority, said:<sup>115</sup>

“It is fundamental to the law of trusts that the court has jurisdiction to supervise and if appropriate intervene in the administration of a trust, including a discretionary trust. As Holland J said in the Australian case of *Randall v Lubrano* (unreported) 31 October 1975, cited by Kirby P in *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 416:

‘no matter how wide the trustee’s discretion in the administration and application of a discretionary trust fund and even if in all or some respects the discretions are expressed in the deed as equivalent to those of an absolute owner of the trust fund, the trustee is still a trustee.’”

62 A deliberate breach of trust may not be dishonest, but departure from the strict terms of the trust will only be justified as honestly done and as beneficial or necessary or as would have been authorised by the Court.<sup>116</sup>

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<sup>112</sup> [1998] Ch 241 at 253-254.

<sup>113</sup> Above, n 1 at 265 [1620].

<sup>114</sup> See also *Scott on Trusts*, n 1, Vol III at 391-3 [222.3].

<sup>115</sup> *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26; [2003] 2 AC 709 at 724.

<sup>116</sup> *Jacobs’ Law of Trusts*, n 1, at 369-370.

Also, it is always useful to recall what Lindley MR said in argument in *Perrins v Bellamy*.<sup>117</sup>

“My old master, the late Lord Justice Selwyn, used to say, ‘The main duty of a trustee is to commit *judicious* breaches of trust.’”

63 The Privy Council on appeal from the Court of Appeal of Guernsey<sup>118</sup> has recently examined this question of the irreducible core trust obligations. The case concerned the meaning of the relevant Guernsey Trust Law which until 1991 provided that:<sup>119</sup>

“Nothing in the terms of a trust shall relieve a trustee of liability for a breach of trust arising from his own fraud or wilful misconduct.”

The amendment to this provision added the words “or gross negligence”.

64 The issue in the proceedings concerned breaches of trust before the amendment took effect in 1991. The question was whether the law prior to 1991 prevented gross negligence being excluded in any event, such that the amendment was only declaratory of the existing law and not a change. The exclusion and exoneration clause had only left “wilful and individual fraud and wrongdoing on the part of the trustee”.

65 The Privy Council was divided. Millett LJ’s judgment in *Armitage v Nurse* was accepted by Lord Clarke in a detailed judgment examining negligence and gross negligence in English and Scots law. Lord Mance agreed, as did Sir Robin Auld. Lady Hale and Lord Kerr dissented. Drawing on the work of the Law Commission, their view was that liability for “wilful default” cannot be excluded from a trustee’s core duty.

66 The issue is one that goes to the heart of the conception of the trust, an institution that fulfils family, testamentary, parental but also deeply

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<sup>117</sup> [1899] 1 Ch 797 at 798.

<sup>118</sup> *Spread Trustee Company Ltd v Hutcheson* [2011] UKPC 13 (Lady Hale, Lords Mance, Kerr and Clarke and Sir Robin Auld).

<sup>119</sup> *Trusts (Guernsey) Law 1989*, s 34(7).

commercial purposes. At the heart of all of them is the management of property for, and in the interests of, others. In this context, it is helpful to make a distinction referred to by *Scott*<sup>120</sup> between clauses that enlarge the trustee's powers and those that relieve from liability.

### The position of creditors

- 67 On current orthodox legal analysis, the access of the creditor to the trust fund is through rights of subrogation.<sup>121</sup> That makes the clauses of the relevant trust deed and the extent to which they may extend the trustee's powers, or limit the circumstances in which he is held liable, very important because they may extend the right of the indemnity.
- 68 It is at this point that the question of the ability to exclude the right of indemnity, adverted to earlier, becomes vital to creditors.<sup>122</sup>
- 69 As to exclusion completely, some statutes provide as much.<sup>123</sup> McPherson J in *Kemtron* thought the nature of the relationship dictated the irremovability of the right.<sup>124</sup> As between trustee and beneficiary, it is not clear why that is so.<sup>125</sup>
- 70 If, however, the right is seen as one integral to the interaction of third parties with the trust, and so not merely a matter between "consenting trustees and beneficiaries", a different view may be taken. This lay at the heart of DeBelle J's view in *Moyes v J & L Developments Pty Ltd (No 2)*<sup>126</sup> that the public policy of protection of creditors of trusts meant that the

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<sup>120</sup> *Scott on Trusts*, n 1, Vol III at 387-388 [222.1].

<sup>121</sup> *Jennings v Mather* [1901] 1 QB 108; aff'd [1902] 1 KB 1; *Re Johnson* (1880) 15 Ch D 548; *Re Frith* [1902] 1 Ch 342 at 346; *Re British Power Traction and Lighting Co* [1910] 2 Ch 470; *Jacobs' Law of Trusts*, n 1, at 574-575 [2012]; and see generally *Scott on Trusts*, n 1, Vol IIIA at 461-519 [266]-[273].

<sup>122</sup> As to the right to exclude see P Edmondson, "Express limitation of a trustee's rights of indemnity" (2011) 5 *Journal of Equity* 77.

<sup>123</sup> See [17] above.

<sup>124</sup> This was also the view of Santow J in *JA Pty Ltd v Jonco Holdings Pty Ltd* [2000] NSWSC 147; 33 ACSR 691 at [50] and [87].

<sup>125</sup> *Jacobs' Law of Trusts*, n 1, at 569 [2106]; Turner LJ in *Re German Mining Co* (1854) 4 De GM & G 19; 43 ER 415.

<sup>126</sup> [2007] SASC 261.

statutory provision (s 35(2)) could not be contracted out of. Although, it may not be clear as to whether the conclusion was one specific to the contractual intent there, which appeared to be to defeat creditors.

- 71 A trustee, without a right of indemnity, would have to look to his own resources. In the context of corporate trustees, questions of insolvent trading may arise.<sup>127</sup>
- 72 The question of limitation of the property subject to the right of indemnity and the lien or charge also arises. Unaffected by the terms of the trust, the trustee's right is over the whole of the assets of the trust.<sup>128</sup> There is no reason to see its worth and utility diminish by any limitation to assets in the fund at the time of incurring, such that if such assets are removed the right is extinguished.
- 73 Two qualifications must be made to this. First, testamentary creditors are not to be prejudiced by the carrying on of a business after the death of the testator, even with authority. They may insist on payment of their debts and immediate realisation of assets, unless they gave consent to the conduct of the business.<sup>129</sup> Secondly, the trust deed may seek to limit the right to certain property.<sup>130</sup>
- 74 Thus, there are at least three circumstances where the trustee is not entitled to exoneration and so where creditors have no access to the trust assets: (a) where the liability was not properly incurred; (b) where the right to indemnity is excluded or limited; and (c) where the trustee is in default or debt to the trust estate. A fourth may exist – the exclusion of personal liability of the trustee (if in the circumstances valid), if the contract cannot be construed as contemplating liability, but only to be satisfied from the trust fund.

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<sup>127</sup> See *Corporations Act 2001* (Cth), s 588G; and also s 197(1); *Young v Murphy* [1996] 1 VR 279.

<sup>128</sup> *Stott v Milne* (1884) 25 Ch D 710 at 715.

<sup>129</sup> See *Vacuum Oil* [1945] HCA 37; 72 CLR 319; *Dowse v Garton* [1891] AC 190; *Re Oxley* [1914] 1 Ch 604; *Octavo* [1979] HCA 61; 144 CLR 360 at 367.

<sup>130</sup> *Ex parte Garland* (1804) 10 Ves 110; 32 ER 786; *Scott on Trusts*, n 1, Vol IIIA at 335 [244.4].

75 The operation of the right and its character have a significant degree of stability, but there remain important questions attending its operation.

Sydney

18 July 2012



## APPENDIX

### **Australian Capital Territory, *Trustee Act 1925*, s 59(4):**

“A trustee may reimburse himself or herself, or pay or discharge out of the trust property, all expenses incurred in or about the execution of his or her trusts or powers.”

### **New South Wales, *Trustee Act 1925*, s 59(4):**

“A trustee may reimburse himself or herself, or pay or discharge out of the trust property all expenses incurred in or about the execution of the trustee’s trusts or powers.”

### **Northern Territory, *Trustee Act 1980*, s 26:**

“A trustee shall, without prejudice to the provisions of the instrument (if any) creating the trust, be chargeable only for money, stocks, funds, and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds or securities nor for any other loss, unless the same happens through his own wilful default, and may reimburse himself; or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers.”

### **Queensland, *Trusts Act 1973*, s 72:**

“A trustee may reimburse himself or herself for or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers.”

**South Australia**, *Trustee Act 1936*, s 35(2):

“A trustee may reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers.”

**Tasmania**, *Trustee Act 1898*, 27(2):

“A trustee may reimburse himself, or pay or discharge out of the trust estate, all expenses incurred in or about the execution of his trusts or powers.”

**Victoria**, *Trustee Act 1958*, 36(2):

“A trustee may reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers.”

**Western Australia**, *Trustees Act 1962*, s 71:

“A trustee may reimburse himself for or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers.”

# **LPAB Diploma in Law Awards Occasional Address**

**The Hon James Allsop**

**President of the Court of Appeal of New South Wales**

**Great Hall, University of Sydney**

**Friday, 13 July 2012**

- 1 May I ask your indulgence by commencing with some personal reflections? I hope they may be of interests or use to you. My own path to the law was not a direct one. Nor did I come to some of the subjects and principles that now engage me as a sitting judge, right away: in particular, those concerning the exercise of power and the theoretical concepts underlying our legal system. Having come to them now, however, I see that they have always been essential, not only to the exercise of judicial technique, but to my life and practice as a legal professional. On the occasion of your graduation, therefore, I wish to say something to you about these subjects and principles, and how they may directly and beneficially bear on your future legal practice and professional life.
  
- 2 I should stress that what I am about to say is not intended to be a lecture on administrative law or legal theory. Rather, I want to use these subjects to illustrate two fundamental facts relevant to all areas of legal practice: from criminal law, to contracts, torts, or conveyancing. These are, first, that your practice and experience of the law will always be enhanced by an understanding of underlying legal principles and theories, and second, that in joining a *learned* profession, you have a continuing obligation to do just that:

to continue learning. You may think your time as a student has ended. (No doubt your friends and family hope that it has, for many will have felt over the years that they were doing your courses with you.) Let me break it to you now – the law is a pursuit of constant learning.

3 When I first embarked on legal studies, I had very little interest in administrative law. The introductory administrative law course at this very university so failed to hold my interest that after my first year I abandoned the study of law altogether. I saw (and I hasten to say that all this was a product of my inadequacy, not my teacher's) the subject as a set of timeworn, barely coherent rules to be memorised and applied; they were boring, archaic and esoteric. Freed from my legal studies, I finished my arts degree and taught High School English and History for a time. I did this just long enough to realise that I may have been a tad hasty in rejecting a career in the law out of hand.

4 Even then, having returned to my legal studies, I did not come around to the virtues of administrative law. And during my practice as a barrister, although it was a necessity, it was borne diligently and dutifully, if not enthusiastically. It was only on becoming a judge that I began fully to appreciate what the subject was about, and what shaped and formed the approach to its content: **power.**

5 Administrative law is about the control of power, and how people should be treated in the exercise of power in a just and decent civil society. Necessarily

embedded within administrative law, therefore, are the political and legal theories that shape and guide Australian society. These theories are based on an inherent suspicion of power, and of those who wield it.

6 Administrative law might seem an unusual choice to illustrate my two fundamental points today. I must confess it serves an additional purpose. Let me explain. Today you come a step closer to entering the legal profession. Already, you possess legal knowledge and skills that set you apart from lay members of the community. This makes you guardians of our legal system: a system that both wields power, and is essential to controlling it. Thus, at this opportunity to address you at the precipice of your legal careers I feel I should also say something about **power**; about your obligations in relation to the power you will, yourself, soon wield, and, as importantly, your responsibilities to remain vigilant guardians of the system that ensures the just and due exercise of power, within statutory and constitutional limits and confined by the rule of law.

7 It has been said that with great power, comes great responsibility. In the first draft of this speech, I attributed that well-worn quote to Voltaire. However, my researcher informs me that I am actually quoting Spiderman... I maintain that Voltaire got there first by a couple of hundred years, but in any event, the sentiment holds true. It is this sentiment, with great power comes great responsibility, that should guide the discharge of your duties as legal practitioners. I will return to the precise content of this professional responsibility in a moment.

- 8 We have John Locke, Voltaire's 17<sup>th</sup> Century Enlightenment predecessor, to thank for the doctrine of the separation of powers that determines the structure of government in most modern democracies; the separation of the executive, legislative and judicial into distinct branches of government. The grasp of this elemental tripartite framework is essential to understanding the approach by the High Court of Australia to administrative law. But **power** is not only to be appreciated and understood – or controlled – by debates about who is entitled to wield it. Power is also about **people**. Those the subject of the exercise of power in a democracy expect that its exercise will recognise and reinforce human dignity and decency, and will reflect the high trust that society has placed in those with public power to exercise it lawfully and for the common good.
- 9 This is where you come in. In exercising your duties to the court and to your clients, it will be necessary for you to identify, and at times, challenge, the legality of the exercise of power. You must ask from time to time: by what legitimate source and theory are limits placed on the exercise of this power? This can only be answered by the assistance of legal and political theory concerning sovereign power, constitutional structure, the legitimate human expectation of those subjected to power, and the nature of the law. If nothing else, such theory demonstrates that power is not linear; it is not always structured and exercised in an ordered way. It is amorphous, and can only be controlled effectively by appreciating the underlying theories that govern its use and limitations.

- 10 The necessity and operation of theory on legal practice is most easily exemplified in the area of administrative law, which is overtly concerned with the control of power, but it holds true across the spectrum of legal practice that you will encounter. Thus, as soon to be legal practitioners (and so guardians of the legal system), you are responsible not only for knowing the law and rules to be applied in order to obtain a living; but also for understanding the underlying theories that give the laws their power, meaning and content.
- 11 Take for example, the pervasive legal notion of natural justice, also called procedural fairness. Fairness is not easily defined. Curiously, it is often best understood by reference to what it is not. The reaction: “It’s not fair!” is intuitive, it is one of our earliest expressed outrages – as any parent of young children can tell you. Its legal meaning, while often times affected by the terms of a statute or the content of a precedent, is nevertheless in its essence, an enduring human response rooted in democratic society’s expectations of equal and fair treatment of individuals by organs of power.
- 12 Let me share with you a past case from my time as a Federal Court judge that revealed to me the theoretical importance of the intuitive concept of fairness. An Iranian applicant made a complaint to the Court of what he alleged to be his unfair treatment by the Refugee Review Tribunal, and the refusal of the primary judge to interfere on the ground of a denial of natural justice. Before beginning, the presiding judge carefully explained to him the limits of the Court’s power and its inability to afford redress for a denial of natural justice in

the circumstances of his case, under the terms of the statute then applicable. The applicant was a well-educated, intelligent, articulate and respectful litigant. His response was to this effect: "I apologise. I did not understand. To put my complaints would therefore waste your time, because I was denied natural justice: I therefore have nothing to put to you." Before resuming his seat, he paused, and said "If I may say, without intending disrespect to the Court, what is the point then?"

- 13 This gracefully disappointed applicant's question recognised that inherent in our democratic system of government is an expectation that natural justice – that is, procedural fairness – will be afforded to all persons affected by the exercise of government power, and that where one branch of government fails to provide it, another will be empowered and obligated to enforce it. Of course it is not possible to give relief to every unfairness felt by each individual; what is, or is not, fair, will often be a matter of debate, and will be affected by statute, precedent and evolving standards of conduct. Nevertheless, in order fully to execute your duties to the courts, your client and to the administration of justice, it will be necessary for you as legal practitioners to locate your client's cause or complaint within the underlying theories of our democratic system. Only by doing this will you be able to think laterally about the sources and avenues of remedies to their problems and to give full expression to their rights in law. You will also, inherently, be performing one of the fundamental legal tasks – exercising vigilance over, and where necessary controlling, government action.



- 14 Let me now say something about the practical reality of meeting the responsibility that you will soon have of assisting in the protection of a free society under the rule of law. This responsibility is fundamental to your daily practice as a legal professional and to your membership of the legal profession. I shall use the remainder of my time, therefore, to speak to you about your professional responsibility.
- 15 A profession is distinguished from a mere job, trade or business most of all by the onerous duties and responsibilities that members take upon themselves in exchange for the privilege of joining in professional association. These duties will by now be well known to you: duties of candour and diligence to the court, duties of good faith and confidentiality to your client. No less important, but sometimes less emphasised, is the duty to continue to read, think and study throughout your time as a legal practitioner. Not just to remain current with the latest legal cases and legislation, but to continue delving into their underlying theories, both old and new, as well as the changing social norms and attitudes that inform fundamental notions such as procedural fairness and reasonableness.
- 16 This practice of looking to the underlying rules and norms should be carefully distinguished from merely establishing the correct precedent governing a case, or the historical reasoning behind a particular law (which, I'm afraid, you still have to do). Oliver Wendell Holmes (then a member of the Supreme Judicial Court of Massachusetts), at an address to the Boston University School of Law in 1897, put it this way:

“[I]t is revolting to have no better reason for a rule of law than that ... it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past... [F]undamental questions ... await a better answer than that we do as our fathers have done.

...

The way to gain a liberal view of your subject is... to get to the bottom of the subject itself. The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalizations by the help of jurisprudence; next, to discover from history how it has come to be what it is; and, finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price. ... We have too little theory in the law rather than too much, especially on this final branch of study.

...

Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house... it is not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject.”<sup>1</sup>

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<sup>1</sup> O W Holmes, “The Path of the Law” (1897) 10 *Harvard Law Review* 457 at 469, 470, 476, 477.

17 Should you still be unconvinced, Holmes concluded that oration with a sentiment that I ask you carry forward with you, and remember throughout your legal career. I referred at the memorial service for David Hodgson, a great judge and philosopher, whom we lost far too early this year:

“We cannot all be Descartes or Kant, but we all want happiness. And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food besides success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.”<sup>2</sup>

18 I won't go so far as to suggest understanding some theory is the key to inner peace or happiness. But it is the key to understanding the whys and what-fors of your career. In addition to making you a better legal practitioner, it will give your livelihood purpose and meaning, and above all, guidance when the path is far from clear. It is a precious gift, as well as a necessity, and should be cared for, tended and revisited regularly.

19 You have worked extremely hard to arrive at this point; a few more hurdles and you will earn the right to have the responsibilities, and burdens of legal

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<sup>2</sup> Ibid 478.

practice placed upon you. In exchange, you will be well rewarded with collegiality, trust and recognition of the value your skills have to society. You are entitled to be extremely proud of yourselves, just as your family and friends are entitled to be proud of you. I have told you something about theory, power and your responsibility continue learning. Let me now simply offer my sincerest congratulations, and best wishes for your future. Thank you.

## **“A Life in the Law” David Hargraves Hodgson 10 August 1939 - 5 June 2012**

*Address at the memorial service 13 June 2012*

David Hodgson’s life in the law was marked by the human qualities of his intellect and personality: brilliance and creativity; industry, thoroughness and perspicacity; warmth, good humour, an understanding of the human condition including its capacity for good; and an abiding sense of fairness and justice.

The son of the well-known and highly respected solicitor Frederick Arthur Hodgson, having distinguished himself in an Arts degree especially in philosophy, David graduated with in 1962 with First Class Honours in Law in a most distinguished year, coming third in Law behind Graham Hill and Brian Tamberlin in a year which also included in the honours list Murray Gleeson, Michael Kirby, John Peden, Jane Matthews, Geoffrey Walker and Kim Jones, the last becoming a distinguished diplomat and public servant. He apparently had no doubt about what he wanted to do. David was admitted to the NSW Bar as a non-practising barrister on 4 May of the same year. He then became the fourth associate to Sir Victor Windeyer on the High Court. After this introduction to the law, he took up a Rhodes Scholarship to study at Oxford where he obtained a DPhil under the great English legal philosopher, Herbert Hart. Professor Hart’s view, expressed to Justice Heydon, was that David Hodgson was the ablest doctoral student that he ever had. Those students included the likes of the future philosophers John Finnis, Joseph Raz and Herbert Morris. The celebrated philosopher and economist Friedrich Hayek in *Law, Legislation and Liberty* [vol 2 *The Mirage of Social Justice* at p 156 fnnt 16] described David Hodgson’s 1967 work *Consequences of Utilitarianism* as a book of considerable importance that should have brought a debate as to certain contradictions in Benthamite thinking to a close.

Returning to Australia in 1965 after marrying Raewyn in Oxford in 1964, he took up practice at the Bar. He read with Philip Powell, later a colleague in the Equity Division and on the Court of Appeal. He was a founding member

of Forbes Chambers at 127 Phillip Street, set up with colleagues including Lionel Robberds. It was a time of very limited accommodation for young barristers. It was a ground-breaking move; the idea behind it being access to the Bar for young barristers. He took dock briefs, acted for protected tenants on the instruction of the Public Solicitor and was always prepared to act for the underprivileged. The members of Forbes Chambers later moved to 233 Macquarie Street as Frederick Jordan Chambers. He took silk in 1979. While doing work for those who needed him and who had no money, he built a strong commercial practice. When counsel such as Ken Handley became too busy to do all the work on offer, David became the commercial counsel of choice for the wise and canny such as Terry Hartman at Currie and Currie. He was also regularly briefed by the Crown Solicitor, often on difficult constitutional matters, and by the Corporate Affairs Commission. He always demonstrated an incisive facility to grasp a problem and its solution rapidly and a sureness of judgment to hold fast to a conclusion well-drawn. These qualities remained with him when he became a judge. For instance, when not long a judge, he heard the North Sydney Brick and Tile case, a hard fought, difficult and, by the standards of the day, long matter involving the cream of the commercial bar. After the hearing, he astonished the parties by delivering an almost flawless judgment in three weeks. The Court of Appeal only nibbled around the edges of it.

David was appointed a judge of the Supreme Court on 31 October 1983 at the young age of 44, in a year that saw Bill Priestley go to the Court of Appeal, John Clarke, Brian Cohen and Ken Carruthers appointed as judges of the Supreme Court. He sat in Equity, shining in an already superbly talented Division. He was Probate and Protective Judge from 1994 to 1997 and was Chief Judge of the Division from 1997 until moving to the Court of Appeal in 2001. From 1996 to 2005, while carrying out his duties as a judge and writing on philosophy, he assisted with a significant number of investigations and reports for the NSW Law Reform Commission, often as Commissioner in Charge.

Time and occasion do not permit close detail of all he did as a judge. I would like to focus upon David's years as a judge, from four perspectives.

First, from the perspective of his associates and tipstaves:

David Hodgson inspired deep affection and loyalty in those who worked for him, especially his associates of many years Dorothy Laidler and Judith Lord. David fostered loyalty with his kindness, modesty and encouraging, but humbling, intellect. The depth of the affection from his former tipstaves could be seen in the book that they had made and gave to him at the time of his retirement. It contained numerous personal recollections of their times with him. He was visibly moved when it was presented to him.

Secondly, from the perspective of the Bar:

In particular for the young barrister, appearing before David Hodgson was one of life's pleasures of legal practice. He was polite, kind and interested in, and respectful of, one's submissions. Even if one had missed the point, or put something less than happily, he would suggest a reframing of the proposition. A debate would then often ensue about the proposition's validity. Sometimes, the debate appeared to be carried on by him with himself. When the correct principle was exposed and refined, it was invariably attributed to counsel. He was also practical, efficient and polite. The Bar, especially the junior Bar, loved him, not just because of the way he treated them, but also because he treated their clients with the same respect and courtesy while attending to their problems with evident diligence and skill. His court epitomised what courts should be like.

Thirdly, from the perspective of his colleagues:

Having a colleague such as David meant that friendship, humour, help and enthusiastic intellectual engagement were always available and freely offered. I spoke to Kevin Holland last week when I was telephoning people with the bad news. He mentioned something that I think was the hallmark of David's work as a colleague – his thorough engagement with the problem at hand and an insistence (always gentle and polite) to debate any contrary view to test the worth of his and your views. It could be intellectually confronting, but it

was always done with his unfailing courtesy. For Keith Mason and me, he was our resident Alexei Stakhanov, always carrying more than his share of the case load, though, unlike Stakhanov, David never made it to the cover of *Time* for his prodigious productivity. To his colleagues, his work was thorough, speedy and reliable. His ability to digest and write on voluminous facts and submissions was astonishing. He thus lightened the load of all his colleagues.

Fourthly, as a jurist:

Notwithstanding the typically humble remarks that David made at his farewell ceremony about his contribution as a jurist, it is to be recognised, **emphatically**, that he wrote many important judgments, both as a trial and an appellate judge. Chief Justice Tom Bathurst referred to a number of these at David's farewell. His judgments were a model of unpretentious clarity, his intellect displayed not by citation of legal precedent and writing, but by the straight-forward, well-reasoned and well-expressed solution that was so rarely wrong. The skilled eye could see brilliance at work in the simplicity and clarity of rapid reduction and resolution. Today is not the occasion to talk about individual cases, rather to speak of the man and his ideas. The judicial task is not merely an intellectual endeavour. For its complete undertaking it requires qualities of patience, insight into the human condition and a recognition of the place of the law in society. David Hodgson understood these things and had these qualities. His demeanour, warmth and intellect embodied the philosophical essences of justice and fairness. Most philosophical debates about the nature of law and justice could be quelled simply by watching David Hodgson work on a daily basis, revealing the active form of the elements of law: rules, interpreted by reference not only to precedent, but also to precept, reason, commonsense and the notion of justice tempered and shaped by society and its requirements. His life in the law was a pursuit of justice and the service of the public by the application of **that** law.

Oliver Wendell Holmes once said that the common law legal system had the final title to respect because it was not a Hegelian dream, but a part of the lives of people. But Holmes recognised that legal theory and philosophy were the necessary, if generally unstated, binding agents of the common law. David Hodgson understood



this too. Holmes' concluding words in *The Path of the Law* reflect the achievement of David Hodgson as a great judge:

*“The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.”*

The above address has been placed on the website with the permission of Raewyn Hodgson, the widow of the late David Hodgson.

The address was the product of significant assistance from colleagues and friends of David, in particular Mr Lionel Robberds QC and Mr Terence Hartmann, solicitor. It is, nevertheless, an inadequate account of David Hodgson's life and achievements in the law; though, I hope that it gives some insight into why he was held in such affection and respect by those who knew him.

James Allsop

## **Legal theory and everyday judging**

Presented to the Oxford Australian and New Zealand Society

Magdalen College

Oxford 23 February 2012

- 1 The title of the lecture is perhaps somewhat portentous. I intend no grand theory of judging; but wish only to share what are perhaps flashes of the obvious that have occurred to me from time to time over my 11 years as a judge. One of the features of leaving the Bar and becoming a judge is that one directs one's analysis to the correct result, or the result to be chosen, rather than the result to be advocated. This has a number of consequences. Cases cease to be read as sites for intellectual strip-mining for valuable quotations and insights, rather they come to be analysed more dispassionately in their legal context. Values begin to intrude. One begins to ask "why" more? Why does this rule exist and what is its proper application. One begins to ask oneself why judges decided cases as they did, and by that one comes to appreciate the place of legal theory and values that permeate decided cases. This brings about a recognition that many cases have theory and values embedded in them even if only through a process, as Friedmann once called it, of "inarticulate self-delusion"<sup>1</sup>, or through a process of silent assumption (knowing or unknowing). One begins to understand how rules are formed and why they change.
  
- 2 There exist important contemporaneous public debates about how judges should do their work, about the shape and content of the legal system, and about the legal theory to guide or govern it. These public debates (by which term I do not refer to

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<sup>1</sup> W. Friedmann, *Legal Theory*, 5<sup>th</sup> Ed (1967) Stevens & Sons at 436 - 437

speeches of judges) are not generally expressed in theoretical terms other than dogmatic and conclusory ones, generally with the vital suppressed premises entirely unexamined.

- 3 The fields of discourse amongst judges are generally the substantive law and the revelation of error by the calculus of applied existing principle. Sometimes in such debates, answers are given by the assertion of the existence, and operation, of an apparently value-free self-referential system or calculus used by judges to solve problems, by drawing on the stock of existing, organised legal principle to apply to the facts as found. This is a persuasive, if not dominant view. That is hardly surprising since it reflects what occurs in many instances of adjudication.<sup>2</sup> Yet it is not the whole answer to understanding judicial method and technique in the resolution of the human disputes that come before the courts. To assert that it is how the judicial process always works requires the demonstration of a complete system so formed. In speaking of such an approach prevalent in the United States in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries (which he called “mechanical jurisprudence” [(1908) 8 Columbia L Rev 605], Roscoe Pound said: “*the judicial function was taken to be one of discovery of the definitely appointed precept...by an absolute method admitting of no scope for anything but logical identification of the actual precept...and mechanical application thereof.*”
- 4 It was this mechanical approach to judging against which, in their own different ways, Holmes and Cardozo spoke. In their important works, *The Path of the Law* and *The Nature of the Judicial Process*, one finds different conceptions of the law and methods of analysis in the decision making process.
- 5 It is important to note at the outset that the central task of the judge, at first instance or on appeal, is the resolution of disputes or the quelling of controversies. A sues B for X result. The dispute is quelled by a ruling or decision in the existing social order with a body of apparently applicable rules. Parties do not argue what system, or theory, of law should apply. Counsel do not undertake critical analysis of Austinian theory or put submissions as to the continuing relevance of natural

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<sup>2</sup> Benjamin N Cardozo, *The Nature of the Judicial Process*, (1921) Yale University Press at 165

law, or the necessity to have regard to sociological jurisprudence to solve the problem. Indeed, one can easily foresee undermining of confidence in a rational court system if these debates were regularly held in individual cases. Yet such notions may be packed in behind the resolution of the dispute.

- 6 The implicit need for the functioning of the judicature as an institution of government attracting public trust and confidence requires a tolerably coherent and predictable approach to dispute resolution by application of what are assumed to be existing and known rules. Embedded always within any system of dispute resolution by law are the antinomies of remorseless change in society, the appetite of humans for certainty and stability in the application of rules, and the need for flexibility or adaption to the individual or unusual or exceptional case.
  
- 7 Let me begin by saying something of administrative law. This is an area in which legal theory and the application of generally expressed norms play vital roles. The very essence of Australian administrative law is the dominant political theory that underpins Australian society: the division of government into three arms or branches in Parliament, Executive and Judicature.<sup>3</sup> There is nothing inevitable about this. It is a governmental and legal construction of power based on secular society, and suspicion of power and those who wield it drawn from the European, English and American political and intellectual struggles of the 17<sup>th</sup> and 18<sup>th</sup> centuries. The grasp of that elemental tripartite framework is essential to understanding the approach by the High Court of Australia to administrative law. The place of s 75(v) of the Constitution guaranteeing the citizen (and most influentially, the non-citizen) the right to seek review in the original jurisdiction of highest court in the country of the exercise of power by the Commonwealth Executive is central and pervasive in the structure and content of Australian

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<sup>3</sup> The modern division of governmental power into three separate branches is generally regarded to have its origins in the works of Locke in *Second Treatise of Civil Government* (1690) Ch 12 and 13 and Montesquieu in *L'Esprit des Lois* (1748) Bk XI Ch 6. Sovereignty, constitutionalism and the rule of law should also be added to the separation of powers doctrine as basic principle underpinning administrative law: for a general overview see S. D. Hotop "*Principles of Australian Administrative Law*" (6<sup>th</sup> Ed) 1985 Law Book Company Limited at 78-103.

administrative law<sup>4</sup> (Commonwealth and State) and the structure of Australian constitutionalism.<sup>5</sup>

8 I abandoned the study of law in 1972. I could not see the slightest interest in the subject I had studied that year – administrative law. That was because I saw it as a group of time-worn, barely coherent rules to be learnt, recalled and applied to their relevant factual circumstances. The glimmer of the dawn shone through on me as a barrister (having returned to the study of the law, I should say) but I did not fully appreciate the fascinations and delicacies of administrative law until I became a judge. Only then did I begin to appreciate what the subject was about, and what shaped and formed the approach to its content: **power**. The subject concerned the reality and limits of the power of Parliament, of the Executive and of the Courts. That was the first perspective or prism through which sovereign state power was to be analysed. But **power** is not only to be appreciated or understood by debates about who is entitled to wield it (Parliament, Minister, civil servant, judge, or private individual or entity) or about who has the last say in approving, or not approving, how power has been wielded. It is also about people: how people should be treated in the exercise of power in a just and decent civil society. This second perspective is not about being nice. Those the subject of the exercise of power in a democracy should be entitled to expect that the lawful manner of the exercise of that power requires attributes or characteristics that recognize and reinforce human dignity and decency, and that reflect the high trust that society has placed in those with public power to exercise it lawfully and for the common good. These considerations now attend expectations of how judges should exercise their power. Bullying arrogance is now viewed as capable of supporting legitimate complaints against judicial officers.

9 Once one appreciates both these perspectives (that is, the inter se division of power and the effects on humans of its exercise) the embedded political and legal theories in administrative law then become more apparent.

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<sup>4</sup> *Attorney-General (NSW) v Quinn* (1990) 170 CLR 1 at 37-38; *Craig v South Australia* [1995] HCA 58; 184 CLR 163; *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; 211 CLR 476; *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16

<sup>5</sup> *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; 211 CLR 476; *Kirk v Industrial Relations Commission (NSW)* [2010] HCA 1; 84 ALJR 154

10 The place and force of sovereign power through the making and executing of commands is, of course, at the centre of the structure of administrative law. By what legitimate source and theory are limits placed on the making of the command or its execution? This can be answered only by the assistance of legal and political theory concerning command, sovereign power, constitutional structure, the legitimate human expectations of those subjected to power, and the nature of law. If nothing else, such theory demonstrates that power is not linear; it is not always structured and exercised in an ordered way. It is amorphous, and can only be controlled effectively by appreciating the underlying theories that govern its use and limitations. These are questions not just for the highest levels of the judiciary in the formulation of high principle; but also for courts dealing on a day-to-day basis with the review of governmental action. This is so because so much of what occurs in reviewing the legality of administrative action concerns its evaluation by reference to two concepts that inform the limits of administrative, and often judicial, power: reason and justice.

11 These two notions can be seen to help shape the control of governmental power and inform the law generally in its declaration and application by the courts.

12 Take the pervasive legal notion of natural justice, or procedural fairness. It has a coherent organized structure based on developed rules and precedents<sup>6</sup>, but at its heart its abiding informing principle is “fairness”<sup>7</sup>. Mason J and Brennan J in *Kioa v West*<sup>8</sup> disagreed as to the vehicle for the carriage of natural justice. Mason J viewed it as a principle of the common law affecting (unless limited or excluded by statute) the exercise of public power.<sup>9</sup> Brennan J viewed it as a part of the statutory command, capable of being limited or excluded by Parliament, such being ascertained in the process of statutory interpretation.<sup>10</sup> The difference may be of limited practical importance, arising only when non-statutory power is being

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<sup>6</sup> “Natural justice” is traditionally broken down into two rules at common law – the hearing rule and the bias rule: see M. Aronson *et al*, *Judicial Review of Administrative Action*, 4<sup>th</sup> Ed (2009) Lawbook Co at [7.20]

<sup>7</sup> *Kioa v West* [1985] HCA 81; 159 CLR 550

<sup>8</sup> *ibid*

<sup>9</sup> *ibid* at 582 – 586 [28]-[34]

<sup>10</sup> *ibid* at 609 – 613 [9] – [19]

exercised. The difference is, however, important for legal theory. If immanent within the common law, that body of principles, expressed in the judicial command of courts, draws its source from some well of fairness as an incident of the common law. If immanent within the sovereign command of Parliament it implies a necessary character of, and limit on, that law-making from some well of fairness attending Parliament's acts.

- 13 What is, or is not, fair will often be a matter of debate; it will often be affected by the terms of a statute or the content of a precedent; but in essence, it is an enduring human response rooted in democratic society's expectations of equal and fair treatment of individuals by organs of power. Syllogistic reasoning expressed in language seeking to define an operative rule is often inadequate to express why an exercise of power is unfair. That is sometimes an infelicity of language. More often, the difficulty arises from the fact that the exercise of power must be assessed in its human dimension taking into account evaluative assessment of, sometimes indefinable, characteristics and nuances of the human condition. Put bluntly, essential in many analytical reviews of the exercise of governmental power is the partly legal and partly human response to the facts: Is this how people should be subjected to power of the state? I once read a US Circuit Court decision (I have lost the reference) about deportation without, or with little, notice being given to an alien who had been lawfully in the US for much of his life, but who had committed a serious criminal offence making him liable to deportation to the country of his birth. The judgment recorded what one of the judges had said during the hearing in response to the elaborate legal argument that had been put forward by counsel for the government. The judge had said, "Yes, but this is not how we treat folks around here." That homely rebuke to counsel for the United States, in such a context, was immanent with legal and Constitutional theory.
- 14 Let me reflect upon a past case that revealed to me the theoretical importance of the intuitive concept of fairness. The case involved an Iranian applicant in Perth. He was incarcerated in a camp in north western Australia. He made the long journey to court to complain of what he alleged to be his unfair treatment by the Refugee Review Tribunal and the refusal of the primary judge to interfere on the ground of a denial of natural justice. Before he was to begin, the presiding judge

carefully explained to him the limits of the Court's power and its inability to afford redress for a denial of natural justice, explaining what that meant for his submissions that had been filed. He was a well-educated, intelligent, articulate and respectful litigant. His response was to the effect: "I apologise. I did not understand. To put my complaints would therefore waste your time, because I was denied natural justice: I therefore have nothing to put to you." Before resuming his seat, he paused, and said "If I may say, without intending disrespect to the Court, what is the point then?"

15 That man's perceptive lament and sense of grievance, by their humanity, informed my appreciation of the debates that had recently taken place about the Constitutional legitimacy of splitting a matter and giving a court only some power to deal with it<sup>11</sup> and that were about to take place about the privative clauses in the Commonwealth Refugee legislation in 2001. If courts are to enjoy the confidence of the public in the review of government action, to limit the bases of that review of legality may risk inducing in litigants a justifiable sense of the impotence or subordination of the court to other more powerful arms of government.

16 Let me turn to reason. Reason also pervades the control of Executive power: for example notions of unreasonableness in the exercise of power<sup>12</sup>, requirements of reasonable capacity to be satisfied of a jurisdictional fact<sup>13</sup>, broad underlying requirements of reason in assessing apprehended bias<sup>14</sup>. It is implicit in the understanding of the content of the power given by Parliament to the Executive that the Executive will act according to reason and not caprice.<sup>15</sup> A legal standard of reason by reference to notions of irrationality and illogicality does not yet, however, command a clear majority in the High Court: see *Minister for Immigration and Citizenship v SZMDS*<sup>16</sup>. Much of the difficulty in cases discussing illogically or irrationally is semantic. What is the difference between

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<sup>11</sup> *Abebe v Commonwealth* [1999] HCA 14; 197 CLR 510

<sup>12</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; 77 ALJR 1165

<sup>13</sup> *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* [1944] HCA 42; 69 CLR 407 at 432

<sup>14</sup> *NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 328; 214 ALR 264

<sup>15</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; 77 ALJR 1165 at [9] per Gleeson CJ

<sup>16</sup> [2010] HCA 16



illogicality and irrationality? By what system of reasoning are we judging? We are all illogical at times; but in what circumstances should that vitiate the exercise of public power? These are questions which, at the moment, the High Court is dealing with, principally by reference to constitutional theory and precedent. Embedded within these questions are the fundamental considerations of Parliament's authority and the need for power authorised by Parliament to be exercised according to reason, and not arbitrarily or capriciously. These are not tests of carelessness; they are tests by reference to which courts are authorised to deny legitimacy to an exercise of power by another arm of government. Perfection of logicity is not always possible, perhaps not even desirable; wise human judgement can sometimes include non-reasoned elements such as trust, intuition, or other appropriate unreasoned responses as much as it can include rational cost-benefit analysis. How such considerations might legitimately fall into an analysis of government power will depend on the whole legal and human context.

- 17 Part of the difficulty in the attempts by the courts to explain the limits of the concepts of reason, logicity and irrationality is their inherent relativity in a variety of human contexts, and the recognition that it is legality, not social policy, over which the courts have a legitimate constitutional monopoly. The concepts of reason, logicity and irrationality do not form part of an undergraduate logic examination. Rather, they are part of the vocabulary of the critique of the exercise of power in relation to human conduct. The assessment of the exercise of that power will depend upon its context, including such things as the nature of the question, the terms of the power, the character of the body exercising it, the character and nature of the subject of the power and the consequences for that person. These considerations must be set against the critical need for unquestioned constitutional legitimacy of the courts in the field of authority exercised by the courts, which may be undermined by courts arrogating to their domain (without Parliamentary authority) questions of social policy. Once one appreciates this multifaceted contextual approach, the limits and difficulty of expressing rules of universal or comprehensive application (such as “jurisdictional error”, “irrationality” or “unreasonableness”) become apparent. For instance, a linear and over-simplistic requirement of sound reason and complete logicity for

any executive act incrementally may become judicial scrutiny of public social policy. Yet, judicial deference to unreasoned or irrational impositions of power that legitimately attract the linguistic descriptions as “arbitrary”, “capricious” and “unjust”, brings the judiciary into public disdain for its impotence. This is so, however, only if the law has immanent within it the denial of these features, for no one would feel disdain for the courts in their expression of powerlessness to strike down as unjust some odious (in the eyes of some) announced statute on welfare reform.

- 18 Let me now return to the home of the sovereign command – the statute – the text chosen by Parliament to issue sovereign command, and its construction and interpretation.
- 19 What is fascinating about the law governing the construction and interpretation of statutes is that it has, at one level in recent decades, proceeded along a consistent path, but at another level, its content reflects the tensions between certainty and more generally informed approaches. Underlying both levels of examination are important questions of legal and political theory.
- 20 At the first level of analysis, there can be no doubt that by force of statute<sup>17</sup> and the common law<sup>18</sup>, the 1980s and 1990s saw a movement away from the literal and textual approach to statutory interpretation. This was influenced by the recognition of the deep and abiding ambiguities in words and meaning<sup>19</sup> and the demand for context to illuminate meaning. Thus the statutes governing interpretation<sup>20</sup> introduced provisions based on the Vienna Convention<sup>21</sup> governing the interpretation of treaties to bring context and secondary material before the courts, at least where ambiguity was present.

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<sup>17</sup> *Acts Interpretation Act 1901* (Cth); *Interpretation Act 1987* (NSW); *Interpretation Act 1978* (NT); *Acts Interpretation Act 1954* (Qld); *Acts Interpretation Act 1915* (SA); *Interpretation of Legislation Act 1984* (Vic); *Interpretation Act 1984* (WA)

<sup>18</sup> For example *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; 187 CLR 384; *Newcastle City Council v GIO General Ltd* [1997] HCA 53; 191 CLR 85

<sup>19</sup> *Kingston v Ke prose Pty Ltd* (1987) 11 NSWLR 404 applied in *Bropho v Western Australia* [1990] HCA 24; 171 CLR 1

<sup>20</sup> *Acts Interpretation Act 1901* (Cth); *Interpretation Act 1987* (NSW); *Interpretation Act 1978* (NT); *Acts Interpretation Act 1954* (Qld); *Acts Interpretation Act 1915* (SA); *Interpretation of Legislation Act 1984* (Vic); *Interpretation Act 1984* (WA)

<sup>21</sup> *Vienna Convention on the Law of Treaties* (1969)

- 21 The common law of statutory interpretation went further<sup>22</sup>: such secondary materials and information revealing context in “its widest sense” were to be examined at the outset, not merely when some ambiguity, textual or otherwise, was revealed.
- 22 This approach was almost universally applauded as revealing the wisdom of modernity and the rejection of encrusted pedantry of a by-gone era that would have the courts give a meaning to Parliament’s words that could be seen to be unintended. Courts were there to facilitate the will of Parliament, not frustrate it or merely to be the recorders of Parliament’s failure to use the words that it should have used. Parliaments are busy and will be frustrated if courts do not facilitate their underlying intentions by giving sensible meaning to sometimes imprecise or unhappy expressions of will by the words chosen. This approach has its roots in pre-positivist notions of the equity of the statute.<sup>23</sup>
- 23 In circumstances of an uncontroversial subject matter, with a court confident in its power and in an environment of mutual respect between Parliament, the Executive and the Courts, this seems all very satisfactory. The arms of government striving for efficient government through the understanding of the expression of Parliament’s will.
- 24 Expressing the matter thus, however, carries deep Constitutional resonances drawn from the legal and political structure of government. Let me give a foreign example. When I was in Hong Kong in January 2010, the Hong Kong press carried reports of the Chinese Ministry of Justice praising the Supreme Court of Macau for its co-operative approach in the interpretation of a particular law. The report was carried in the week in which the Hong Kong Court held its opening of law term function. All the speeches at this function stressed the rule of law and the

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<sup>22</sup> *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; 187 CLR 384 at 408 citing *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg* [1975] UKHL 2; [1975] AC 591 at 614, 629, 638; *Wacando v The Commonwealth* [1981] HCA 60; 148 CLR 1 at 25-26; *Pepper v Hart* [1992] UKHL 3; [1993] AC 593 at 630; *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* [1985] HCA 48; (1985) 157 CLR 309 at 312, 315; *Isherwood v Butler Pollnow Pty Ltd* (1986) 6 NSWLR 363 at 388.

<sup>23</sup> Francis Bennion, *Statutory Interpretation*, 3rd ed (1997) Butterworths at 218-222

essentiality of the independence of the courts. These were not empty homilies. If they are not said at such a function, it might be taken that independence has been superseded by co-operation. In saying that I am not intending to be critical of the Macau Supreme Court. I have no knowledge of the rights, wrongs, or politics of the issue that gave rise to the newspaper report. Rather, it reminded me of the constitutional risks of interpretative doctrines based on cooperatively effecting the general will of the Parliament gained through the understanding of background and context. The words of the Act are the constitutional tools of Parliament. The text is the sovereign act or command. It is, above all, the text that is to be interpreted.

- 25 That is not to urge a return to literalism: far from it. My personal view is that one of the greatest achievements of the High Court in the 1990s was the development of a coherent multi-factorial doctrine of statutory interpretation. It is the recognition of the Constitutional importance of the text that I stress, without the need to resort to contextually-blind literalism.
- 26 These issues are deeply important politically and reflect the importance of the political and legal theory of tripartite constitutional government. Their contemporary relevance to Australia can be seen in the judicial task in the resolution of the debate about privative clauses in *Plaintiff S157*. The deep Constitutional question confronted by the High Court in that case was avoided, at least at the point of ratio of the case, by the process of statutory interpretation. The Court (Gleeson CJ in one judgment and Gaudron, McHugh, Gummow, Kirby and Hayne JJ in another) stressed the need to examine the precise words used by Parliament. The definition of “privative clause decision under the Act” was read down to mean decisions not infected with jurisdictional error, for those were not decisions at all and not “under the Act”. This construction could only be a view reached by ignoring or giving little weight to the Second Reading Speech. Of greater weight than this speech were the broad principles of legality in statutory construction and in protecting the Constitution, and in particular the Court’s role (through s 75(v)) in keeping the Executive within lawful power. Some of the reasoning in the plurality’s judgment has a degree of circularity; but that circularity reflects the limits of syllogistic reasoning at the point of intersection of

Executive and Judicial power. The Court made clear Parliament's inability to free the Executive from review by the Court by adopting a mechanism of widening its authority, thereby legitimizing what would otherwise be jurisdictional error. That review was by reference to standards determined by the Court through the notion of jurisdictional error embedded in s 75(v). Embedded in turn within jurisdictional error are informing notions of reason and justice and the essence of the task committed by the Constitution to the High Court: the review of the exercise of public power by the Commonwealth.

- 27 Rules of practice and procedure may seem to be the driest of subjects. They seem also to be far away from the influence of legal theory. The first proposition is hard to persuade outsiders (or indeed insiders) to the contrary of. I will not try. I hope to show you, however, that the second proposition is not true.
- 28 The rules for litigation have changed enormously in the last 40 years – at least in civil law. These changes are the product of a movement in contemporary values and a change in perception in society, government and the judiciary as to the meaning of “justice”.
- 29 Roscoe Pound once described the “sporting theory” of justice<sup>24</sup> as a system that operated almost as a game in which rules were set and parties used them, to their own advantage, against the other side. Procedural and pleading rules were detailed and strict; absence of crucial formality, however substantially irrelevant to the justice of the case, could spell doom for the litigant.<sup>25</sup> This was reflected in the place of the judge at the trial – aloof, dispassionate, ruling on evidence and leaving the content of the trial to the parties. Justice was the product of the judge or jury's view of the case after the iterative operation of these governing rules.

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<sup>24</sup> Roscoe Pound ‘The Causes of Popular Dissatisfaction with the Administration of Justice’ (1906) 29 *ABA Rep* 395, 404-406

<sup>25</sup> Jack Jacob and Iain Goldrein, *Pleadings: Principles and Practice*, (1990) Sweet & Maxwell at 21-23 “Historical perspectives” and in particular footnote 17 describing examples of where under the old common law procedure a failure of the pleadings could be fatal to the case

- 30 No longer is this the position.<sup>26</sup> Central to the change has been the altered perception of the place of the judge and the court in the resolution of disputes. The judge and court have come to play (at least in procedure) an overarching, almost managerial role in the organisation and preparation of the case for trial. The degree of this participation varies from court to court and list to list; but it is real.
- 31 The changed roles of the Court and the judge derive from the realisation that more disputes can be solved by fewer judges (and more quickly) if they are shaken and not merely stirred. They also derive from a more pervasive view, with the decline in jury trials, that judicial supervision of the case is essential to the doing of justice between the parties, in a substantive sense. That is justice, not merely in seeing the unbiased interaction of the rules and the facts, but in seeing evident right done in a timely fashion. Parties now have duties of imperfect obligation to see litigation run efficiently and justly.
- 32 Statutes such as the *Civil Procedure Act*<sup>27</sup> provide for litigation to be conducted in a manner that is “just, quick and cheap”. That Act places duties on the courts, the parties and practitioners to achieve this,<sup>28</sup> and requires the Court to act in accordance with the dictates of justice,<sup>29</sup> which is defined as an evaluative concept

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<sup>26</sup> *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27; 239 CLR 175

<sup>27</sup> *Civil Procedure Act 2005* (NSW)

<sup>28</sup> “**56 Overriding purpose**

- (1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the **just, quick and cheap** resolution of the real issues in the proceedings.
- (2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.
- (3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.
- (4) A solicitor or barrister must not, by his or her conduct, cause his or her client to be put in breach of the duty identified in subsection (3).
- (5) The court may take into account any failure to comply with subsection (3) or (4) in exercising a discretion with respect to costs.” (emphasis added)

<sup>29</sup> “**58 Court to follow dictates of justice**

- (1) In deciding:
  - (a) whether to make any order or direction for the management of proceedings, including:

that carries with it considerations that include institutional efficiency, the willingness of the parties to co-operate and the just resolution of the ultimate dispute.

33 Justice is not an empty concept here, although it is a fluid one. Parliament has used the words “just” and “justice” in a meaningful, but open, way.

34 The simple notion of justice or fairness that springs out of practice and procedure is the same essential attribute that informs and forges great Constitutional principle – the fair hearing, impartiality, separateness and independence from other sources of power and influence, judicial technique and method, the protection of the individual from power, the necessary humanity of governmental structures and the respect for the dignity of people in the exercise of power<sup>30</sup>. That practice and procedure and high Constitutional principle are linked by common elemental notions throws into relief the importance of judicial technique and method as a Constitutional element of the notion of justice.

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- (i) any order for the amendment of a document, and
  - (ii) any order granting an adjournment or stay of proceedings, and
  - (iii) any other order of a procedural nature, and
  - (iv) any direction under Division 2, and
- (b) the terms in which any such order or direction is to be made,

the court must seek to act in **accordance with the dictates of justice**.

- (2) For the purpose of determining what are the **dictates of justice** in a particular case, the court:
- (a) must have regard to the provisions of sections 56 and 57, and
  - (b) may have regard to the following matters to the extent to which it considers them relevant:
    - (i) the degree of difficulty or complexity to which the issues in the proceedings give rise,
    - (ii) the degree of expedition with which the respective parties have approached the proceedings, including the degree to which they have been timely in their interlocutory activities,
    - (iii) the degree to which any lack of expedition in approaching the proceedings has arisen from circumstances beyond the control of the respective parties,
    - (iv) the degree to which the respective parties have fulfilled their duties under section 56 (3),
    - (v) the use that any party has made, or could have made, of any opportunity that has been available to the party in the course of the proceedings, whether under rules of court, the practice of the court or any direction of a procedural nature given in the proceedings,
    - (vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction,
    - (vii) such other matters as the court considers relevant in the circumstances of the case. (emphasis added)

<sup>30</sup> *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; 189 CLR 51, *Nicholas v R* [1998] HCA 9; 193 CLR 173; *International Finance Trust Co Ltd v New South Wales Crime Commission* [2009] HCA 49; 84 ALJR 31; *Kirk v Industrial Relations Commission (NSW)* [2010] HCA 1; 84 ALJR 154,

- 35 It is beyond this discussion to analyse the discussions of judicial technique and method discussed by such judges as Cardozo<sup>31</sup>, Dixon<sup>32</sup>, Posner<sup>33</sup> and Heydon<sup>34</sup> speaking extra-judicially and more recent examples of Brennan J<sup>35</sup>, Gleeson CJ<sup>36</sup>, Dawson J<sup>37</sup>, Hayne J<sup>38</sup>, Gummow J<sup>39</sup> and Heydon J<sup>40</sup> speaking judicially. Embedded within those expressions are differences and arguments as to the perceived relative importance to be given (or not given) to considerations such as the nature and application of law as rule, precedent, deductive logic, inductive logic, contemporary values of society and enduring norms such as reasonableness and justice.
- 36 Let me turn to contract. Deciding contract cases is one the most important functions of the operation of the legal system outside the administration of the criminal law. That is because it is the instrument of the vindication of the bargain in society, both domestic society and international society. In putting the matter thus, attention is already directed to aspects of legal theory: the bargain as an elemental feature or concept in human behavior; the existence of natural law rights in society and between societies by reference to a principle of *pacta sunt servanda*; the necessary political theory underpinning the importance of individual rights to be protected by the law and rights gained by free bargain to be included in such; and the possible existence of law or binding principle beyond one society, that is beyond the sovereign state, arising from international activity and intercourse.

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<sup>31</sup> Benjamin N Cardozo, *The Nature of the Judicial Process*, (1921) Yale University Press

<sup>32</sup> Sir Owen Dixon “Concerning Judicial Method” Lecture (1955) Yale University in *Jesting Pilate* (1965) Law Book Company Ltd, a compilation of Sir Owen Dixon CJ's extra-curial papers and writings

<sup>33</sup> Richard A Posner, *The Problems of Jurisprudence*, (1990) Harvard University Press

<sup>34</sup> J D Heydon “Judicial activism and the death of the rule of law” 47(1) *Quadrant* 9-22 (2003)

<sup>35</sup> *Giannarelli v Wraith* [1988] HCA 52; 165 CLR 543 at 584 – 585; *Mabo v Queensland (No 2)* [1992] HCA 23; 175 CLR 1 at 29-30, 57-58; *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292 at 318-320; *Theophanous v Herald & Weekly Times Ltd* [1994] HCA 46; (1994) 182 CLR 104 142-143; *Brandy v Human Rights & Equal Opportunity Commission* [1995] HCA 10; 183 CLR 245

<sup>36</sup> *Travel Compensation Fund v Tambree (t/as R Tambree and Associates) and Others* [2005] HCA 69; 224 CLR 627 Gleeson CJ said at [29]; *Attorney-General (Cth) v Alinta Limited* [2008] HCA 2; 233 CLR 542 at [4]-[5]

<sup>37</sup> *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* [1988] HCA 44; 165 CLR 107 at 162

<sup>38</sup> *Cattanach v Melchior* [2003] HCA 38; 215 CLR 1 at [223] – [242]; *Thomas v Mowbray* [2007] HCA 33; 233 CLR 307 at [496]-[500]

<sup>39</sup> *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)* [1997] HCA 8; 188 CLR 241; *Scott v Davis* [2000] HCA 52; 204 CLR 333 at [264]-[267]; *Thomas v Mowbray* [2007] HCA 33; 233 CLR 307 at [80]-[89]

<sup>40</sup> *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10; 56 NSWLR 298, in particular at [437] and [456]



- 37 The influence of legal theory on contract law and related doctrine has been real. The influence of positivist rule-based striving for objective certainty has been deeply influential. A recent example was *Toll v Alphapharm*<sup>41</sup>, a contract case concerning storage and transport of goods, the goods were damaged by the carrier exposing the goods to the wrong temperature. The standard form application had been signed. Above the signature were the words “please read ‘Conditions of Contract’ (overleaf) prior to signing”. The person who signed did not read the conditions. The carrier relied on two clauses on the back of the form. The High Court emphatically rejected the approach of the NSW Court of Appeal, which had held that in order for those terms and conditions to be made part of the contract, it was necessary for the carrier to establish that it had done what was **reasonably** sufficient to give the signer notice of the terms and conditions and that what had been done in this case, that is the written statement above the place for signature, was not **reasonably** sufficient to give such notice. One can see in this approach the application of a test of reasonableness as to the incorporation into business contracts of exclusion clauses in contracts of adhesion. The High Court would have none of it. It allowed the appeal giving reasons in a single joint judgment (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) that emphasized the importance of the principle in *L’Estrange v F. Graucob Ltd*<sup>42</sup> that when a contractual document is signed, then absent fraud or misrepresentation the signing party is bound by the written terms, even if they have failed to read them. It was said that to accept the premise of the Court of Appeal’s reasoning “involves a serious qualification to the general principle concerning the effect of signing a contract without reading it”<sup>43</sup>.
- 38 The importance of rule-based resolution of contractual disputes to foster a framework of stability for the carrying on of business calls forward rule-based legal theory shorn as much as possible of contestable norms. This can be eloquently seen in the commanding exposition of the place of the courts in dealing

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<sup>41</sup> *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2003] NSWCA 75; 56 NSWLR 662 and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165

<sup>42</sup> [1934] 2 KB 349

<sup>43</sup> *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165 at [53]

with legal rules that govern markets by Lord Diplock in *The “Maratha Envoy”*<sup>44</sup>. The underlying premise of Lord Diplock’s comments was the desire to foster the use of English law as the dominant chosen law of international contracts. The perception that a stable well-administered rule-based law of contract would best attract markets such as commodities, shipping and insurance to London was both astute and successful. The clear positivist rule-based theory supplied this certainty. That view lies at the heart of the suspicion of English lawyers of generalized norms such as good faith in contract law.

- 39 Yet, it is, I think, a mistake to view commercial law as based solely on certainty. Two of its living and informing themes are honest common sense and good faith. Commercial law takes its most vibrant and important form in truly international transactions: merchants of one country dealing with merchants of another country. Legal systems, religion and political systems may differ widely, but bargains are struck, kept to, broken, overcome by *force majeure* and resolved by negotiation or third party resolution. The binding glue of such commerce is often not the sharp edge of clear, certain rules, but the broader assurance of trust, commonsense and good faith.
- 40 International commercial law, influenced, but not confined or governed, by municipal laws, existed for centuries as a *lex mercatoria*. This was no romantic notion; it was real.<sup>45</sup> Its influence declined with the growth of the sovereign nation state; but it has not disappeared.
- 41 The development of delocalised and non-national dispute resolution by non-governmental entities in international commercial arbitration guided by the autonomy of the parties to choose not only method of resolution but also the principles and the law (and not just sovereign law) to govern any dispute is of

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<sup>44</sup> *Federal Commerce & Navigation Co Ltd v Tradax Export SA (The Maratha Envoy)* [1978] AC 1 at 8

<sup>45</sup> See generally, Trakman L *The Law Merchant: The Evolution of Commercial Law* (Fred B Rothman 1983); Sanborn F *Origins of the Early English Maritime and Commercial Law* (William Hein & Co 2002); Chitty J *Lex Mercatoria: or a Complete Code of Commercial Law by Wyndam Beawes* (6th Ed London 1813); Malynes G *The Ancient Law Merchant* (3rd Ed 1686); Holdsworth *A History of English Law* (3rd Ed 1945) Vol V pp 60-154; Rose F (Ed) *Lex Mercatoria: Essays in Honour of Francis Reynolds* (LLP 2000);

huge importance. Principles based on reason and elemental standards of human conduct emerge.<sup>46</sup>

- 42 Certainty and stability are of course hugely important for commerce, as they are for society generally. In self-contained markets, whether national or international, rules are crucial. The clearer the rule, the sharper the price distinction, and thus the more efficient the market. Well-ordered and well-informed cohesive markets often deal with normative considerations in their own way: one breaks one's word, even the spirit of the bargain in some closed markets, at one's peril. Such cohesive groups and markets are most suited to positivist rule-based certainty under which the calculus of legal responsibility can be straight-forwardly analysed and resolved, morality can be left in those circumstances to the unwritten codes of acceptance - strict legal rules for legal responsibility; "club norms" for social or commercial acceptance to participate.
- 43 This debate often turns on the comparative perceived importance of rules to facilitate rapid and straightforward calculations of legal responsibility in a busy and fast-moving market, on the one hand, and reasonable fairness in individual result, on the other.
- 44 What is not to be forgotten in this dialectic between certainty and fairness is that business people are human. It is that humanity that informed the two great principles of the *lex mercatoria - pacta sunt servanda* and good faith. How could it be otherwise in an international system without a sovereign command, but reflecting the common humanity of those who participate in commerce from widely different societies.
- 45 Similar debates have taken place in cognate fields of private law: the recognition and working out of the principles of restitution<sup>47</sup> and the theoretical and

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<sup>46</sup> *ibid*

<sup>47</sup> For a brief introduction and overview to the recognition of restitution in Australia see *Mason & Carter's Restitution Law in Australia*, 2<sup>nd</sup> Ed (2008) Butterworths at [101]-[111]

substantive relationship between Law and Equity<sup>48</sup>. Both are huge topics, beyond my remit today, other than to make some general remarks. It is sometimes said that the essence of the common law is to be found in positivist rule-based structures and Equity, drawing from its ecclesiastical and natural law sources, provides the open-textured humanity over-riding the sharp bite of “the Rule”. There is an element of truth in this, but to accept it too broadly is to misunderstand the Common Law and its relationship with Equity, and to fail, profoundly, to recognise the place of concepts of fairness, natural justice and right reason in the Common Law.

- 46 The doctrines and principles of restitution enunciated by Lord Mansfield in *Moses v Macferlan*<sup>49</sup> founded in equity (in the sense of fairness) and natural justice were common law principles. The deep influence of these natural law considerations on the common law in this regard was explained in the important judgment (if I may say so) of Gummow J in *Roxborough’s Case*<sup>50</sup>.
- 47 There has, nevertheless, been demand by the High Court of Australia for rule-based categorisation in both common law<sup>51</sup> and equitable<sup>52</sup> doctrine. But it cannot be doubted that elemental notions of fairness and justice play their part in the disposition of common law cases and doctrinal development in the common law. The law of contract is built on honest commercial commonsense.<sup>53</sup> Lord Steyn once said:<sup>54</sup>

“The theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or a

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<sup>48</sup> See *Meagher, Gummow & Lehane’s Equity Doctrines & Remedies*, 4<sup>th</sup> Ed (2002) Butterworths at “Chapter Two – The Judicature System” and for a recent series of articles debating the “fusion” between Equity and Common Law see Simone Degeling and James Edelman (eds), *Equity in Commercial Law*, (2005) Law Book Company in particular the papers collected in “Part 1 – Fusion”.

<sup>49</sup> *Moses v Macferlan* (1760) 2 Burr 1005; 97 ER 676; Friedmann considers that “It is as guiding principles in law-making that natural law ideas have exercised the most profound and enduring influence on English law” and goes on to say “Of the open invocation of principles of natural justice the most important example is Lord Mansfield’s famous attempt to introduce the doctrine of unjust enrichment in English law”: see W. Friedmann, *Legal Theory*, 5<sup>th</sup> Ed (1967) Stevens & Sons at 135.

<sup>50</sup> *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; 208 CLR 516

<sup>51</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 81 ALJR 1107; *Lumbers v W Cook Builders Pty Ltd (in liquidation)* [2008] HCA 27

<sup>52</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 81 ALJR 1107

<sup>53</sup> *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; 117 FCR 424 at [408]

<sup>54</sup> *First Energy (UK) Ltd v Hungarian International Bank* [1993] 2 Lloyd’s Rep 194 at 196

principle of law. It is the objective which has been and still is the principal moulding force of our law of contract. It affords no licence to a Judge to depart from binding precedent. On the other hand if the prima facie solution to a problem runs counter to the reasonable expectations of honest men, this criterion sometimes requires a rigorous re-examination of the problem to ascertain whether the law does indeed compel demonstrable unfairness.”

- 48 Allow me to give you an example. In *Ford v Perpetual Trustees*<sup>55</sup> the notions of fairness and justice bore heavily on the recognition and application of the common law doctrines of *non est factum* and restitutionary recovery, and the relationship between the two.
- 49 Mr Ford was in his 50s. He was deeply intellectually impaired. In another age, he would have been called “simple”. He had no real capacity to understand anything more than basic everyday events and human emotions. Yet, he had been married and had an adult son. It was this son who manipulated him into borrowing \$250,000, nominally for himself, but really for the benefit of the son. The loan was arranged by interposed fee-takers, none of whom was an agent of the lender. Mr Ford “signed” the loan application, in that his hand gripped a pen and he put his name to the page. But he had no capacity to understand the transaction. *Non est factum* was pleaded and found – the signing was not his deed.
- 50 The discussion of principle in the cases on *non est factum* recognised the tension between certainty and justice. In the House of Lords in *Saunders v Anglia Building Society*<sup>56</sup>, Lord Wilberforce recognised the anomaly of looking to the state of subjective capacity in the context of the objective theory of contract. His Lordship recognised the need to confine the doctrine, in particular because its limits were unclear; nevertheless, he recognised the plea of *non est factum* to be an occasional essential instrument of justice for the protection of the weak, the powerless and the preyed upon.
- 51 In *Ford*, the interesting question arose as to the relationship between the common law plea of *non est factum* and restitutionary recovery. The plea of *non est factum* having been made out, there was no contract and so the *Contracts Review Act*

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<sup>55</sup> *Ford by his Tutor Beatrice Ann Watkinson v Perpetual Trustees Victoria Limited* [2009] NSWCA 186

<sup>56</sup> [1971] AC 1004.

1980 (NSW), which permits the court to make orders to cure unjust contracts, did not apply. So, the lender said, Mr Ford must repay the money he received. Most of the money had been paid directly to the vendors of a business bought in Mr Ford's name, but really for his son. The contract for the business had not been set aside and was fully executed, thus there were unavowed obligations of Mr Ford that had been satisfied. There could be no change of position defence since Mr Ford had no understanding of any aspect of the transaction. A number of cases said that receipt of money was an "incontrovertible benefit". The primary judge felt compelled to order restitution.<sup>57</sup> The Court of Appeal reversed him. The relevant enquiry was (a) whether in substance he had received the moneys and (b) whether there was injustice in retention. Form and technicality were to be eschewed in favour of substantive justice. One aspect of the reasoning was the need for coherence between the common law doctrines of *non est factum* and restitution. It was held that it would undermine the effective deployment of the common law plea of *non est factum* as an instrument of justice to apply restitutionary rules at common law in a mechanical way to require repayment that would be unjust.

### **Concluding Remarks**

- 52 The notions of law, justice, order and authority are deeply important to a stable functioning human society, not least in order to retain its coherence under remorseless change.
- 53 One conception is justice under the law, being the dispassionate application of the value-free rules regularly made by the sovereign with power and in accordance with the accepted *grundnorm*.<sup>58</sup> This positivist view may, at times, seem a little spiritless: the law of dry principle. Reflection, however, on the social and physical

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<sup>57</sup> *Perpetual Trustees Victoria Limited v Ford* [2008] NSWSC 29; 70 NSWLR 611

<sup>58</sup> See Hans Kelsen, "The Pure Theory of Law – Part II", 51 *Law Quarterly Review* 517 (1935) for the theory that every legal norm in a given legal order deduces its validity from a highest fundamental or basic norm (the *Grundnorm*), which itself is not capable of deduction but must be assumed as an initial hypothesis (see in particular [29]-[30] at 517-518). Although in later works Kelsen modified the concept of the Grundnorm from a hypothesis to a fiction, see W. Friedmann, *Legal Theory*, 5<sup>th</sup> Ed (1967) Stevens & Sons at 277, footnote 3.

tyranny and terror of Central Europe consumed by the roaming, slaughtering gangs and platoons of the Thirty Years War or on the peasants and townsfolk of western and northern France butchered, starved and raped by the marauding English companies of the One Hundred Years War or numerous recent similar examples of the tyranny of uncontrolled gang force in so-called failed states reminds one of the importance of order, authority and rule. Authority, rules, formalism and stability are not to be sneezed at. They create, or reflect, security from disorder. When people label the calls for harsher punishment in the criminal law as the cries of the uncivilized, it is well to remember that of all things people most expect and demand from government, perfectly legitimately, are safety and freedom. That may not make the calls sound policy, but the calls may reflect an intuitive social need for rules as well as fairness.

- 54 Yet, once stability, order and predictable authority are extant to a tolerable degree, other elemental human needs or expectations arise, depending in large part on the prevailing political will. Relationships between rules and enduring principles of fairness and justice, and the rational and the intuitive human responses to power arise.
- 55 The United States legal scholar Grant Gilmore described Judge Benjamin Cardozo's famous lectures, published as the *Nature of the Judicial Process*<sup>59</sup>, as having "almost no intellectual content".<sup>60</sup> To a working judge, that seems a little harsh. It would also, I venture to suggest, have astounded those in attendance at Yale at the delivery of his first lecture, they who gave Cardozo a standing ovation that did not cease until he left the lecture hall. Judges solve human problems of people in dispute before them. Cardozo worked in an era when legal formality and strict deductive legal logic as the dominant legal technique had begun to draw out the reaction of the sociological jurisprudence of Pound and the skeptical positivism of Holmes and Gray. Cardozo (following Gray) spoke of four methods of decision making: the logical analysis and progression of precedent – the rule of analogy - the method of philosophy; historical analysis – the method of evolution;

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<sup>59</sup> Benjamin N Cardozo, *The Nature of the Judicial Process*, (1921) Yale University Press

<sup>60</sup> Grant Gilmore, *The Ages of American Law*, (1977) Yale University Press at 76

custom of the community – the method of tradition; and justice, moral and social welfare and the mores of the day – the method of sociology.<sup>61</sup>

56 What this expression may perhaps lack in its sequential or alternate deployment is the essential immanent elements of reason and justice at all stages of analysis. I do not suggest that these elements explain the legal system or that they suffice for the organization of legal principle. But they are enduring and informing legal values.

57 No system of **ordered** existence can prosper without clear, coherent functioning rules, applied with intellectual discipline and rigour. Equally, no system of **civilised** existence can prosper, binding its diverse members by a loyalty to its laws, without clear recognition of the place in the content and administration of the law of the additional considerations of justice, equality, fairness and appropriate protection of the weak, the powerless and the preyed upon. The prose of most judges reflects all these influences. In some cases, “error” discerned by the appellate court is the product of the difference in the weight to be given to one or other of these elements.

58 There is of course much more to legal theory than the identification of some of its constituent elements. I have not discussed, other than inferentially, the views of competing schools of thought and ideas, such as: Austinian positivism<sup>62</sup>, Kelsen<sup>63</sup>, the sovereignty of Parliament<sup>64</sup>, the foreignness of ethical values to legal rules<sup>65</sup>, the immanence of ethical values in law<sup>66</sup>, law as rules<sup>67</sup>, law as justice<sup>68</sup>, justice as

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<sup>61</sup> Andrew L Kaufmann, Cardozo, (1998) Harvard University Press at 206

<sup>62</sup> John Austin, *Lectures on Jurisprudence*, 4th Ed (edited by R Campbell) (1879) John Murray Publishing

<sup>63</sup> Hans Kelsen, “The Pure Theory of Law – Part I”, 50 *Law Quarterly Review* 474 (1934); Hans Kelsen, “The Pure Theory of Law – Part II”, 51 *Law Quarterly Review* 517 (1935)

<sup>64</sup> A V Dicey, *Introduction to the Study of Law of the Constitution*, 10<sup>th</sup> Ed (1959) Macmillan

<sup>65</sup> For a review of the separation of law and morality in the theories of Jeremy Bentham and John Austin and the position of legal positivism in the 20<sup>th</sup> century see: HLA Hart, “Positivism and the Separation of Law and Morals” 71 *Harvard Law Review* 593 (1958). More generally see: John Austin, *Lectures on Jurisprudence*, 4th Ed (edited by R Campbell) (1879) John Murray Publishing; Hans Kelsen, “The Pure Theory of Law – Part I”, 50 *Law Quarterly Review* 474 (1934); Hans Kelsen, “The Pure Theory of Law – Part II”, 51 *Law Quarterly Review* 517 (1935); HLA Hart, *The Concept of Law*, 2<sup>nd</sup> Ed (1994) Clarendon Press

<sup>66</sup> In direct response to HLA Hart’s article at footnote 11 see Lon L Fuller “Positivism and Fidelity to Law – A Reply to Professor Hart” 71 *Harvard Law Review* 630 (1958); See more generally: Radbruch, *Rechtsphilosophie*, (4<sup>th</sup> Ed, 1950) as discussed in HLA Hart, “Positivism and the Separation of Law and Morals” 71 *Harvard Law Review* 593 (1958); Lon L Fuller, *The Morality of Law*, Revised Ed (1969) Yale



an empty expression requiring societal content<sup>69</sup>, and justice as an enduring concept able to be intuitively recognised and expressed<sup>70</sup>, and so on. You can do no better than begin by reading the debates between Hart and Fuller as to the relationship between law and morals in the Harvard Law Review of 1958.

59 If I may conclude with the repetition of some thoughtful words of a great judge, Oliver Wendell Holmes, 115 years ago to a group of people just like you. Justice Holmes was addressing the students of the Boston University School of Law at the dedication of their new hall on 8 January 1897. He recognized the presumptuousness of advice to the young saying, “the advice of elders to young men is very apt to be as unreal as a list of the best hundred books”. He was then a justice of the Supreme Judicial Court of Massachusetts, to become its Chief Justice, before becoming an associate justice of the United State Supreme Court. Holmes was a tough pragmatic skeptic, who had a veneration for the law and the common law system as, to use his words, “*one of the vastest products of the human mind*”. He said “*It [the common law legal system] has the final title to respect that it exists, that it is not a Hegelian dream, but a part of the lives of men.*” In that address (which is published in 10 Harvard Law Review as “The Path of the Law”) Holmes concluded by saying something of legal theory and jurisprudence. He did not try to encapsulate his then half a lifetime’s work. Rather, he simply said that the law had too little theory, rather than too much. I will finish by repeating what Holmes said about the importance of theory: “*Theory is the most important part of the dogma of the law, as the architect is the*

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University Press - procedural natural law and law’s inner morality; R Dworkin, *Taking Rights Seriously*, (1977) Duckworth Publishing (containing a reprint of Dworkin’s famous early essays “The Model of Laws I” and “The Model of Laws II”); John Finnis, *Natural Law and Natural Rights*, (1980) Clarendon Press.

<sup>67</sup> Hans Kelsen, “The Pure Theory of Law – Part I”, 50 *Law Quarterly Review* 474 (1934); Hans Kelsen, “The Pure Theory of Law – Part II”, 51 *Law Quarterly Review* 517 (1935); HLA Hart, *The Concept of Law*, 2<sup>nd</sup> Ed (1994) Clarendon Press

<sup>68</sup> This may incorporate two separate notions: a) law as formal justice (building on Aristotlian notions of distributive justice); and b) law as substantive justice. For discussion of law as formal justice see W. Friedmann, *Legal Theory*, 5<sup>th</sup> Ed (1967) Stevens & Sons at 21 – 25 – “The Relation of Justice to Law and Ethics” and for law as substantive justice reference should be had to classical natural law works such as St Thomas Aquinas, *Summa Theologica* and Grotius, *De Jure Belli al Pacis* as well as more recently Radbruch, *Rechtsphilosophie*, (4<sup>th</sup> Ed, 1950) as discussed in HLA Hart, “Positivism and the Separation of Law and Morals” 71 *Harvard Law Review* 593 (1958). For a modern statement of the classical natural law position of law as substantive justice see Deryck Beyleveld and Roger Brownsworth “The Practical Difference Between Natural Law Theory and Legal Positivism” 5(1) *Oxford J. Legal Stud* 1 (1985) at 1 n1

<sup>69</sup> Aristotle, *The Nicomachean Ethics*; Perelman, *The Idea of Justice and the Problem of Argument*, (English Edition 1963); W. Friedmann, *Legal Theory*, 5<sup>th</sup> Ed (1967) Stevens & Sons at 25

<sup>70</sup> See Classical natural law theory: St Thomas Aquinas, *Summa Theologica*; Grotius, *De Jure Belli al Pacis* and more recently John Finnis, *Natural Law and Natural Rights*, (1980) Clarendon Press

*most important man who takes part in the building of a house....It is not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject....The danger is that the able and practical minded should look with indifference or distrust upon ideas the connection of which with their business is remote.....The object of ambition, power, generally presents itself nowadays in the form of money alone. Money is the most immediate form, and is a proper object of desire. 'The fortune,' said Rachel, 'is the measure of the intelligence.'...[But] To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas....We cannot all be Descartes or Kant, but we all want happiness. And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food beside success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law."*

60 Thank you for inviting me to speak, and for your patient attention.

Oxford

23 February 2012



## Some Reflections on Good Faith in Contract Law

### Oxford University Obligations Group

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Good faith is a topic that has been written about at inordinate length, by an almost intolerably wide group of people – some worth reading, some not. I gave a paper at the University of New England in New South Wales in October 2010 on this subject. In preparation for it I collected enough material to fill a closely typed footnote of 2½ pages.

It is also a topic, at least in Australia, that many view as one which gives an insight into the personality and politics of a person: if in favour of good faith, the person must be left of centre, a do-gooder, a liberal progressive, woolly thinking and lacking intellectual rigour; if against, *und so weiter*. I am not sure why good faith should conjure such unmanly characteristics (if you will excuse the sexism in the aid of metaphorical effect). After all, no one could accuse Judge Posner of the 7th Circuit or Justice Scalia of the Supreme Court of woolly thinking and lack of intellectual rigour, let alone of being unmanly do-gooders.

In 1984, in *Tymshare Inc v Covell*,<sup>1</sup> then Judge Scalia of the District of Columbia Circuit perhaps put his finger on one of the aspects of good faith that has deflected attention from its place in contract law and filled people with a fear of indeterminate content. The so-called “modern doctrine” of the “obligation to perform in good faith” was, he said, “simply a rechristening of fundamental principles of contract law well established ...”. After referring approvingly to Professor Summers’ notion of an excluder analysis (excluding bad faith), he agreed with Professor Alan Farnsworth that the significance of the doctrine is in “implying terms in the agreement”. Scalia J went on:

“When these two insights are combined, it becomes clear that the doctrine of good faith performance is a means of finding

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<sup>1</sup> 727 F 2d 1145 (1984).

within a contract an implied obligation not to engage in the particular form of conduct which, in the case at hand, constitutes 'bad faith.' In other words, the authorities that invoke, with increasing frequency, an all-purpose doctrine of 'good faith' are usually if not invariably performing the same function executed (with more elegance and precision) by Judge Cardozo in *Wood v Lucy, Lady Duff-Gordon*, 222 NY 88, 91, 118 NE 214, 214 (1917), when he found that an agreement which did not recite a particular duty was nonetheless "instinct with [...] an obligation," imperfectly expressed,' quoting from *McCall Co v Wright*, 133 AD 62, 68, 117 NYS 775, 779 (1909), aff'd, 198 NY 143, 91 NE 516 (1910). The new formulation may have more appeal to modern taste since it purports to rely directly upon considerations of morality and public policy, rather than achieving those objectives obliquely, by honouring the reasonable expectations created by the autonomous expressions of the contracting parties. But it seems to us that the result is, or should be, the same."

The point he was making was that expressing the obligation generally in terms of moral duty implies a source of authority and content from outside the contract. This Scalia J rejects. So did Posner J in *Market Street Associates Limited Partnership v Frey*.<sup>2</sup> If I may respectfully say, this is a hugely rewarding judgment to read for any contract lawyer in the common law tradition. Posner J first warned against the morally directed content of the phrase confusing contractual obligation with fiduciary obligation. Secondly, he rejected that the duty supported a freestanding obligation of precontractual candour or disclosure. Thirdly, he noted that after formation the party is not required to be an altruist and loosen obligations when the other gets into trouble; but he did distinguish this from sharp practice by taking deliberate advantage of an oversight by the other about its rights. This is akin to theft and if it be permitted by the law, the production of over elaborate contracts will be necessitated. Once the contract is made the situation changes and a modicum of trust, co-operation and honesty is required – but (and this is what is essential to grasp) *in furtherance of the bargain*.

Judge Posner rooted the obligation in the agreement of the parties. He emphasised that contracts come in different forms and for different purposes.

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<sup>2</sup> 941 F 2d 588 (1991).

Some allocate risks in the participation in markets, some are concerned with family or social relationships, some are to regulate future co-operative ventures. He said that the office of good faith was to forbid opportunistic behaviour that would take advantage of the position of the other in a way un contemplated by the bargain and contrary to the substance of the bargain; thus, inferentially, to support the bargain as properly construed.

He said memorably at 595:

“The contractual duty of good faith is thus not some newfangled bit of welfare-state paternalism or (*pace* Duncan Kennedy, ‘Form and Substance in Private Law Adjudication,’ 89 *Harv L Rev* 1685, 1721 (1976)) the sediment of an altruistic strain in contract law, and we are therefore not surprised to find the essentials of the modern doctrine well established in nineteenth-century cases...”.

These views of Scalia J and Posner J may not represent the uniform United States application of the doctrine. The individual and separate existence of State law, and the non-existence of federal (at least non-maritime) common law since *Erie Railway Co v Tompkins*,<sup>3</sup> makes search for a uniform position in the United States elusive, notwithstanding attempts at uniformity. Some sense of uniformity is brought by the two great modern attempts to unify and synthesise American law – The Uniform Commercial Code (UCC) and the Restatements of various branches of the law, including contracts. The UCC has been adopted with minor variations in almost every state.

That the UCC is widely adopted does not mean that it is uniformly interpreted. Uniform expression of principle often belies different approaches to evaluative application. This is a phenomenon well-known to those trying to prove foreign law as a fact and is not limited to different evaluations and practical applications of good faith.

Before turning to some more local considerations, let me reinforce the approach of Judges Scalia and Posner by reference to the UCC itself, the

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<sup>3</sup> 304 US 64 (1938).

*Restatement (2d) of Contracts* and to a circuit decision administering Pennsylvania law.

The original UCC defined good faith as “honesty in fact in the conduct or transactions concerned” [1-201 (19)]. This was later revised to “honesty in fact and the observance of reasonable commercial standards of fair dealing” [1-201 (20)]. Similar wording appears in different parts of the UCC: eg sale of goods [2-103 (1)(b)] and negotiable instruments [3-103 (a)(4)]. The Restatement (2d) [205] reads: “Every contract imposes on each party a duty of good faith and fair dealing in its performance and enforcement.” Baldly stated thus, it has an appearance of a freestanding distinct obligation capable of being sued on, and thus there is the necessity to give it meaningful content.

At this point what Judges Scalia and Posner said becomes critical. The implication is referable to the particular agreement of the parties, its place being in the interpretation, construction and implication of what has been agreed, by reference to an assumption that the parties have agreed to conduct themselves fairly towards each other in support of their mutual bargain.

It is here that the 1994 commentary on the UCC by the Permanent Editorial Board should be noted. It stated that the good faith provision “does not support an independent cause of action for failure to perform or enforce in good faith ... [T]he doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.”

In *Duquesne Light Co v Westinghouse Electric Corp*,<sup>4</sup> the Third Circuit, dealing with Pennsylvania law, expressed the matter similarly. Quoting Professor Steven Burton, it said:

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<sup>4</sup> 66 F 3d 604 at 617 (1995).

“With rare exception, the courts use the UCC good faith requirements in aid and furtherance of the parties’ agreement, not to override the parties’ agreement for reasons of fairness, policy, or morality.”

The Court continued (citing Burton):

“[The] courts generally utilize the good faith duty as an interpretive tool to determine ‘the parties’ justifiable expectations’, and do not enforce an independent duty divorced from the specific clauses of the contract.”

Of course, the devil may lie in the words “with rare exception” and “generally”.

Let me turn away from the United States for a moment to some considerations of a general character that require some consideration and reflection in connection with good faith.

First, as I have already said, identical linguistic expressions of principle can be applied very differently by courts in different countries. That is a reflection of the different influences and expectations of different societies upon the development of legal doctrine and how it is applied. One need not be an adherent of sociological jurisprudence to accept this.

Secondly, great care must always be exhibited to prevent the particular factual application of a general principle being wrongly transformed into a narrower legal rule. This process causes confusion and multiplicity of so-called rules, all needing to be reconciled through factual analysis, with resultant confusion of doctrine.

Thirdly, there is the deep importance to the community, in particular the commercial community, of a satisfactory balance of certainty, fairness and common sense in the rules which govern the consensual relationships of its members; and for the cost-effective, expeditious and just resolution of disputes by reference to such rules. The two features of doctrine and practice play on each other: legal doctrine will be influenced by the question whether it undermines or promotes reasonably efficient dispute resolution. Further, the



conflict or choice as to how to express law is often seen to be between apparently value-free rules and more generally expressed evaluative norms, principles or concepts.

A striking example of the relationship between expression of principle and method of dispute resolution is the law of salvage. Salvage reward is just that – a reward, not a quantum meruit, arrived at in a discretionary evaluation. That works, without overly long and detailed evidence or incoherently inconsistent results, only by the use of skilled, experienced and specialised arbitrators or maritime judges.

Commercial law is, or to a significant degree should be, the reflection of society's facilitation, not hindrance,<sup>5</sup> of commercial endeavour. That said, the norms that underpin a just and fair society and its legal system should underpin commerce. It is honest commercial endeavour that is to be facilitated, not hindered, and they are the reasonable expectations of honest commercial men and women that are to be vindicated and protected. The law does not provide many rules for thieves and cheats, other than rules against thieving and cheating. As Lord Shaw of Dunfermline said in 1924 in *Cantiere San Rocco SA v Clyde Shipbuilding and Engineering Co*,<sup>6</sup> a rule that leaves the loss to lie where it falls "works well enough among tricksters, gamblers and thieves". His Lordship recognised, with a touch of disdain, that this was the approach of the law of England as to the consequences of frustration of contracts. But, for Scotland, his Lordship saw a somewhat fairer rule, one that conformed more with honesty, reasonable expectations and fairness, under the law of restitution.

Involved in the above reconciliations of doctrine and practice, and of rule and principle, are what can be seen as competing considerations of certainty and generally expressed norms of conduct. It is to be recognised at the outset that no system of law and no system of commercial law can exist without

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<sup>5</sup> Lord Justice Devlin, "The Relation between Commercial Law and Commercial Practice" (1951) 14 Mod LR 249.

<sup>6</sup> [1924] AC 226 at 259.

generally expressed norms of conduct. Also, sometimes, a sensible rule can only be expressed coherently, and with any degree of certainty, using a generally expressed norm.

One view of law and commercial law sees a system of value-free rules which can always be called upon and applied in a self-referential system providing the tolerably certain answer to a given problem. In such a system, practical certainty is said to be achieved by the clarity of the value-free rule and its application to relevant facts, without the need for theoretical generalisation or morals. That this is a pervading view is hardly surprising, since it reflects what occurs in many instances of adjudication.<sup>7</sup> It is, however, inadequate to explain fully the process of decision-making or to express fully and clearly legal principle.

Certainty is a pervading human need. It takes its place from the earliest years of our existence as a necessary environmental factor in our human relationships with our parents, our siblings and our friends. In commerce, the need for certainty is founded upon a desire for clarity, efficiency and despatch in commercial dealings. Clarity and certainty enable risk to be priced more finely and more reliably, thereby aiding the operation of markets. Reduction of the risk attending a transaction reduces transactional cost and tends to a lowering of price. This can increase total economic activity.

But certainty is not necessarily value-free. There have been few equals of Lord Mansfield in his understanding, and lucid expression, of commercial law. In 1761, in *Hamilton v Mendes*,<sup>8</sup> he famously said:

“The daily negotiations and property of merchants ought not to depend upon subtleties and niceties; but upon rules, easily learned and easily retained, because they are the dictates of common sense, drawn from the truth of the case.”

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<sup>7</sup> Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) at 165.

<sup>8</sup> (1761) 2 Burr 1198 at 1214; 97 ER 787 at 795.

This was not a call for rules shorn of values, but for simple rules reflective of the common sense and norms of the merchants. That was not, however, a call for moral or legal perfection. In 1774, in *Vallejo v Wheeler*,<sup>9</sup> the same judge said:

“In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon.”

Lord Mansfield was well aware of the need for certainty, simplicity and clarity in markets that were fast-moving, international and subject to price variation and thus speculation.

Yet certainty, whilst very important, is not an overwhelming or dominating consideration in human existence. The certainty of a beating by a brutal father is as unwanted as the certainty of clear strict rules that overly favour banker over customer, shipowner over charterer, franchisor over franchisee, or domestic over foreign merchant.

Whilst certainty undoubtedly contributes to the reduction of risk and the more efficient working of markets, risk is not limited to lack of certainty. The high probability of being fleeced in a market with clear rules (because of the prevalence of tolerated aggressive sharp practice) is a risk factor likely to outweigh the benefit of clarity of rules.

People, including commercial people, expect a degree of common sense, fairness and justice in the law and in the rules that govern commercial behaviour. The place of morals and norms of justice in any legal system is an important jurisprudential and theoretical question.<sup>10</sup> It is also an intensely

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<sup>9</sup> (1774) 1 Cowp 143 at 153; 98 ER 1012 at 1017.

<sup>10</sup> The debate is famously captured in the essay exchange between H L A Hart and Lon L Fuller: see H L A Hart, “Positivism and the Separation of Law and Morals” (1958) 71 *Harvard Law Review* 593 and, in direct response, L L Fuller, “Positivism and Fidelity to Law – A Reply to Professor Hart” (1958) 71 *Harvard Law Review* 630. The debate can also be seen by comparing the key works of the eminent legal theorists of the

practical day-to-day question. People, including business people, understand notions of honesty, fairness and justice in their dealings. They often have a different view as to what this produces at the point of any given dispute, but the notions inhere in human conduct and expectations. A balance must always be struck between specific rule-based certainty and the application of generalised norms informed by honesty, reasonable expectations and fairness.

Take honesty. It is an essential requirement of any commercial market. Honesty is a moral concept, the core elements of which are truth and moral rectitude. It is unnecessary, however, to explore the reaches of moral philosophy to accept, as a working hypothesis for development of practical legal rules, that honesty is a relative, and not absolute, concept for this purpose. Just as markets may be seen to have, or not to have, workable degrees of competition, so they may have workable degrees of honesty. One only has to recall the dictum of Cardozo CJ in *Meinhard v Salmon*<sup>11</sup> comparing acceptable conduct in the workaday world of the market with the fiduciary's "punctilio of an honor the most sensitive" to appreciate the relativity of the concept. Nevertheless, it is an essential norm for the reduction of risk and the maximisation of efficient economic activity. One rarely hears a party or a judge say "but what is honesty?" ("What is truth?", on the other hand, has been asked from time to time.)

Honesty is a concept wide enough to include, but not to be exhaustively defined by, a subjective or personal sense of right and wrong. Honesty can, though not necessarily must, incorporate the imputed or imposed standards of

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late nineteenth and the twentieth century: see, for example, J Austin, *Lectures on Jurisprudence, or The Philosophy of Positive Law*, 4th ed (John Murray, 1879) (edited by R Campbell); J Austin, *The Province of Jurisprudence Determined* (John Murray, 1832); H Kelsen, "The Pure Theory of Law – Its Method and Fundamental Concepts" (1934) 50 *Law Quarterly Review* 474; H Kelsen, "The Pure Theory of Law – Part II" (1935) 51 *Law Quarterly Review* 517; L L Fuller, *The Morality of Law*, Rev ed (Yale University Press, 1969); R Dworkin, *Taking Rights Seriously* (Duckworth, 1977) (containing a reprint of Dworkin's famous early essays "The Model of Laws I" and "The Model of Laws II"); J Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980); H L A Hart, *The Concept of Law*, 2nd ed (Clarendon Press, 1994); W G Friedmann, *Legal Theory*, 5th ed (Columbia University Press, 1967), Ch 3.

<sup>11</sup> 249 NY 458 (1928).

others: the “normally acceptable standards of honest conduct”,<sup>12</sup> judged by reference to what the person actually knew. This is a broad normative standard to be judged by reference to community or market expectations and standards of conduct.

The balance between specific value-free rules and honest conduct is, or should be, self-evident: the former are constrained by the latter. Although certainty may, thus, on one view, be compromised, this occurs for a fundamentally important consideration – the honest working of society and commerce. In a sense, certainty (by reference to reasonable expectations) is strengthened by the moral content. For instance, when should the strict and clear contractual obligation of a banker to obey the mandate of its customer be qualified by reference to the character or quality of the conduct of the customer? The New Zealand Court of Appeal in *Westpac New Zealand Ltd v MAP & Associates Ltd*<sup>13</sup> recently answered the question by reference to whether the customer’s conduct reflected “normally acceptable standards of honest conduct.”<sup>14</sup> More precise definition of “acceptable” in this context in furtherance of rule-based certainty would be futile and only likely to elevate factual applications of the legal norm into narrower and more intricate rules, producing incoherence in fine distinctions.

Thus, at important points of rule-making, there is no choice but to leave the rule expressed generally, if the only alternative is to express a multitude of

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<sup>12</sup> *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378; *Twinsectra Ltd v Yardley* [2002] UKHL 12; [2002] 2 AC 164; *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2005] UKPC 37; [2006] 1 WLR 1476; *Westpac New Zealand Limited v MAP and Associates Ltd* [2010] NZCA 404.

<sup>13</sup> [2010] NZCA 404.

<sup>14</sup> *Westpac New Zealand Ltd v MAP & Associates Ltd* [2010] NZCA 404 at [46]:

“[A] bank will be liable for dishonest assistance where it has actual knowledge of the circumstances of the transaction ... such as to render its participation contrary to normally acceptable standards of honest conduct ... In assessing whether its participation is contrary to such standards, the concept of the reasonable banker may well prove helpful. In this context, factors such as the significance or unusual nature of the transaction, the customer’s banking practices, banking practices within the relevant industry and statutory reporting requirements will be relevant.”

exemplifications of factual applications as rules, and create detail and confusion. In some contexts and with some rules, the sensible vindication of Lord Mansfield's statement in *Hamilton v Mendes* that rules for commerce should be easily learned and easily retained, means that certainty, to the extent it is possible, is fostered, not undermined, by the use of the generally expressed norm. It is sometimes the only way of expressing the sensible commercial rule.

The recognition of the importance of honesty takes us some way down the path of discussing good faith. Good faith includes honesty.

No legal construct governing commercial behaviour can entirely eschew norms beyond honesty that are generally expressed and informed by standards of the relevant group. The balance between specific value-free rules and generally expressed norms is a judgmental one based on legal tradition, legal technique, the perceived importance and value of the inter-related operation of these factors and a knowledge of the expectations and standards of the community or market governed by the legal construct.

There are many examples in commercial law of mechanical or value-free rules giving way to a norm or principle (beyond the implicit requirement of honesty) that is more evaluative in foundation, whether because that is the chosen compromise or because the generally expressed norm best expresses a simple rule. One recent and one older example in commercial law illustrate the point.

In *The 'Achilleas'*<sup>15</sup> in the House of Lords, Lord Hoffmann, in dealing with contractual damages, saw a need to move away from mechanistic application of otherwise clear rules based on *Hadley v Baxendale*<sup>16</sup> and *Koufos v Czarников*<sup>17</sup> and to approach the calculation of damages in contract by

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<sup>15</sup> [2009] 1 AC 61.

<sup>16</sup> (1854) 9 Ex 351; 156 ER 145.

<sup>17</sup> *Koufos v C Czarников Ltd ('The Heron II')* [1969] 1 AC 350.

reference to more general notions of reasonable conformance with the substance of the underlying bargain. His Lordship, rather than applying the test of foreseeability, posited, as the primary question in deciding whether loss was recoverable in contractual damages, the ascertainment of the risks, and thus the losses, which the parties' intentions (objectively ascertained) revealed had been bargained for as part of the contract. Thus, the assessment was whether a reasonable person at the time of making the contract would have contemplated the assumption of responsibility for that kind of loss.

In marine insurance, the notion of discharge of the insurer from liability is central to the operation of the promissory warranty<sup>18</sup> and to the operation of the principles of deviation<sup>19</sup> and delay.<sup>20</sup> The discharge of the insurer will see the assured lose, for all time, the benefit of the contract of insurance. If there is delay in a voyage covered by a voyage policy, the rule is expressed generally: "the insurer is discharged from liability as from the time when the delay became unreasonable".<sup>21</sup> The rule, easily learned and easily retained, is expressed in general terms.

The above are examples of the preferred use of rules that have a degree of evaluation and uncertainty to them which are adopted for reasons of commercial fairness or appropriateness, or because that is the only way simply to express the rule.

Let me now return to good faith. The reality is that good faith or cognate notions, perhaps differently expressed on occasions, infuse the general law (using that expression to encompass common law, equity and maritime law).

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<sup>18</sup> See the *Marine Insurance Act 1909* (Cth), ss 39-47 for the operation of warranties and *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd (The 'Good Luck')* [1992] 1 AC 233 at 262-264.

<sup>19</sup> *Marine Insurance Act 1909* (Cth), ss 52 and 53.

<sup>20</sup> *Marine Insurance Act 1909* (Cth), s 54.

<sup>21</sup> *Marine Insurance Act 1909* (Cth), s 54.

Time and space permit only a present concentration on the law concerning contracts. It is apt, however, to recognise that the expression “good faith” is embedded in public law,<sup>22</sup> equity and trusts,<sup>23</sup> property<sup>24</sup> and company law,<sup>25</sup> taking its meaning and legal content in those areas from context and the incidents of relationships governed by law and equity.

What I wish to say, however, should be understood as being quite distinct from the use of good faith in the fiduciary context. If the legal relationship is one involving a trust or fiduciary relationship, the notion of good faith takes on particular attributes that are well-known and not the subject of this discussion. The criteria by reference to which the fiduciary relationship is recognised do not lead to a simple test without conceptual difficulty.<sup>26</sup> The characteristic aspect of the duty of the fiduciary is, within the terms of the relationship, to subordinate its interests in favour of its beneficiary in order to act solely in the interests of the beneficiary. This subordination will be derived from the degree of power and control and consequent vulnerability of the respective parties in the relationship, and from the essential element of service or representation of the interests of the other.

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<sup>22</sup> A member of the Executive or an administrator must exercise power in good faith, requiring an honest and genuine attendance to the power being exercised. This carries with it the need to act honestly and genuinely for the purposes of the power. The extent to which this carries an element of reasonableness may be debateable. Reasonableness (in the sense of “in accordance with reason”) may be seen to be a separate requirement, though its place as a necessary element of the exercise of public power is not finally established. Fairness is the central operative consideration of the rules of procedural fairness or natural justice. Here the exercise of the power is conditioned by the largely non-self interested context. The power has a public object.

<sup>23</sup> Notions of good faith infuse equity whether in a fiduciary context or generally, such as in the law of mortgages, penalties, unconscionability, clean hands and many other areas. It takes its place in the remedial structure of orders for specific performance and injunctions.

<sup>24</sup> Good faith is a central notion in the law of property. It is at the heart of priorities in the place of the bona fide purchaser for value without notice.

<sup>25</sup> In company law directors are obliged to act in good faith and in the interests of the company as a whole. This is a fiduciary context even though, in many practical circumstances, directors and those to whom they answer have an interest. That interest is to be subordinated to the beneficiary, the company as a whole.

<sup>26</sup> *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; 156 CLR 41.



The usage of the phrase good faith in this equitable context should not give rise to the notion that in a commercial non-fiduciary context it carries with it the obligation upon a contracting party to subordinate its interests to those of the arm's length contractual counterparty. That is not the case. The possibility of confusion with the incidents of faithfulness of the equitable fiduciary have led some (wisely I think) to prefer other terminology: fidelity to the bargain<sup>27</sup> and fair dealing.<sup>28</sup>

The first example of what is embedded in the law is the implied term requiring the fidelity to the bargain.

In 1864, in *Stirling v Maitland*, Cockburn CJ said:<sup>29</sup>

“if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative.”

This was an expression of a negative by implication. Some years later, Lord Blackburn in *Mackay v Dick* expressed a similar idea by reference to the process of construction of the contract and by reference to positive action:<sup>30</sup>

“[if] ... parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.”

These ideas were eloquently (and, if I may say so, more powerfully) expressed in Australia in 1896 in the Supreme Court of Queensland by Chief

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<sup>27</sup> H K Lücke, “Good Faith and Contractual Performance” in P D Finn (ed), *Essays on Contract* (Law Book Co, 1987), 155-182 at 155; E A Farnsworth, “Good Faith in Contract Performance” in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon Press, 1997) at 155.

<sup>28</sup> *Restatement (2d) of Contracts*; E A Farnsworth, *Farnsworth on Contracts*, 3rd ed (Aspen, 2004).

<sup>29</sup> (1864) 5 B & S 840 at 852; 122 ER 1043 at 1047.

<sup>30</sup> (1880-81) LR 6 App Cas 251 at 263.

Justice Griffith in *Butt v M'Donald*.<sup>31</sup> He stated a general rule of somewhat broader reach than that stated either by Cockburn CJ or by Lord Blackburn:

“It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other to have the benefit of the contract.”

It might be thought that by this expression of the matter – “the benefit of the contract” – that is, what each has bargained for, received, given up and paid for, was protected, in all contracts, by a general rule of implication. Support for this came from what Dixon J said in *Shepherd v Felt & Textiles of Australia Ltd*:<sup>32</sup> that contained within every express promise is a negative covenant not to hinder or prevent the fulfilment of the purpose of the express covenant.

It is necessary, however, to examine carefully the judgment of Mason J (with whom Barwick CJ, Gibbs Stephen and Aickin JJ agreed) in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Limited*.<sup>33</sup> After referring to *Mackay v Dick* and *Butt v M'Donald*, Mason J discussed the implication of a contractual duty to co-operate. He said<sup>34</sup> that it was easy to imply a duty to co-operate contractually in the doing of acts which are necessary to the performance of **fundamental** obligations under the contract. It was, he said, “not quite so easy to make the implication when the acts in question are necessary to entitle the other contracting party to a benefit under the contract but are not essential to the performance of that party’s obligations and are not fundamental to the contract.” At this point the importance of implication or imposition of a rule and the construction of a particular contract became important. Mason J continued:

“... Then the question arises whether the contract imposes a duty to co-operate on the first party or whether it leaves him at liberty to decide for himself whether the acts shall be done, even if the consequence of his decision is to disentitle the

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<sup>31</sup> (1896) 7 QLJ 68 at 70-71.

<sup>32</sup> [1931] HCA 21; 45 CLR 359 at 378.

<sup>33</sup> [1979] HCA 51; 144 CLR 596.

<sup>34</sup> *Ibid* at 607-608.

other party to a benefit. In such a case, the correct interpretation of the contract depends, as it seems to me, not so much on the application of the general rule of construction as on the intention of the parties as manifested by the contract itself.”

The distinction made by Mason J between the benefit of fundamental or essential terms and of non-fundamental or non-essential terms may throw doubt upon the entire equivalence of his approach with a more general obligation of fidelity to the bargain that can perhaps be seen in Chief Justice Griffith’s expression of the rule in *Butt v M’Donald*. If such a more general obligation subsists, its breach would prima facie occur when a party acted in a way to deny a contractual benefit to the counterparty, whether fundamental or not.

In any given case, it may or may not be reasonable to expect a party to act, or refrain from acting given the expense or risk of the act, to ensure the benefit to the counterparty. Thus, notions of fidelity to the bargain and co-operation to vindicate, or ensure receipt of, benefits can be seen to be restrained or constrained by a sense of reasonableness or fair dealing arising from the parties’ mutual rights.

This may perhaps be seen to be the proper scope and reach of reasonableness in good faith and fair dealing: the element of commercial reasonableness and fairness in behaving with a faithfulness or fidelity to the bargain. As Lord Wright said in *Hillas and Co Ltd v Arcos Ltd*,<sup>35</sup> the legal implication of what is reasonable runs throughout the whole of English law and is easily made.

There is also a body of case law in contract that deals with the exercises of powers or discretions which affect the counterparty. These cases reveal that there is no novelty whatsoever in constraining powers and discretions having their source in contract by implications of honesty, reasonableness and good faith. Examples are numerous.

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<sup>35</sup> [1932] All ER 494 at 507.

In *Meehan v Jones*,<sup>36</sup> all the members of the High Court implied an obligation to act honestly in a clause providing a party with a right to rescind unless satisfied with finance. A majority of the Court concluded that the party also had an obligation to do all that was reasonable to obtain that finance.

In *Stadhard v Lee*,<sup>37</sup> Cockburn CJ said that building contract clauses dealing with the satisfaction of a party about a state of affairs received “a reasonable construction [securing] only what was reasonable and just”.

In *Carr v JA Berriman Pty Ltd*,<sup>38</sup> Fullagar J construed a clause giving an architect “absolute discretion ... to issue written instructions ... in regard to the omission of any work” by reference to its purpose and a limitation of reasonableness.

In *Godfrey Constructions Pty Ltd v Kanangra Park Pty Ltd*,<sup>39</sup> the High Court dealt with cl 14 of the then standard form contract for the sale of land: the clause providing the vendor who was unable or unwilling to comply with or remove any objection or requisition made by the purchaser with the entitlement to rescind. The use of the clause was confined by the Court by various expressions of value judgment. Barwick CJ<sup>40</sup> said it would be “unconscionable” for the vendor to use cl 14 on the particular requisitions – to permit him to do so would allow him to say that there was a sale conditional upon his willingness to perform. Walsh J<sup>41</sup> recognised that the cases prevented the power being used arbitrarily or unreasonably. Gibbs J<sup>42</sup> constrained the clause by the need to act reasonably. Stephen J<sup>43</sup> employed

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<sup>36</sup> [1982] HCA 52; 149 CLR 571.

<sup>37</sup> (1863) 3 B & S 364 at 371-372; 122 ER 138 at 141.

<sup>38</sup> [1953] HCA 31; 89 CLR 327.

<sup>39</sup> [1972] HCA 36; 128 CLR 529.

<sup>40</sup> *Ibid* at 538.

<sup>41</sup> *Ibid* at 543.

<sup>42</sup> *Ibid* at 547.

<sup>43</sup> *Ibid* at 549-555. One of the cases discussed by Stephen J in *Godfrey Constructions* was *Gardiner v Orchard* [1910] HCA 18; 10 CLR 722, where Isaacs J, in discussing

notions of proper purpose and reasonableness. See also *Pierce Bell Sales Pty Ltd v Frazer*.<sup>44</sup>

In *Interfoto Library Ltd v Stiletto Ltd*,<sup>45</sup> Bingham LJ explained the English approach to good faith. He compared civil law systems' acceptance of an over-riding obligation to "play fair" – a principle of open and fair dealing. English law, on the other hand, has committed itself to no such general principle, developing piecemeal solutions to demonstrated problems of unfairness.

Lord Wilberforce made a similar comment in *The 'Eurymedon'*<sup>46</sup> that English law had committed itself to a technical and schematic doctrine of contract. See also Lord Hope of Craighead in *R (European Roma Rights Centre) v Immigration Officer, Prague Airport ('The Roma case')*.<sup>47</sup>

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such clauses that gave the vendor the power to rescind, said that three considerations attended them: first, the purpose of the clause, which was as stated by Sir John Romilly MR in *Greaves v Wilson* (1858) 25 Beav 290 at 293; 53 ER 647 at 650 to be the case where the vendor was to be put to so much expense and trouble as to make it unreasonable that he be called upon to do it; secondly, the bona fides on the part of the vendor in using the power; and thirdly, the reasonableness of the use of the clause.

<sup>44</sup> [1973] HCA 13; 130 CLR 575. See also what Viscount Radcliffe said in *Selkirk v Romar Investments Ltd* [1963] 1 WLR 1415 at 1422-1423 in discussing equitable principles to control such a clause:

"[the vendor] must not act arbitrarily, or capriciously, or unreasonably. Much less can he act in bad faith. He may not use the power of rescission to get out of the sale 'brevi manu', since by doing so he makes a nullity of the whole elaborate and protracted transaction. Above all, perhaps, he must not be guilty of 'recklessness' in entering into his contract ... [being] an unacceptable indifference to the situation of a purchaser who is allowed to enter into a contract with the expectation of obtaining a title which the vendor has no reasonable anticipation of being able to deliver."

<sup>45</sup> *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 at 439.

<sup>46</sup> *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154 at 167.

<sup>47</sup> [2004] UKHL 55; [2005] 2 AC 1 at 50-53 [59]-[64].

There is no doubt, however, that our law, including the law of contract, is littered with principles, rules and approaches which contain what can be seen as the elements of good faith. What might be said to be absent is the recognition of an expressed norm reflecting its presence as an informing principle.

Let me turn to good faith as a coherent implication or underpinning norm. The most frequently posited difficulty is that of giving the phrase content. The posited principle of "playing fair" implies a non-contractual source at work. This is not necessarily the case.

In a search for the meaning which American courts have given the phrase, I have examined some of the cases in New York (a great commercial centre, no little brother to London, but historically a jurisdiction in which English law has influenced doctrine). They repay reading. What they reveal is a coherent utilisation of good faith as an informing implication or assumption that assists in the construction of contracts and the implication of terms to give effect to the perceived honest and reasonable expectations of the parties in respect of the bargain made and its limits. None would surprise an English lawyer; the process of implication may be somewhat readier than that reflected in English cases, but the legal reasoning and results do not suggest any source of obligation outside the contract.

Let me give you some examples.

In 1868, in *Railroad Company v Howard*, Justice Clifford, giving the opinion of the US Supreme Court, said:<sup>48</sup>

"Corporations as much as individuals are bound to good faith and fair dealing, and the rule is well settled that they cannot, by their acts, representations and silence, involve others in onerous engagements and then turn around and disavow their acts and defeat the just expectations which their own conduct has superinduced".

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<sup>48</sup> 74 US 392 at 413 (1868).

The expression of the matter thus reflects a reach of the concept intrinsically tied to, and constrained by, the contract entered and the honest and fair performance of what has been agreed, rather than the superimposition of moral values having their source and legitimacy outside the contract, and operating beyond the agreement of the parties. It echoed Cockburn CJ, Lord Blackburn and Griffith CJ.

In *Uhrig v Williamsburg City Fire Insurance Company*,<sup>49</sup> the New York Court of Appeals dealt with an arbitration clause in an insurance policy. Both the insured and insurer were to appoint an appraiser, the two appraisers appointing an umpire. The two appraisers could not agree. There was evidence that the insurer, resisting an endeavour to break the deadlock over the appointment of an umpire, refused to appoint another appraiser. Earl J said:

“Under the arbitration clause it was the duty of each party to act in good faith to accomplish the appraisal in the way provided in the policy...”.

Good faith was the informing consideration requiring the promotion and not the defeat of the bargain by taking steps not expressly called for in the words of the contract.

There are numerous New York cases constraining the party given a contractual power in the way I have described in English and Australian cases; it was said that good faith required such powers and satisfactions to be reached otherwise than arbitrarily, capriciously, irrationally or dishonestly. It was sometimes expressed as not construing a contract to leave one party at the mercy of the other: *Doll v Noble*;<sup>50</sup> *Industrial and General Trust Co Ltd v Tod*.<sup>51</sup>

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<sup>49</sup> 56 Sickels 362; 4 NE 745 (1886).

<sup>50</sup> 116 NY 230; 22 NE 406 (1889) (NYCA).

<sup>51</sup> 180 NY 215; 73 NE 7 (1905) (NYCA).

*New York Central Iron Works v United States Radiator Co*<sup>52</sup> is a good example of the use of good faith to give content to promises. The case concerned a supply and distribution contract. The vendor agreed to supply goods and the buyer agreed to deal exclusively in the vendor's goods and to develop and enlarge the market. Both were merchants in trade and not speculators. The vendor refused to supply goods beyond a certain number based on historic demand and sought a limit by implication by reference to past years' sales. The Court refused but also said this:<sup>53</sup>

“But we do not mean to assert that the plaintiff had the right ... to order goods to any amount. Both parties ... are bound to carry it out in a reasonable way. The obligation of good faith and fair dealing towards each other is implied in every contract of this character. The plaintiff could not use the contract for the purpose of speculation in a rising market since that would be a plain abuse of the rights conferred.... [A breach would be shown by pleading that] orders were [made] in excess of the plaintiff's reasonable needs and were not justified by the conditions of the business or the customs of the trade. In other words, that the plaintiff was not acting reasonably or in good faith, but using the contract for a purpose not within the contemplation of the parties; that is to say, for speculative as distinguished from regular and ordinary business purposes.”

Reasonableness was identified with good faith. Good faith demanded that the contract not be employed beyond its business purposes: compare *The 'Achilleas'*.

*Patterson v Meyerhofer*<sup>54</sup> concerned an agreement to sell land from the plaintiff to the defendant. At the time of agreement the defendant knew that the plaintiff was not then the owner, but expected to obtain the land at a foreclosure sale. The defendant went to auction and outbid the plaintiff. She got the land at a price better than she had agreed to pay the plaintiff. Willard Bartlett J said:<sup>55</sup>

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<sup>52</sup> 174 NY 331; 66 NE 967 (1903) (NYCA).

<sup>53</sup> 174 NY 331 at 335-6; 66 NE 967 at 968.

<sup>54</sup> 204 NY 96; 97 NE 472 (1912).

<sup>55</sup> 204 NY 96 at 100-101; 97 NE 472 at 473.



“In the case of every contract there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part. This proposition necessarily follows from the general rule that a party who causes or sanctions the breach of an agreement is thereby precluded from recovering damages for its non-performance or from interposing it as a defense to an action upon the contract ... ‘Where a party stipulates that another shall do a certain thing, he thereby impliedly promises that he will himself do nothing which may hinder or obstruct that other in doing that thing.’ ...

By entering into the contract to purchase from the plaintiff property which she knew he would have to buy at the foreclosure sale in order to convey it to her, the defendant impliedly agreed that she would do nothing to prevent him from acquiring the property at such sale.”

Good faith supported a construction of the contract that gave the bargained-for commercial benefit to the party.

Similarly in *Simon v Etgen*,<sup>56</sup> where a promise to sell land and use the profit as the payment under a release contained an implication to sell within a reasonable time. The implication of good faith is not made generally as a free standing term but as an informing implication to shape the precise content of the particular implication. It is an operative norm.

The expression “every contract implies good faith and fair dealing” often used in these early cases directs attention to what flows from the entry into the relationship – a standard of conduct, in the context of the bargain, that is manifested in the construction of and giving content to the contract in accordance with honesty and the reasonable expectations of those in the bargain. That language directs attention to a norm, not the implication in every contract of a free standing obligation.

Let me finish this dipping into New York law by reference to one further case, *Kirke La Shelle Co v Armstrong*.<sup>57</sup> The parties settled a dispute about the assignment by a debtor of certain plays and property. As consideration for

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<sup>56</sup> 213 NY 589; 107 NE 1066 (1915) (NYCA).

<sup>57</sup> 263 NY 79; 188 NE 163 (1933) (NYCA).

the settlement, the defendant promised to pay the plaintiff half of all moneys received from the revivals of the plays in New York and elsewhere and to obtain the plaintiff's consent to all contracts effecting the exploitation of the play. The defendant, without consulting the plaintiff, sold the "talkie" rights to the play, arguing that this new medium unknown at the time of contract fell outside its terms. The New York Court of Appeals disagreed with the trial court and the appellate division and found a fiduciary relationship. That need not concern us. It also founded its decision on contract, aside from any fiduciary relationship. The Court expressed the principle in a way that equated good faith and fair dealing with support of the bargain entered, in the sense of the grant of the construed benefit in commercial terms:

"in every contract there is an implied covenant that neither party shall do anything which will have the affect of destroying or injuring the right of the other to receive the fruits of the contract, which means that in every case there exists an implied covenant of good faith and fair dealing."

Following two cases, *Harper Bros v Klaw*<sup>58</sup> and *Manners v Morosco*,<sup>59</sup> the Court held that even though the agreement did not cover "talkies", the unrestricted deployment of those rights would (on the evidence) destroy the value of the play. There was an implied negative covenant not to use the ungranted part of the copyright estate to the detriment of the particular rights granted. The "talkie" rights had to be the subject of agreement.

One can agree or not with the implication. There were cases that refused to go so far. What is clear, though, is that good faith was being used to support and give reasonable protection to the willed bargain of the parties and the commercial benefits it provided – not as an externally sourced obligation to be fair outside the contractual terms.

Turning briefly to the content of the phrase when used expressly by parties in the context of an obligation to negotiate in good faith, in *United Group Rail*

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<sup>58</sup> 232 F 609 (1916) (NY District Court).

<sup>59</sup> 252 US 317 (1920).

*Services v Rail Corporation of NSW*,<sup>60</sup> the New South Wales Court of Appeal held that an obligation to negotiate was a sufficiently certain concept for a definite contractual obligation. The Court expressly disagreed with *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd*<sup>61</sup> and *Walford v Miles*.<sup>62</sup> In discussing the practical content of the phrase in the context of the obligation to negotiate a resolution of a dispute under an existing contract, the Court said.<sup>63</sup>

“It is to be anticipated at the time of entry into the contract that disputes and differences that may arise will be anchored to a finite body of rights and obligations capable of ascertainment and resolution by the chosen arbitral process (or, indeed, if the parties choose, by the Court). The negotiations (being the course of treaty or discussion) with a view to resolving the dispute will be anticipated not to be open-ended about a myriad of commercial interests to be bargained for from a self-interested perspective (as in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd*).<sup>64</sup> Rather, they will be anticipated to involve or comprise a discussion of rights, entitlements and obligations said by the parties to arise from a finite and fixed legal framework about acts or omissions that will be said to have happened or not happened. The aim of the negotiations will be anticipated to be to resolve a dispute about an existing bargain and its performance. Honest and genuine differences of opinion may attend the parties’ views of their rights and obligations. Such things as difficulties of proof and uncertainty as to fact or law may, perfectly legitimately, strike the parties differently. That accepted, honest business people who approach a dispute about an existing contract will often be able to settle it. This requires an honest and genuine attempt to resolve differences by discussion and, if thought to be reasonable and appropriate, by compromise, in the context of showing a faithfulness and fidelity to the existing bargain....

The parties have mutually agreed to bring an approach of genuineness and good faith to that process of seeking resolution of any such disagreement. That agreement carried with it, in ordinary language, a requirement to bring an honestly held and genuine belief about their mutual rights and obligations and about the controversy to the negotiations, and to negotiate by reference to such beliefs.

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<sup>60</sup> [2009] NSWCA 177; 74 NSWLR 618.

<sup>61</sup> [1975] 1 WLR 297.

<sup>62</sup> [1992] 2 AC 128.

<sup>63</sup> [2009] NSWCA 177; 74 NSWLR 618 at [70]-[74].

<sup>64</sup> (1991) 24 NSWLR 1.

These are not empty obligations; nor do they represent empty rhetoric. An honest and genuine approach to settling a contractual dispute, giving fidelity to the existing bargain, does constrain a party. The constraint arises from the bargain the parties have willingly entered into. It requires the honest and genuine assessment of rights and obligations and it requires that a party negotiate by reference to such. A party, for instance, may well not be entitled to threaten a future breach of contract in order to bargain for a lower settlement sum than it genuinely recognises as due. That would not, in all likelihood reflect a fidelity to the bargain. A party would not be entitled to pretend to negotiate, having decided not to settle what is recognised to be a good claim, in order to drive the other party into an expensive arbitration that it believes the other party cannot afford. If a party recognises, without qualification, that a claim or some material part of it is due, fidelity to the bargain may well require its payment. That, however, is only to say that a party should perform what it knows, without qualification, to be its obligations under a contract. Nothing in cl 35.11 prevents a party, not under such a clear appreciation of its position, from vindicating its position by self-interested discussion as long as it is proceeding by reference to an honest and genuine assessment of its rights and obligations....

If business people are prepared in the exercise of their commercial judgement to constrain themselves by reference to express words that are broad and general, but which have sensible and ascribable meaning, the task of the Court is to give effect to, and not to impede, such solemn express contractual provisions. It may well be that it will be difficult, in any given case, to conclude that a party has not undertaken an honest and genuine attempt to settle a dispute exhibiting a fidelity to the existing bargain. In other cases, however, such a conclusion might be blindingly obvious. Uncertainty of proof, however, does not mean that this is not a real obligation with real content.”

In this analysis it is vital to distinguish both questions of incompleteness and questions of certainty.

Recently, in *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service*,<sup>65</sup> Hodgson JA, in dealing with the content of the phrase “utmost good faith” in express terms in the subject contracts (which were to last for 100 years), adopted what Sir Anthony Mason had said in a paper in 2000, namely that a contractual obligation of good faith embraced the following notions:

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<sup>65</sup> [2010] NSWCA 268.

- (1) an obligation on the parties to co-operate in achieving the contractual objects;
- (2) compliance with honest standards of conduct; and
- (3) compliance with standards of conduct that are reasonable having regard to the interests of the parties.

Hodgson JA saw these elements as consistent with other cases in the New South Wales Court of Appeal, in particular *Alcatel Australia Ltd v Scarcella*<sup>66</sup> and *Burger King Corporation v Hungry Jack's Pty Ltd*.<sup>67</sup> His Honour, however, recognised that:<sup>68</sup>

“ ... a contractual obligation of good faith does not require a party to act in the interests of the other party or to subordinate its own legitimate interest to the interests of the other party; although it does require it to have due regard to the legitimate interests of both parties”.

The usual content of the obligation of good faith that can be extracted from existing New South Wales Court of Appeal cases can be expressed as follows:

- (a) obligations to act honestly and with a fidelity to the bargain;
- (b) obligations not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and
- (c) an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.

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<sup>66</sup> [2001] NSWCA 401.

<sup>67</sup> [2001] NSWCA 187; 69 NSWLR 558.

<sup>68</sup> [2010] NSWCA 268 at [147].

These obligations do not require subordination of a party's own interests to those of the contractual counterparty. The content and scope of the obligation depends upon the other terms of the contract and the context in which the contract was made. Reasonableness takes its place as an objective element in fair dealing together with honesty and fidelity to the bargain in the furtherance of the contractual objects and purposes of the parties, objectively ascertained.

In *United States Surgical Corp v Hospital Products International Pty Ltd* at first instance,<sup>69</sup> McLelland J (as he then was) examined New York law and accepted the evidence of Judge Breitel (formerly Chief Judge of the New York Court of Appeals) as to the interpretation of § 205 of the *Restatement (2d) of Contracts*. McLelland J concluded that the approach of New York courts to § 205 did not materially diverge from the law of Australia as expressed in *Secured Income Real Estate* and *Butt v M'Donald*.

Gummow J in *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd*<sup>70</sup> adopted these views. What Gummow J drew from them, however, was that they supported an approach not to recognise a general obligation of good faith, rather than one to recognise it.

The phrase good faith is, of course, capable of being given a much broader reach, as a general obligation to make disclosures of candour and to act fairly and reasonably, generally, by the imposition by the court (through the law) of an obligation so to act – even if it goes beyond, or is inconsistent with, the agreed terms of the parties' contract. That, however, is not how New York contract law sees the matter.

An example may be taken from Germany. Whilst an analysis of the operation of § 242 of the German Civil Code of 1900, with its apparently narrow

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<sup>69</sup> [1982] 2 NSWLR 766.

<sup>70</sup> [1993] FCA 445; 117 ALR 393 at 402-403.

expression of good faith,<sup>71</sup> is beyond this paper, it is to be noted that it was used in Weimar Germany to revalorise nominal monetary obligations in the face of catastrophic inflation. These decisions are said to have hit the German legal community like a bombshell.

At this wider level, the obligation, if it exists, may require general pre-contractual disclosure to a degree which requires that bargaining take place on an equal foundation of information and may require that the parties deal reasonably and fairly with each other, quite apart from the other provisions of the contract, as an independent obligation.

The legitimacy of, and any acceptance of, such a broader imposed norm depends upon the theoretical framework from which one works. It is at this point that one needs to consider some of the theoretical underpinnings of a law of contracts.

### **Legal technique**

Common law courts do not legislate, nor are they law reform agencies.<sup>72</sup> Judges apply judicial method and technique. The place of policy and legal theory in the declaration, development and rationalisation of judge-made law is a topic in itself. In *Attorney-General (Cth) v Alinta Ltd*,<sup>73</sup> Gleeson CJ made clear that legal method was not the propounding of a mechanical application of inflexible rules, without regard to wisdom and expediency. The common law, Gleeson CJ said, was judge-made.<sup>74</sup>

“ ... and its development and rationalisation necessarily involve attention to such questions. Furthermore, many of its settled principles, in their application to changing circumstances and social conditions, require judgment about what is wise and expedient.”

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<sup>71</sup> “wie Treu und Glauben” (literal translation: fidelity and faith).

<sup>72</sup> See the comments of Mason J in *State Government Insurance Commission v Trigwell* [1979] HCA 40; 142 CLR 617 at 633.

<sup>73</sup> [2008] HCA 2; 233 CLR 542.

<sup>74</sup> *Ibid* at [5].

The need for courts to act incrementally, building on the past using a judicial method of analysis, is not inimical to the recognition of society's needs and the policy formulation that inheres in a role of adaption and development of law to contemporary society.<sup>75</sup>

It is not a large step to recognise the conception of good faith generally as an informing principle, expectation or maxim of the common law. As a general rule, parties are assumed and expected to act in a manner consistent with honesty and the reasonable expectations created by them. The vindication of contractual rights and duties thereby created, in a manner consistent with a fidelity or faithfulness to any bargain entered, should be an aim of the law of contract.

Nor is it a large step to recognise that “necessity” or “necessary” for business efficacy inheres in fair dealing and vice versa. Efficacious in a business sense includes a notion of fair dealing, if that is an underlying recognised norm. The important analysis of necessity in this context by Priestley JA in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*<sup>76</sup> reveals the circularity that can attend rejection of an implication of good faith because of the need to show necessity for business efficacy.

If one accepts that honesty, fair dealing and fidelity to the bargain as entered are basal elements of commerce, the recognition of that can manifest itself in a number of ways. It would always inform the interpretation of a written contractual instrument; on this basis there would be seen to be no difference between the approach of Mason J in *Secured Income* and Griffith CJ in *Butt v M'Donald*. It would always inform the consideration of the formation of contracts, in particular those that are not contained in an apparently

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<sup>75</sup> See, eg, *Giannarelli v Wraith* [1988] HCA 52; 165 CLR 543 at 584-585; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* [1988] HCA 44; 165 CLR 107 at 160-162; *Mabo v Queensland (No 2)* [1992] HCA 23; 175 CLR 1 at 29-30 and 57-58; *Dietrich v R* [1992] HCA 57; 177 CLR 292 at 318-320.

<sup>76</sup> (1992) 26 NSWLR 234 at 261-263.



comprehensive document.<sup>77</sup> It would inform a ready implication in many contracts of an appropriately constructed obligation.

Debates continue about method and mechanism.<sup>78</sup> The real issue, however, is the recognition of the reality and existence of the norm itself and its conformance to governing legal theory. Within the resolution of that issue one finds the true content and scope of the phrase for general application.

## Legal theory

Law, legal doctrine and legal method are underpinned by legal theory.

How one views the legal system and the legal theory underpinning it, to a significant degree, governs the formulation of the answers to legal questions, such as the role of good faith in contract law.

For instance, the view that a contract derives from the will of the parties assists in understanding why they should be bound (whether as a matter of decency based on natural law, or pursuant to an individualist notion of will and right) and in understanding how the law should approach their compact and their promises.

An underpinning conception or theory that would justify or make sensible a general obligation to disclose information in pre-contractual negotiations or to behave fairly and reasonably in a transaction irrespective of its terms, properly construed, might have a number of features. It would or could include the view that consent requires more than formal manifestation and, to be “true”,

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<sup>77</sup> See, eg, *Hawkins v Clayton* [1988] HCA 15; 64 CLR 539 at 573 (Deane J); *Byrne v Australian Airlines Ltd* [1995] HCA 24; 185 CLR 410 at 422 (Brennan CJ, Dawson and Toohey JJ) and 442 (McHugh and Gummow JJ); *Breen v Williams* [1996] HCA 57; 186 CLR 71 at 90-91 (Dawson and Toohey JJ) and 123-124 (Gummow J); *Moneywood Pty Ltd v Salamon Nominees Pty Ltd* [2001] HCA 2; 202 CLR 351 at 374 [80] (Gummow J); *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* [2000] HCA 25; 202 CLR 588 at 610 [46] (Gaudron, McHugh, Gummow and Hayne JJ).

<sup>78</sup> See E Peden, *Good Faith in the Performance of Contracts* (LexisNexis Butterworths, 2003), Ch 2.

consent requires a reasonable degree of equality of knowledge. Such symmetry of information may require disclosure to bring it about. It would or could include a view that equality of exchange involves not only symmetry of information, but also a just price. If such matters were included in the theory underpinning contract, they would reflect essential or immanent characteristics of the contract as an institution or end informing its essence or being.

The above elements can be seen underlying pre-nineteenth century natural law theory derived from Aristotle and Aquinas, revived in sixteenth and seventeenth century Spain and taken up by the northern European natural law theorists, including Grotius, Pufendorf and Pothier.<sup>79</sup>

These became problematic notions with the rise of individual responsibility, competition and the market theories of Locke, Mill, Bentham, Adam Smith, Spencer and Darwin. Social contractarianism gave way to individualism and laissez faire economic and political ideas. English legal theory came to be influenced by the legal positivism of John Austin.<sup>80</sup>

The will theory that had been part of natural law became adapted by the abandonment of moral notions of a just price or equality of exchange. The will and intention of the parties was, as objectively manifested, to set price and terms as part of contracts becoming mechanisms of risk allocation. Contracts were no longer merely the reflection in the law of obligation of the transfer of property and executed performance; rather, the contract, in its paradigm form, became the exchange of promises by individuals. The promise was not a moral duty, but an exercise of individual free will in the allocation of risk.<sup>81</sup>

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<sup>79</sup> P Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1979); J Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Clarendon Press, 1991); R Harrison, *Good Faith in Sales* (Sweet & Maxwell, 1997) Chs 1-2.

<sup>80</sup> See J Austin, *The Province of Jurisprudence Determined and Lectures on Jurisprudence*, above n 10.

<sup>81</sup> Atiyah, above n 80.

These ideas reflected the movement away from a society whose economic activity was founded upon the physical transactions of land and goods to one whose economic activity was founded to a greater degree on markets and the consequent commercial need for risk allocation. If the paradigm is the exchange of promises to fix a risk by reference to those promises, the notion of a just price or an equal exchange becomes problematic.

Lord Mansfield expressed the view in *Carter v Boehm*<sup>82</sup> in relation to all contracts:

“Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary ...”.

That no longer holds true for contracts generally. It is, of course, the foundation of the general law of insurance. It can also be seen to inhere in contracts to do with the transfer of land in the vendor’s duty to disclose latent defects of title.<sup>83</sup>

Thus, the contract came to be a legal construct, going beyond restitution for performed consideration or reliance, becoming the method of private parties looking after their own interests, making their private law and allocating business risk. In the conception of justice, notions of equality of exchange and a just price gave way to the law setting a framework for each to protect his interests in nominating his terms for the bargain.

In this framework, legal positivism developed; equity became stabilised into a rule-based structure with a reduced role for discretion as to individual cases,<sup>84</sup> and law became, to a degree, perceived to be separated from morality.<sup>85</sup> This

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<sup>82</sup> (1766) 3 Burr 1905 at 1910; 97 ER 1162 at 1165.

<sup>83</sup> *Carlish v Salt* [1906] 1 Ch 335; *Beyfus v Lodge* [1925] Ch 350 at 357; P N Wikrama-Nayake and L Voumard, *The Sale of Land in Victoria*, 4th ed (Law Book Co, 1986) at 216ff.

<sup>84</sup> R Meagher, J D Heydon and M Leeming, *Meagher, Gummow & Lehane’s Equity Doctrines and Remedies*, 4th ed (LexisNexis Butterworths, 2002) at 8 [1-070].

<sup>85</sup> For a review of the separation of law and morality in the theories of Jeremy Bentham and John Austin and the position of legal positivism in the twentieth century, see: Hart (1958), above n 10. More generally see: Austin (1879), above n 10; Kelsen

model of contract theory underlying the classical law of contract was lucidly discussed by Patrick Atiyah<sup>86</sup> and Grant Gilmore<sup>87</sup> in their great works. The extent to which unfairness became an irrelevant concept is important. In such a model, as Lord Devlin said,<sup>88</sup> “free dealing was fair dealing”. The court’s function did not include assessing fairness. The expression of the court’s refusal to mend bad bargains was commonplace. Yet in the United States, as has been seen, the courts never abandoned expressions of good faith and fair dealing within the contract.

Given the familiarity of the law with the notion of good faith in the way I have described, an intrusion into contract theory of a principle or obligation of the kind discussed by Judge Breitel before McLelland J and maintained since the nineteenth century in the United States is not a radical alteration; indeed, it is not an intrusion at all. Never driven out was the recognition that essential to the law of contract was the support of the bargain made, as expressed by Cockburn CJ, Lord Blackburn and Griffith CJ. A principle or obligation of good faith of the kind discussed by Judge Breitel and the New York cases, and in the views of Judges Posner and Scalia, is a buttressing of the foundational notions of honesty and faithfulness to the bargain that have always existed. The principle is reinforced by the recognition that contractual obligations do not set up a fault-free choice or election to perform or pay damages. Contractual promises supported by consideration constitute legal rights to performance.<sup>89</sup>

How good faith operates will depend upon context and the evident contractual purposes of the arrangement. In a risk allocation contract, such as a futures

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(1934), above n 10; Kelsen (1935), above n 10; Hart (1994), above n 10; and Friedmann, above n 10, Chs 21-27.

<sup>86</sup> Atiyah, above n 80 at 402-403.

<sup>87</sup> G Gilmore, *The Death of Contract* (Ohio State University Press, 1976).

<sup>88</sup> P Devlin, *The Enforcement of Morals* (Oxford University Press, 1965) at 47.

<sup>89</sup> *Ahmed Angullia bin Hadjee Mohammed Salleh Angullia v Estate and Trust Agencies (1927) Ltd* [1938] AC 624 at 634-635 and *Coulls v Bagot's Executor and Trustee Company Ltd* [1967] HCA 3; 119 CLR 460 at 504; *Alley v Deschamps* (1806) 13 Ves Jr 225 at 227 and 228; 33 ER 278 at 279; and *United Group Rail* [2009] NSWCA 177 at [72].

contract or a time charter in an operating market, true good faith may well be the punctilious and complete performance of the bargain, to the letter. Whining about how the market has moved in a market which can move may itself be bad faith.

On the other hand, in a long term, though non-fiduciary, contract, good faith may require give and take, co-operation and a reasonable consideration of the interests of the other. No business person would find this moralistic or paternalistic – as long as it conformed in structure and intent with the bargain.

To go beyond this and to posit a wider notion detached from the agreement of the parties, conforming with a duty of general candour and fairness beyond the structure and terms of the contract, faces the problems of lack of legitimacy of the underpinning theory and, apart from statute, a lack of legal technique or method of creating the duty. It would also raise a wider question in the law of torts about the development of a doctrine of abuse of rights.<sup>90</sup>

An analogy (perhaps imperfect) exists in public international law, where good faith stands as a universally recognised principle and an absolutely necessary ingredient in the operation of the international legal order,<sup>91</sup> without

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<sup>90</sup> H C Gutteridge, "Abuse of Rights" (1933-35) 5 *The Cambridge Law Journal* 22; D J Devine, "Some Comparative Aspects of the Doctrine of Abuse of Rights" [1964] *Acta Juridica* 148; J H Crabb, "The French Concept of Abuse of Rights" (1964) 6(1) *Inter-American Law Review* 1; P Catala & J A Weir, "Delict and Torts: A Study in Parallel" (1964) 38(2) *Tulane Law Review* 221; A Mayrand, "Abuse of Rights in France and Quebec" (1974) 34 *Louisiana Law Review* 993; J Cueto-Rua, "Abuse of Rights" (1975) 35 *Louisiana Law Review* 965; V Bolgar, "Abuse of Rights in France, Germany and Switzerland: A Survey of a Recent Chapter in Legal Doctrine" (1975) 35 *Louisiana Law Review* 1015; G M Redmann, "Abuse of Rights: An Overview of the Historical Revolution and the Current Application in Louisiana Contracts" (1987) 32 *Loyola Law Review* 946; J M Perillo, "Abuse of Rights: A Pervasive Legal Concept" (1995) 27 *Pacific Law Journal* 37; A Gambaro, "Abuse of Rights in Civil Law Tradition" (1995) 4 *European Review of Private Law* 561; E Reid, "Abuse of Rights in Scots Law" (1998) 2 *Edinburgh Law Review* 129.

<sup>91</sup> Article 2(2) of the *Charter of the United Nations* and Arts 26 and 31(1) of the *Vienna Convention on the Law of Treaties*; Permanent Court of Arbitration, *Venezuelan Preferential Claims Case* (22 February 1904) in J B Scott (ed), *Hague Court Reports* (1910) Vol 1 at 55; the *Nuclear Tests Case (Australia v France)* [1974] ICJ Rep 253 at 268; and see generally E Zoller, *La Bonne Foi en Droit International Public (Good Faith in Public International Law)* (Editions A Pedone, 1977), discussed by M Virally in a review essay in (1983) 77 *American Journal of International Law* 130; B Cheng,

necessarily being an independent source of obligation in itself. Its place and role as an operative principle can be seen as assisting in giving content and legal reach to acts undertaken. The International Court of Justice in *In re Border and Transborder Armed Actions (Nicaragua v Honduras)*<sup>92</sup> said that good faith “is not in itself a source of obligation where none would otherwise exist”.<sup>93</sup>

This approach, though constrained, expressly recognises the norm as an underlying and operative principle. If this were the position in private law, the formation, interpretation and performance of a contract could all be informed by the express norm. Implication of terms would proceed on the basis of the operative working principle of recognised importance and coherence.

As Judge Posner said, it is not newfangled welfare-state paternalism or a sediment of altruism; rather, it is a principle which has inhered in the fabric of commerce for centuries and which our courts have recognised on a piecemeal basis for a long time.

Whilst not always adhered to by all courts in the United States, there is a clear limitation in many American cases that good faith is an interpretative tool and an obligation directed to the terms of the contract itself. It assists in interpretation and implication, but it is not a duty independently standing apart from the contract provisions (including implications), or inconsistent with them.<sup>94</sup> Indeed, such is stated in the commentary to the UCC § 1-304.<sup>95</sup>

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*General Principles of Law as applied by International Courts and Tribunals* (Grotius Publications, 1987) Pt 2 at 105-160.

<sup>92</sup> [1988] ICJ Rep 69 at 105 [94].

<sup>93</sup> This was reiterated in *In re Land and Maritime Boundary (Cameroon v Nigeria)* [1998] ICJ Rep 275 at 297 [39]; see generally the discussion in *The Roma Case* [2005] 2 AC 1 at 52 [62].

<sup>94</sup> *Duquesne Light Co v Westinghouse Elec Co* 66 F 3d 604 at 617 (1995); *Riggs National Bank of Washington v Lynch* 36 F 3d 370 at 373 (1994).

<sup>95</sup> Commentary introduced in 1994 says the following in relation to § 1-304: “This section does not support an independent cause of action for failure to perform or enforce in good faith. Rather, this section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, a remedial right or power. This distinction makes it clear that the doctrine of good faith merely

To the extent that such an approach is recognised, questions of the inter-related operation of construction and implication, the legal method of implication and the extent of implication necessary in any particular contract will arise.

Even if it be correct that the doctrine in its operation and extent described by Farnsworth, Scalia J, Posner J and the commentary to § 1-304 of the UCC does not add materially to the well-established legal rules that I have earlier described, as Steytler J said in *Central Exchange Ltd v Anaconda Nickel Ltd*,<sup>96</sup> the implication of a term or the use of the recognised norm or obligation would undoubtedly bring a degree of flexibility to the operation of the law, in particular implication of terms. Further, as Sir Anthony Mason said,<sup>97</sup> the recognition of the concept might bring a degree of coherence to the various rules that presently exist.

Finally, you will recall that the court in *Duquesne* used the words “with rare exceptions” and “generally”. There are instances when courts in the US have given the phrase “good faith” from the UCC a scope and content beyond mere implication. Many of these are in franchise cases where the courts have been astute to protect parties (franchisees) with significantly lesser bargaining power.

The existence of these and of some continental notions of an obligation outside the contract make far more acute the cries of “what is its content?” The answer will lie in what is fair dealing in all the circumstances by reference to the court’s perception of the fairness of the exchange. I do not propose to explore this. Neither England nor Australia has a statutory source of such obligation. However, it is not necessarily to be feared as something akin to

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directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached”.

<sup>96</sup> [2002] WASCA 94; 26 WAR 33.

<sup>97</sup> A F Mason, “Contract, Good Faith and Equitable Standards in Fair Dealing” (2000) 116 *Law Quarterly Review* 66 at 94.

the expropriation of the means of production by the dictatorship of the proletariat. In Australia a coherent and predictable body of jurisprudence has developed around the simply expressed obligation in trade and commerce not to engage in conduct that is misleading or deceptive or likely to mislead or deceive. Likewise, in New South Wales a similarly coherent body of cases has developed around the *Contracts Review Act 1980*, which authorises the court to vary or set aside non-business contracts that are “unjust”.

Thank you for the invitation to speak and your gracious attention.



## Written submissions – what judges love (and hate)

Lincoln's Inn January 2012

- 1 Learned Hand, as you may know, was one of the greatest American judges. He was not appointed to the Supreme Court. In the 1920s, 1930s and 1940s he commanded the 2<sup>nd</sup> Circuit Court of Appeals (the federal appeal court taking in New York State and surrounding areas). With his cousin Augustus Hand (Gus) and Dean Swann, who moved from Yale, the three of them were one of the best appellate courts ever in the English speaking world.
- 2 Just after Learned moved to practice in New York City in 1905, having begun practice in the somewhat provincial capital of New York, Albany, he lamented his lack of a thriving practice. All he was given was work for other law firms on a contract basis. That work was writing briefs (in effect written submissions) for appeals in the New York Court of Appeals and the 2<sup>nd</sup> Circuit Court of Appeals.
- 3 Two things are revealed by this. First, the Americans have been using written submissions for much longer than English and Australian courts. (Can you imagine the startled look on the fact of the Master of the Rolls in 1905 if counsel had filed 20 pages of skeleton argument and, on rising to his feet, asked whether he would assume that the court had read them?)
- 4 Secondly, briefs or submissions were, in 1905, and are today, difficult to write. That is why those other lawyers were asking the brilliant Learned to write them.
- 5 I will talk about appellate written submissions; but what I say can, with some modification, be translated into written submissions at trial. Given

however that the usual appellate task is dissecting the cadaver in a post-mortem, not creating a living creature at trial, written submissions are a more usual and appropriate appellate tool.

- 6 I will not differentiate between skeleton arguments and written submissions. What I say may need to be modified by reference to your own practice guidelines.
- 7 There is no magic formula. There is, however, one golden rule – dense, turgid, and structureless written submissions turn sweet gentle and humane appellate judges into bad-tempered and rude enemies.
- 8 You have to think about each written submission you draft as to what is its best form and structure. The issues to be addressed will be vital – is it fact, law or a mixture?
- 9 There are, however, a number of things to remember.
- 10 The first is that you have to explain something that you, now, know a great deal about. Your reader will too, but only in due course. The document will initially be read by a judge knowing nothing of your argument. Try and remember how you came to understand the subject. That may well be the best route through the forest of explanation to the court.
- 11 Secondly, written submissions generally have three functions and they must be drafted to fulfil all three.
- 12 First, the written submissions will be read before the appeal by a busy reader, who may have two, three or four appeals that week. So, there must be a short, coherent and readable encapsulation of the essence of your argument. The second function is that the written submissions will be used during the argument to follow and understand the appeal. So the structure and text should reflect how you intend to speak. “Where are you in your written submissions, Ms X?” Can be a precursor to expressed

irritation if what you are saying cannot be easily identified in badly organised writing; or, it can be the beginning of a warm and meaningful relationship if it can be seen that what is being said reflects a clear written position. It also tends to keep the bench quieter, if they know what you are doing, where you have come from and where you are going. The third function is that the written submissions will be used after the hearing to write the judgment. So, not only must there be a crisp intelligible introduction, and an elegant structure reflecting the oral address, but a reasonably comprehensive placement of significant information. It is this third function which often dominates (and ruins) written submissions. Long, dense, badly organised, even if comprehensive submissions make judges irritable and unenthusiastic in their attention. If written submissions are hard to grasp (first function not fulfilled) and if they are useless to use during argument (second function not fulfilled) they will not have been part of the process of information gathering and intellectual synthesis by the court.

- 13 You want your written submission, annotated and marked, to be the bench's primary reference point. Judges hate having to read your written submissions, any transcript and their own notes.
- 14 Written submissions are not mere preparations for the appeal, they are not a mere procedural precondition for the appeal. They are now the first half of the appeal. You do not get enough time to argue appeals entirely orally. If you do written submissions badly, half your appeal has been done badly.
- 15 Finally, what do you say on your feet? After all, the written submissions are perfect.
- 16 This is a lecture in itself – the relationship, the critical relationship, between the written and the spoken word in advocacy.
- 17 Remember – your court will be busy. They will have read your written submissions – perhaps more than once, perhaps once. They are quite

likely not to have fully absorbed them. You have a group of intelligent, busy people who may have a jumbled or confused understanding of what you want to say. You have to ensure that the structure and detail of their understanding accords with your argument. What must they grasp? What structure of argument? What central body of facts? Take them in the materials to what you wish them to understand. Do not just read the written submissions. Time is precious. Think about what case, what facts, what parts of the trial judgment you wish them to read – then and there.

18 “Why are you taking us to this Ms X, the references are all in your very helpful submissions?” his Lordship asks not without a touch of impatience.

19 “Yes your Lordship; they are, but I wish to take you to selected parts of the evidence of the meeting to demonstrate that there can be no doubt that the learned judge’s findings on this central issue were wrong. I will take you to the first three references in [61] and leave the court to read the other seven there referred to which are in like terms.”

20 Judges love that:

- you have command of the paper;
- you have command of the facts and your brief; and
- you have command of the court.

21 Well-structured written submissions enable you to achieve what all advocacy is about:

- control of the occasion and
- persuasion

22 Written submissions are hard to do well. It is more than putting down all the stuff. It is organising it for all the functions that they will serve and to help you organise the thinking of busy judges, of varying dispositions. That is why those New York lawyers used Learned.

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The Maritime Law Associations  
of the United States, Canada, Australia and New Zealand

**FALL MEETING**

**CONTINUING LEGAL EDUCATION  
IN HAWAII**

December 2 – 7, 2011  
J W Marriott Ihilani, Ko Olina

**The Hon Justice James Allsop  
President  
NSW Court of Appeal**

# The Influence of the United States on Admiralty Law in Australia

## Introduction

The roots of Australian and United States' admiralty and maritime law are very similar, being found in the general maritime law of Western Europe and England, in Constitutions with significant similarities in structure and text and in a similar Anglophone outward-looking view of the world including international commerce.

Despite this similarity of roots they have grown to a significant degree separately. That perhaps is a product of the difference in consequence between revolutionary birth and quietly moving away from paternal or maternal grasp or reach.

If I have committed errors of interpretation of United States' law I apologise in advance.

One aspect of what I wish to do is to give a perspective on the Admiralty and maritime grant in s 76(iii) of the Australian Constitution and to emphasise the rich and diverse sources of this branch of the general law. Much can be learnt from the United States Constitution in this regard. Section 76(iii) is a Constitutional recognition of the existence of a rich and fascinating body of law of singular importance to the Australian nation. The scope of s 76(iii) and the consequences of its place in the Constitution are important elements in the future development of maritime law in this country.

During the process of reform of Admiralty in Australia in the 1970s and 1980s, considerable intellectual energy was expended upon illuminating the nature and extent of colonial and Australian Admiralty and maritime jurisdiction. Some of that work expressed a justifiable lamentation at the stunted complexity of the then position governed by the *Colonial Courts of Admiralty Act 1890* (Imp) under the shadow of s 76(iii) of the Australian Constitution.<sup>1</sup>

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<sup>1</sup> For example see Zelling, H "Constitutional Problems of Admiralty Jurisdiction" (1984) 58 *ALJ* 8; Ying, C A "Colonial and Federal Admiralty Jurisdiction" (1981) 12 *Federal law Review* 236.

Many of these difficulties and complexities were cured by the clear terms and simple structure of the *Admiralty Act*. There remain, however, dormant questions of a basal character which, at some point, will need to be addressed if Australia is to have fully coherent and robust national Admiralty and maritime arrangements. These questions were recognised by the Law Reform Commission,<sup>2</sup> but its approach was not to recommend steps into potentially controversial territory; rather, its avowed aim was to reduce Australian Admiralty jurisdiction into simple, clear and coherent terms, upon its Australian Constitutional, rather than a colonial and Imperial, foundation.

The illumination of United States' roots and similarities may permit Australians, in due course, to give a more coherent and rational structure to their maritime law.

There is a tendency, understandable given Australia's colonial past, to examine Australian Admiralty and maritime law from an exclusively English or Imperial historical perspective. The nature and development of Australian maritime law must, however, be assessed and approached by reference to Australia as a fully independent member of the community of nations. Two elements are important in the last sentence: independence and membership of the community of nations. These two elements reflect the ever-present necessity in maritime law to balance domestic national interests with the interests of harmony in the wider world of participation in the community of nations. As a colony, these strands of interest were mediated through the institutions, law and interests of a great imperial power. Now, we must strike our own balance.

Admiralty and maritime jurisdiction is not just a collection of suits found to have been within the cognisance of, and administered by, the English Admiralty Court (exemplified by the action *in rem* against a ship itself and the capacity to arrest the ship irrespective of the presence within the jurisdiction of any party said to be personally responsible for any claim). It is more than that. It is a body of law, and the administration of a body of law, with roots in public international law, civil law, international commerce, international agreement and the laws of nations. Its

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<sup>2</sup> See generally [ALRC, \*Civil Admiralty Jurisdiction\* \(Report 33, 1986\) Ch 5](#) ~~the ALRC Report Chapter 5.~~

history is rich and its contents are vibrant and modern. It is only an arcane or obscure branch of the law to those whose legal thinking is informed exclusively by land-based human activity. It is a branch of the law central to the economic life of this country, being a great trading nation accounting for a significant portion of the world's maritime task, both by volume and by value. It is a branch of the law of immense public importance to an island continent with claims over, and responsibility for, vast marine areas, including Antarctic seas. It is the law of maritime affairs.

Admiralty courts in England had their origins in the civilian tradition. Until the 19<sup>th</sup> century, the court dealing with Admiralty law was *not* a common law court or a Chancery court, but a civilian court. Competition over centuries that has been called an “incessant war of jurisdiction”<sup>3</sup> saw the English Admiralty Court's jurisdiction diminished from its former medieval claims by the time of the fashioning of the Constitution of the United States of America. There were reforms in England in the 19<sup>th</sup> century<sup>4</sup> which saw some extension of jurisdiction to the Admiralty Court. In 1873<sup>5</sup>, as part of the general jurisdictional reforms of the 19<sup>th</sup> century, Admiralty jurisdiction was swept into the common law courts and the civilian Admiralty Court was abolished.

In Australia, until the operation of the *Colonial Courts of Admiralty Act 1890* (Imp), the Vice-Admiralty courts established in the colonies from the earliest settlement were Imperial courts, separate from the local colonial courts.

The Australian Constitution did not immediately form a fully independent nation state, but a federal dominion.<sup>6</sup> Nevertheless, it was an organic document of self-government, which, through the passage of 20<sup>th</sup> century domestic and world politics and affairs, stands as the Australian national federal compact.

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<sup>3</sup> Scott LJ in *The Beldis* [1936] P 51 at 85.

<sup>4</sup> [¶The Admiralty Court Act 1840 \(UK\)](#) and the [Admiralty Court Act 1861 \(UK\)](#).

<sup>5</sup> [¶The Supreme Court of Judicature Act 1873 \(UK\)](#).

<sup>6</sup> When Australia became a fully independent nation state is not a straightforward question. On one view, it was not until the passing of the *Australia Acts* (Cth) and (UK). On another view, it was the adoption of the Statute of Westminster. There are other possibilities.



To appreciate the full potential scope for a national and coherent body of Admiralty and maritime law in Australia, it is necessary to explore s 76(iii) of the Constitution and its context. Section 76(iii), in its terms, is concerned with the conferral of jurisdiction on the High Court, as follows:

*The Parliament may make laws conferring original jurisdiction on the High Court in any matter:*

...

*(iii) of Admiralty and maritime jurisdiction;*

...

This is only one paragraph (of nine) in ss 75 and 76,<sup>7</sup> which, taken together, define the content of the Commonwealth polity's judicial power to resolve controversies: the judicial power of the Commonwealth, or, federal jurisdiction.

Section 77<sup>8</sup> of the Constitution provides for the Commonwealth Parliament to have authority to legislate to confer jurisdiction that is referred to in ss 75 and 76 on other federal courts and invest such jurisdiction in State courts, including the power to make conferral of jurisdiction on federal courts exclusive. The power of the Commonwealth Parliament to provide (at its choice) for the exercise of federal

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<sup>7</sup> The full text of ss 75 and 76 is as follows:

**s 75 Original jurisdiction of High Court**

*In all matters:*

- (i) arising under any treaty;*
  - (ii) affecting consuls or other representatives of other countries;*
  - (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;*
  - (iv) between States, or between residents of different States, or between a State and a resident of another State;*
  - (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;*
- the High Court shall have original jurisdiction.*

**s 76 Additional original jurisdiction**

*The Parliament may make laws conferring original jurisdiction on the High Court in any matter:*

- (i) arising under this Constitution, or involving its interpretation;*
- (ii) arising under any laws made by the Parliament;*
- (iii) of Admiralty and maritime jurisdiction;*
- (iv) relating to the same subject-matter claimed under the laws of different States.*

**s 77 Power to define jurisdiction**

*With respect to any of the matters mentioned in the last two sections the Parliament may make laws:*

- (i) defining the jurisdiction of any federal court other than the High Court;*
- (ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;*
- (iii) investing any court of a State with federal jurisdiction.*

jurisdiction by the courts of the States was a significant point of distinction from the Constitution of the United States. Parliament has exercised this power since the passing of the *Judiciary Act 1903* (Cth). The wielding of governmental power (using that expression in the broad sense) being the judicial power of one polity could be, and has been, entrusted to the courts of other polities. This, of itself, was, and remains, a significant political achievement. The trust, respect and comity between the polities and their courts for each other reflected in this arrangement are aspects of the federal compact of the highest importance, and not to be taken for granted or undermined in any way.

### **Article III section 2 of the United States Constitution**

The context of the Admiralty and maritime grant in s 76(iii) was not only colonial, but also national and international. There is no doubt that s 76(iii) was taken from the terms of Article III section 2 of the United States Constitution, which, relevantly, was in the following terms:<sup>9</sup>

*The judicial Power shall extend ... to all Cases of admiralty and maritime Jurisdiction; ...*

The relevant similarity between the two Constitutions did not end with the text of the provisions dealing with Admiralty and maritime jurisdiction. One can see in the text and structure of the whole of Article III section 2, the origin of the form

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<sup>9</sup> The full text of Article III section 2 was as follows:

*“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.*

*In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.*

*The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”*  
[\[emphasis added\]](#)

and terms of ss 75 and 76 of our Constitution. The similarity also extended to the place of each provision in the structure of each Constitution: the Admiralty and maritime provision appeared in the part of the Constitution providing for the Federal Judicature and its jurisdiction.<sup>10</sup> In each Constitution, the enumerated heads of legislative power were contained in another part of the document. Also, the legislative powers in each Constitution included one for trade and commerce beyond one State and an incidental power.<sup>11</sup> Neither Constitution stated expressly that the national legislature had authority to legislate in respect of Admiralty and maritime **law** as opposed to **jurisdiction**.

The influence of United States' Constitutional learning leading up to the formation of the Australian Constitution is clear.<sup>12</sup> It is, therefore, instructive for Australians to explore the development of Article III section 2 insofar as it concerned admiralty and maritime jurisdiction in the United States up to 1900 (as the jurisprudence available and known to at least some of the framers of our Constitution) and thereafter (as a means of assessing the reliability of the earlier, 19<sup>th</sup> century, jurisprudence).<sup>13</sup>

A number of important questions arose in the 19<sup>th</sup> century in connection with the United States' admiralty grant: first, the meaning of the phrase "admiralty and maritime jurisdiction" itself, which issue included the question whether it was a phrase to be understood by reference to the laws of nations or by reference only to practice and procedure in the English Admiralty Court; secondly, whether the Congress had legislative power over the subject of admiralty and maritime **law** and not merely over the conferral of **jurisdiction**; thirdly, whether admiralty and maritime jurisdiction extended past the influence of the tide and extended into the great arterial rivers and lakes of the North American continent; and, fourthly, the

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<sup>10</sup> Each constitution had separate sections dealing with the powers of the legislature, the courts and the executive.

<sup>11</sup> As to trade and commerce, see s 51(i) in the Australian Constitution and Article 1 [Section 8\(3\)](#) in the United States Constitution. As to the incidental power, see s 51(xxxix) in the Australian Constitution and Article 1 [Section 8\(18\)](#) in the United States Constitution.

<sup>12</sup> *D'Emden v Pedder* (1904) 1 CLR 91 at 113; Hunt, [E American Precedents in Australian Federation](#) (1930); Zines, *L Cowen and Zines's Federal Jurisdiction in Australia* (3<sup>rd</sup> ed, 2002) at 1-2; and *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 512.

<sup>13</sup> Relevant to the Admiralty and maritime jurisdiction in Article III section 2 were cognate questions about the interpretation and operation of the *Judiciary Act 1789*.

extent to which admiralty and maritime jurisdiction of federal courts was exclusive of state courts.

I do not propose to discuss all of these questions. The first two are the most relevant for understanding of future direction of Admiralty and maritime law in Australia. I will also touch upon the third. I will ignore the fourth, the complexities of which, together with the relationship between Admiralty law and state legislation, have bedevilled the law in the United States.<sup>14</sup>

### *The meaning of the phrase “admiralty and maritime jurisdiction”*

Early in the 19<sup>th</sup> century, some judges in the United States took the view that the phrase “admiralty and maritime jurisdiction” was to be taken to refer to the Admiralty jurisdiction of England.<sup>15</sup> This approach, if persisted with, would have imported into a branch of United States’ law the restrictions on the jurisdiction to which the efforts of the common law courts had subjected the English Courts of Admiralty.<sup>16</sup> The sweeping and scholarly judgment of Story J in *De Lovio v Boit*<sup>17</sup> (sitting as a circuit judge) exploded this notion. After a destructive examination of the limitations on Admiralty in England, Story J expressed the content of the phrase “of admiralty and maritime jurisdiction” in Article III section 2 in a manner informed by the laws of nations as the jurisdiction which regulates maritime commerce and affairs based on the civil law and the customs and usages of the sea.<sup>18</sup>

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<sup>14</sup> This is not intended to be a full analysis of the United States position. Rather, I simply seek to draw important elements from the United States law of possible relevance to the Australian context.

<sup>15</sup> See for example, *United States v McGill* 4 US 426 at 429-430 (1806) (Washington J sitting as a circuit judge).

<sup>16</sup> The history of that conflict in general terms is too well known to require elaboration. Its detail can be found in *De Lovio v Boit* 7 F.Cas 418 (1815); Wiswall, F *The Development of Admiralty Jurisdiction and Practice Since 1800* (Cambridge 1970) at 4-11; Robertson, D W *Admiralty and Federalism* (The Foundation Press, 1970) Ch 3; Gilmore, G and Black, C L *The Law of Admiralty* (2<sup>nd</sup> ed, Foundation Press, 1975) pp 8-10; Marsden, R G *Select Pleas in the Court of Admiralty* (Selden Society London 1894) Vol 1 at xiv; Holdsworth, W *A History of English Law* (7<sup>th</sup> ed, 1956) vol 1 at 544-568.

<sup>17</sup> 7 F.Cas 418 (1815).

<sup>18</sup> *Ibid* at 443:

“[T]hat maritime jurisdiction, which commercial convenience, public policy, and national rights, have contributed to establish, with slight local differences, over all Europe; that jurisdiction, which under the name of consular courts, first established itself upon the shores of the Mediterranean, and, from the general equity and simplicity of its proceedings, soon commended itself to all the

This broad conception of the content of the phrase and the international sources of admiralty and maritime law gave rise to some controversy at the time, but it has not been departed from.<sup>19</sup>

The breadth of the sources of the phrase gave rise to the recognition that there was a general maritime law, with its sources beyond the common law and equity jurisprudence of English courts.<sup>20</sup> In 1828, Marshall CJ said: “Admiralty cases [do not] arise under the constitution or laws of the United States [but] are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise.”<sup>21</sup>

One needs to be careful at this point. However broadly the judges expressed themselves in these cases, later authorities have made clear that this international source of the general maritime law did not make it other than the maritime law **of the United States**.<sup>22</sup> In 1875, the Supreme Court, in *The ‘Lottawanna’*,<sup>23</sup> made clear that the international sources of maritime law, distinct from the terrene common law, informed the development of United States’ maritime law as a distinct branch of municipal law. Bradley J in *The ‘Lottawanna’*<sup>24</sup> referred to the “general maritime law” as the “basis and groundwork” for municipal recognition.<sup>25</sup> The roots, sources and informing

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*maritime states; that jurisdiction, in short, which collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable Consolato del Mare, and still continues in its decisions to regulate the commerce, the intercourse and the warfare of mankind.”*

<sup>19</sup> The Supreme Court, in 1847, in *Waring v Clarke* 46 US 441 (1847) (see also *Morewood v Enequist* 62-64 US 677 at 678 (1859)), expressed the matter in similar terms and, in 1870, in *Insurance Co v Dunham* 78 US 135 (1870), unanimously approved it.

<sup>20</sup> *The ‘Scotia’* 81 US 170 at 187-188 (1872).

<sup>21</sup> *American and Ocean Insurance Co v 356 Bales of Cotton* 26 US 511 at 545-546 (1828).

<sup>22</sup> *The ‘Lottawanna’* 88 US 558 at 573-575 (1875); Holmes J in *The ‘Western Maid’* 257 US 419 at 432 (1922); *Moragne v States Marine Lines Inc* 398 US 375 at 386-388 (1970); to the same effect in England see *The ‘Tojo Maru’* [1972] AC 242 at 290-291; and in Australia see *Blunden v Commonwealth* (2003) 218 CLR 330 at 337-338 [13] and *Elbe Shipping SA v The Ship ‘Global Peace’* [2006] FCA 954 at [51].

<sup>23</sup> 88 US 558 (1875).

<sup>24</sup> 88 US 558 (1875).

<sup>25</sup> At 573 stating

*“... Each state adopts the maritime law, not as a code having any independent or inherent force, proprio vigore, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law. And thus it happens, that, from the general practice of commercial nations in making the same general law the basis and*

considerations of this branch of the law were maritime and international. The law itself was municipal.<sup>26</sup>

Two further opinions of Story J (sitting as a circuit judge) illustrate the separate international and maritime sources of the development of the general maritime law in the United States: *Harden v Gordon*<sup>27</sup> and *Reed v Canfield*.<sup>28</sup>

In both these cases, Story J developed rules of maritime law unconstrained by apparently applicable rules of contract and common law. In *Harden v Gordon*, Story J set aside the articles of a seaman which had purported to restrict his right to maintenance and cure to access to a medicine chest on board the ship. In so doing, Story J recognised the concern for seamen that an Admiralty court will exhibit.<sup>29</sup>

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*groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common, comes to be the common maritime law of the world.*

*This account of the maritime law, if correct, plainly shows that in particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole.*

...

*That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." But by what criterion are we to ascertain the precise limits of the law thus adopted? The Constitution does not define it. It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received in England, or lastly, such modification of both of these as was accepted and recognized as law in this country. Nor does the Constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary. It assumes that the meaning of the phrase "admiralty and maritime jurisdiction" is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of "cases in law and equity," or of "suits at common law," without defining those terms, assuming them to be known and understood."*

<sup>26</sup>- For a more detailed discussion of these matters see Allsop, J "Maritime Law: The nature and importance of its international character" (2010) 84 *Australian Law Journal* 681; and (2010) 34 *Tulane Maritime Law Journal* 555.

<sup>27</sup> 11 F. Cas 480 (1823).

<sup>28</sup> 20 F. Cas 426 (1832).

<sup>29</sup> In dealing with the contractual articles Story J said at 485:

*"Every court should watch with jealousy an encroachment upon the rights of seamen because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily over reached. But courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favour and guardianship. They are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat*

The juridical foundations for Story J's approach were said to be general principles of justice, doctrines of general equity and the customs and usages of the sea. The case and the principles of the maritime law expressed by Story J in it were approved a century later in *Garrett v Moore-McCormack Co.*<sup>30</sup>

In 1832, in *Reed v Canfield*, Story J reached beyond the common law, stating that seafarers were “in some sort co-adventurers upon the voyage” and thus were both entitled and subject to “peculiar rights, privileges, duties and liabilities”. In this case, the shipowner was liable for expenses of a crewman who suffered frostbite in returning to his ship after shore leave until he reached the completion of his cure, as far as ordinary medical expenses were concerned. A century later the Supreme Court in *Farrell v United States*<sup>31</sup> agreed with this analysis. Story J also departed from the common law by rejecting the defence of contributory negligence.

Story J was not alone in this work, which recognised the separate sources and development of the general maritime law. For instance, Chase J in 1865 (sitting as a circuit judge) in *The 'Sea Gull'*<sup>32</sup> refused to recognise the common law rule that saw the end of a cause of action with the death of the plaintiff. The husband of a stewardess on the steamer *Leary* who had been killed in the collision of *Sea Gull* with *Leary* successfully sued *Sea Gull* as defendant.<sup>33</sup>

The present relevance of these cases is not the precise state, or direction of the development, of United States' admiralty and maritime law in the first half of the

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*young heirs, dealing with their expectations, wards with their guardians, and cestuis que trust with the trustees. ... If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction is that the bargain is unjust and unreasonable, that advantage has been taken of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable...*

<sup>30</sup> 317 US 239 (1942).

<sup>31</sup> 336 US 511 (1949).

<sup>32</sup> 21 F.Cas 909 (1865): See *Moragne v States Marine Lines Inc* 398 US 375 at 387-388 (1970) for other cases to the same effect.

<sup>33</sup> The Supreme Court, however, in 1886, in *The 'Harrisburg'* 119 US 199 rejected this particular doctrinal difference between the maritime law and the common law. Though, see now, *Moragne v States Marine Lines Inc* 398 US 375 (1970).

19<sup>th</sup> century, but the recognition, at least, that the sources of the general maritime law in the United States were maritime and international in character, based on enlarged principles of justice combined with the customs and usages of the sea. It is undoubted that this approach continued for much of the 20<sup>th</sup> century.<sup>34</sup> For example, in 1959, in *Kermarec v Compagnie General Transatlantique*<sup>35</sup> the Supreme Court refused to apply the existing common law rules governing an occupier's liability in respect of a gratuitous licensee in deciding upon a claim in respect of an injury to a visitor to a crew member on board the ship *Oregon*. The Court held that the rights and liabilities of the shipowner were to be measured by the standards of the general maritime law freed from inappropriate common law concepts. It held that the distinctions in the law of occupier's liability, such as the different duties in respect of licensees and invitees, were inherited from a land-based culture traceable to a feudal heritage and were foreign to fundamental principles of admiralty and maritime law which were based on traditions of simplicity and clarity.<sup>36</sup> Adopting this approach, the Court held that the shipowner owed a duty to exercise reasonable care for all those on board the vessel for purposes not inimical to the owner's legitimate interests.

*The existence of legislative power over the subject of admiralty and maritime law.*<sup>37</sup>

The express terms of the admiralty and maritime grant in Article III section 2 referred to "jurisdiction". During the American colonial period the word "jurisdiction" was often used to refer to a general authority to govern.<sup>38</sup> The text of Article III and the history of the Constitutional Convention appear to make clear, however, that what was being referred to was judicial authority, and not legislative

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<sup>34</sup> See *The 'T J Hooper'* 60 F 2d 737 (1933: 2<sup>nd</sup> CCA); and *Kermarec v Compagnie General Transatlantique* 358 US 625 (1959). For a discussion of the vicissitudes of the approach to the status or place of maritime law see Brown, J "[Admiralty Judges: Flotsam on the Sea of Maritime Law](#)" (1993) 24 *Journal of Maritime Law and Commerce* 249 *op cit note 3 above*; Haight, C S "Babel Afloat: Some Reflections on Uniformity in Maritime Law" 1996 Nicholas J Healy Lecture in Kimball, JD *The Healy Lectures* (LLP 2003) p 59; and Force, R "Deconstructing Jensen: Admiralty and Federalism in the 21<sup>st</sup> Century" 2000 Nicolas J Healy Lecture in Kimball, JD *The Healy Lectures* (LLP 2003) *op cit* p 99.

<sup>35</sup> 358 US 625 (1959).

<sup>36</sup> *Ibid* at 628-632.

<sup>37</sup> See generally the note "From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century" (1953-1954) 67 *Harvard Law Review* 1214.

<sup>38</sup> Robertson, D W *Admiralty and Federation* (Foundation Press, 1970) p 136.



authority.<sup>39</sup> That said, the full implication of judicial power should be recognised. The conferral of jurisdiction is not a matter of mere procedure. It is the conferral of a species of governmental power to quell controversies. Courts and judges invested with this power have a duty to exercise it if jurisdiction is invoked,<sup>40</sup> and thus they have the responsibility to ascertain and declare the general maritime law.<sup>41</sup> Thus understood, there can be no doubt that there was a Constitutional recognition of a substantive general maritime law ascertained, developed and declared by the federal courts. (The same, with a recognition of the role of State courts at the choice of Parliament, can be said of s 76(iii).)

The early United States cases tended to found Congressional authority over maritime matters on the commerce power and the importance of intercourse between nations and interstate trade.<sup>42</sup> The inherent tension in the use of the commerce clause as the foundation of this power was ultimately resolved by recourse to Article III section 2 as an independent source of authority for Congress to legislate upon admiralty and maritime matters. In 1851, in *The 'Genesee Chief'*,<sup>43</sup> Taney CJ founded the validity of an amendment to the *Judiciary Act* extending federal admiralty jurisdiction to lakes and river waterways on the admiralty and maritime clause in Article III section 2, not on the commerce power. In 1874, in *The 'Lottawanna'*,<sup>44</sup> Bradley J recognised the lack of complete coterminousness of the grant of judicial power in Article III section 2 and the commerce power. In 1889, in *Butler v Boston and Savannah Steamship Co*,<sup>45</sup> Bradley J confirmed the admiralty and maritime grant in Article III section 2 as a

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<sup>39</sup> See Goodman (1961) 5 *Amer J Leg Hist* 326 and [Robertson, D W Admiralty and Federation \(Foundation Press, 1970\) p 136](#)~~Robertson op cit p 136~~.

<sup>40</sup> *The 'St Lawrence'* 66 US 522 at 526 (1862).

<sup>41</sup> *The 'Resolute'* 168 US 437 at 439 (1897).

<sup>42</sup> See *Gibbons v Ogden* 22 US 1; *The 'Daniel Ball'* 77 US 557 at 564 (1870); query whether *Waring v Clarke* 46 US 441 (1847) can be seen as more widely based: cf [Robertson, D W Admiralty and Federation \(Foundation Press, 1970\)](#)~~Robertson op cit~~ pp 142-143; *Moore v American Transportation Co* 65 US 1 at 6 (1861); *Providence & New York Steamship Co v Hill Manufacturing Co* 109 US 578 (1883); *The 'Thomas Jefferson'* 23 US 428 (1825); and see the legislation drafted by Story J to extend federal jurisdiction to lakes and inland navigable waters: 5 Stat 726 (1845). The taxation power was also relevant in respect of some laws.

<sup>43</sup> 53 US 263 (1851).

<sup>44</sup> 88 US 558 at 576-577 (1874).

<sup>45</sup> 130 US 527 (1889).

source of legislative power.<sup>46</sup> He reiterated this, unequivocally, two years later in 1891 in *In re Garnett*.<sup>47</sup>

This approach vindicated the strong views of Story J, expressed extra-judicially in his Constitutional treatise, that the structure of the Constitution implied Congressional legislative power coterminous with the reach of the judicial power.<sup>48</sup> That is, the legislature had power to make laws over matters which were the responsibility of the federal courts to decide, and upon which the federal courts had a responsibility to declare the law.

This coterminous arrangement of the powers of the two branches of government was affirmed in 1917 in *Southern Pacific Co v Jensen*<sup>49</sup> and in 1924 in *Panama Railroad Co v Johnson*.<sup>50</sup> The existence of admiralty and maritime law as a branch of United States' law and its national significance can be seen in the words of Van Devanter J delivering the opinion of the Supreme Court in *Panama Railroad*.<sup>51</sup>

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<sup>46</sup> In dealing with Congressional and Massachusetts legislation concerning limitation of liability he said at 557:

*“As the Constitution extends the judicial power of the United States to ‘all cases of admiralty and maritime jurisdiction,’ and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature and not in the state legislatures.”*

<sup>47</sup> 141 US 1 (1891), saying at 12:

*“It is unnecessary to invoke the power given to Congress to regulate commerce in order to find authority to pass the law in question. The act was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends.”*

<sup>48</sup> Story, J *Commentaries on the Constitution of the United States* (Abridged Edition, Boston 1833) at 584 [821]:

*“The framers of the Constitution adopted two fundamental rules with entire unanimity: First, that a national judiciary ought to possess powers co-extensive with those of the legislative department. Indeed the latter necessarily flowed from the former and was treated, and must always be, as an axiom of political government.”*

<sup>49</sup> 244 US 205 at 215-216 (1917).

<sup>50</sup> 264 US 375 at 385-386 (1924).

<sup>51</sup> *Ibid.* *“As there could be no cases of ‘admiralty and maritime jurisdiction’ in the absence of some maritime law under which they could arise, the provision presupposes the existence in the United States of a law of that character. Such a law or system of law existed in Colonial times and during the Confederation and commonly was applied in the adjudication of admiralty and maritime cases. It embodied the principles of the general maritime law, sometimes called the law of the sea, with modifications and supplements adjusting it to conditions and needs on this side of the Atlantic. The framers of the Constitution were familiar with that system and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject – its substantive as well as its procedural features – under national control because of its intimate relation to navigation and to interstate and foreign commerce. ...”*

It can also be seen in the words of McReynolds J in *Southern Pacific Co v Jensen*.<sup>52</sup>

One important reason for this implication based on Article III section 2 was the need for uniformity and clarity in the dealing with maritime affairs and commerce without the need to discriminate functionally and geographically in respect of what people or vessels were doing. Vessels use the same navigable water whether they are engaged in foreign, interstate or intrastate trade.<sup>53</sup>

Later cases made explicit the role of the “necessary and proper clause” (the equivalent of the incidental power in s 51(xxxix) in the Australian Constitution) in the implication of the legislative authority of Congress over admiralty and maritime law.<sup>54</sup>

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<sup>52</sup> 244 US 205 at 214-215 (1917);

; “Article III § 2, of the Constitution, extends the judicial power of the United States ‘To all cases of admiralty and maritime jurisdiction;’ and Article I, § 8, confers upon the Congress power ‘To make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof.’ Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. *Butler v Boston & Savannah Steamship Co.*, 130 U. S. 527; *In re Garnett*, 141 U. S. 1, 14. And further, that in the absence of some controlling statute the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction. *The Lottawanna*, 21 Wall. 558; *Butler v Boston & Savannah Steamship Co.*, 130 U. S. 527, 557; *Workman v New York City*, 179 U.S. 552.”

-Gilmore, G and Black, C L *The Law of Admiralty* (2<sup>nd</sup> Ed., Foundation Press, 1975) at pp 45-47 describe maritime law as a world-wide and ancient branch of the law comprising the laws, customs and usages in respect of shipping and the sea reflected in judge made law, statutes, codifications, international conventions and public law. It is unnecessary to deal with the more controversial issues in *Jensen*, in particular the relationship between maritime law and the common law and statutes of a state: see Gilmore, G and Black, C L pp 403-406.

<sup>53</sup> As one leading United States text on Constitutional law said at the time (Hare, J I Clark *American Constitutional Law* (Boston, Little, Brown and Co, 1889) at p 109):

“It is the character of the traffic as internal, inter-State or foreign, and not whether it takes place over a road or river, by boat or railway, which must be considered in applying the commercial power; but admiralty jurisdiction has a wider scope, and may be exercised over all boats using the navigable waters of the United States. Vessels use the same waters whether they are engaged in foreign or domestic trade; and as disorder and litigation would result if they were governed by different rules, Congress may make and the admiralty enforce such regulations as are requisite to give certainty to title, maintain order and prevent the collisions which may be as disastrous on a river as at sea. The craft which is plying to-day between places in the same State may to-morrow extend her voyage to another, or proceed to sea; and it is therefore essential that she in common with all others which are or may be engaged in coasting or foreign trade, shall be governed by the same rule.”

<sup>54</sup> *The ‘Thomas Barlum’* 293 US 21 at 42 (1934).

Thus, it is (and was by 1900) clear that Congress has (and had) power to legislate for the subject matter recognised by the admiralty and maritime Constitutional conferral of judicial authority: admiralty and maritime law.<sup>55</sup> This conclusion arose as an incident of or implication from the text and structure of the Constitution aided by the necessary and proper clause.

The limit of Congressional authority brought about by the Constitutional recognition of the existence of the general maritime law was that Congress could not fundamentally alter the boundaries of what was admiralty and maritime law.<sup>56</sup>

### *Whether admiralty and maritime jurisdiction extended inland beyond tidal waters*

The decision of Story J in *De Lovio v Boit* was a clear declaration of independence of United States' jurisprudence from English precedent. One aspect of English law (though not one at issue in *De Lovio v Boit*) was the seaborne limits of admiralty. Two statutes of Richard II in 1390 and 1392<sup>57</sup> that had been the legal foundation of many of the attacks of the common lawyers upon Admiralty contrasted things done within the realm with things done upon the sea (only the latter being the subject of Admiralty jurisdiction), removing Admiralty's jurisdiction over contracts, pleas and quarrels and all other things arising within the bodies of counties. Thus, any contract made within the body of a county (*infra corpus comitatus*) including charterparties, policies of marine insurance and other maritime contracts was held to be outside the jurisdiction of the Admiralty Court. This meant that Admiralty never had jurisdiction over tideless streams. Europe had no such notion as a limit to maritime jurisdiction.<sup>58</sup>

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<sup>55</sup> See *Moragne v States Marine Lines Inc* 398 US 375 (1970); *Romero v International Terminal Operating Co* 358 US 354 at 360-361 (1959).

<sup>56</sup> *Panama RR Co v Johnson* at 386-387. It is unnecessary to discuss this issue and the related question of the relationship between state legislation and the maritime law in the United States. It suffices to say that the role of the High Court as more than a federal court -as the ultimate appellate court in state and federal matters (the keystone of the federal arch)and the existence of one common law of Australia place Australia in a different position to the United States.

<sup>57</sup> 13 Ric. II c.5 and 15 Ric. II c.3.

<sup>58</sup> *Angell Tide Waters* (2<sup>nd</sup> Ed., 1847) p 79; Note in (1953-1954) 67 Harvard Law Review 1214 at 1217 (22)

Surprisingly,<sup>59</sup> in 1825, Story J accepted the limitation on United States admiralty and maritime jurisdiction in *The 'Thomas Jefferson'*<sup>60</sup> in respect of a vessel working above the ebb and flow of the tide.<sup>61</sup> From 1857, however, the tidewater doctrine was swept away in *The 'Genesee Chief'*,<sup>62</sup> *The 'Magnolia'*<sup>63</sup> and *The 'Eagle'*,<sup>64</sup> after having been strained to the limit in earlier cases.<sup>65</sup>

The importance of this development of United States' admiralty and maritime law is the recognition of the capacity of that law to develop away from the stunting strictures of English Admiralty jurisdiction under the effects of the common law courts when the demands of national commercial and maritime development called for it. The notion that a national maritime jurisdiction in Continental United States could ignore the great maritime arteries of the Union and the large inland seas of the Great Lakes ultimately had to be rejected. The manifest national interests of the Union simply demanded it.

### *Concluding remarks on Article III section 2*

Underlying the approach to the United States' admiralty and maritime power were a sense of national independence and a clear and confident recognition of the subject matter as nationally important. The experience of a weak central government during the period of the Confederation left its scars on those who framed the American federal compact.<sup>66</sup> There was also a recognised need for

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<sup>59</sup> In particular, given the views expressed by lower courts before 1825 emphasising the need for national authority over the great navigable arteries of the Union: see the note in (1953-1954) 67 *Harvard Law Review* 1214 at 1218.

<sup>60</sup> 23 US 428 (1825).

<sup>61</sup> Considerable speculation has occurred to explain what was seen as an atypical approach of Story J – see [Robertson, D W Admiralty and Federation \(Foundation Press, 1970\) Robertson \*op cit\* pp 105-109](#); and the note in (1953-1954) 67 *Harvard Law Review* 1214 at 1215-1219. An understanding of the political pressures on the Court at the time perhaps explain it.

<sup>62</sup> 53 US 443 (1851).

<sup>63</sup> 61 US 296 (1857).

<sup>64</sup> 75 US 15 (1868).

<sup>65</sup> See *Peyroux v Howard* 32 US 324 (1833); and *Waring v Clarke* 46 US 441 (1847).

<sup>66</sup> Not for nothing would Hamilton say:

*“The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes... These so generally depend on the laws of nations and so commonly affect the rights of foreigners that they fall within the considerations which are relative to the public peace. The most important part of them are, by the present Confederation, submitted to federal jurisdiction.”*

commercial simplicity in the formation of the United States Constitution.<sup>67</sup> With these considerations in mind, the Constitution was interpreted accordingly.

### **Section 76(iii) of the Australian Constitution**

In Australia, s 76(iii) has not received the detailed attention that the equivalent part of the Article III section 2 did in the 19<sup>th</sup> Century. To a significant degree, at least in the first half of the 20<sup>th</sup> century, the approach to the Constitutional provision and the subject of maritime affairs generally was governed by a recognition of Australia's subordinate colonial position and of the Constitution being (at the time of its creation and for many years thereafter) a federal compact for a group of colonies. Time, political development and Australian nationhood have moved on. To some extent, that development has been recognised in Australian law.

#### *The meaning of the phrase "Admiralty and maritime jurisdiction"*

The first aspect discussed above in the United States context, the scope of the admiralty grant, has now been unequivocally settled by the High Court in terms similar to those expressed by Story J in *De Lovio v Boit* and by the specific recognition of his great judgment. In *Owners of 'Shin Kobe Maru' v Empire Shipping Co Inc*<sup>68</sup> the High Court, in a unanimous joint judgment, made clear the broad Constitutional scope of s 76(iii). It was not limited by English and colonial history; it was not tied to the state of Admiralty jurisdiction in England or the local colonies as at 1900 or 1890. Rather, the Court said that s 76(iii)<sup>69</sup>:

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<sup>67</sup> Small and Jayson (Eds) *The Constitution of the United States of America* (1964) (referred to in [Zines, L Cowen and Zines's Federal Jurisdiction in Australia](#) (3<sup>rd</sup> ed, 2002) [Cowen and Zine's Federal Jurisdiction in Australia](#) (3<sup>rd</sup> ed) at 72) said the following:

*"Since one of the objectives of the Philadelphia Convention was the promotion of commerce through removal of obstacles occasioned by the diverse local rules of the States, it was only logical that it should contribute to the development of a uniform body of maritime law by establishing a system of federal courts and granting to these tribunals jurisdiction over Admiralty and maritime cases."*

<sup>68</sup> (1994) 181 CLR 404.

<sup>69</sup> 181 CLR 404 at 424.

*“extends to matters of the kind generally accepted by maritime nations as falling within a special jurisdiction, sometimes called Admiralty and sometimes called maritime jurisdiction, concerned with the resolution of controversies relating to marine commerce and navigation.”*

This view swept away the doubts and hesitations about the scope or reach of s 76(iii) that had been expressed by Isaacs J in *John Sharp and Sons Ltd v Ship ‘Katherine Mackall’*<sup>70</sup> and passed over the caution (if I may put it that way without any intended disrespect) of Dixon J in *McIlwraith McEachern Ltd v Shell Co of Australia Limited*.<sup>71</sup> It vindicated the submission of Sir Owen Dixon, when he had been senior counsel for the Commonwealth, in *The ‘Katherine Mackall’* at 424, the views of Gibbs J in *China Ocean Shipping Co v South Australia*,<sup>72</sup> the views of Zelling J in the 1981 FS Dethridge Memorial Address “Of Admiralty and Maritime Jurisdiction”<sup>73</sup> and the views of the Australian Law Reform Commission.<sup>74</sup> This had been the view of the Full Court of the Federal Court in the decision under appeal in *The ‘Shin Kobe Maru’*<sup>75</sup> and of Gummow J at first instance in the same case.<sup>76</sup>

It is important to stress that the judgments at all levels in *The ‘Shin Kobe Maru’* came to the width of s 76(iii) by a process of the liberal construction of an Australian Constitutional provision. It was unnecessary for the High Court to deal with the issue of the international sources of the law or with some contestable decisions about the limitations of Article III section 2. Nevertheless, all the judgments in the case, in particular that of Gummow J at first instance, display a recognition of the contextual relevance of the nature and scope of the grant in Article III section 2.<sup>77</sup>

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<sup>70</sup> (1924) 34 CLR 420 at 427-428.

<sup>71</sup> (1945) 70 CLR 175 at 208-209.

<sup>72</sup> (1979) 145 CLR 172 at 204.

<sup>73</sup> *FS Dethridge Memorial Addresses 1977-1988* (Maritime Law Association of Australia and New Zealand, 1989) also found in (1982) 56 ALJ 101.

<sup>74</sup> [At \[70\] of the ALRC, \*Civil Admiralty Jurisdiction\* \(Report 33, 1986\) \[70\]ALRC Report.](#)

<sup>75</sup> (1992) 38 FCR 227 at 235 and 245-247.

<sup>76</sup> (1991) 32 FCR 78 at 100-111.

<sup>77</sup> The scope of s 76(iii) is not crucial in many cases. The Law Reform Commission took the view that the simplification of the administration of Admiralty jurisdiction suggested the benefits of a closed defined list of maritime claims, without a catch-all provision using the Constitutional reach of s 76(iii) as the boundary of the conferral and investiture by the Act. However, it can be relevant in the operation of the associated jurisdiction of the court in the manner recently displayed in *Elbe Shipping SA v The Ship ‘Global Peace’* [2006] FCA 954. If there is a claim in the writ that falls within the lists in s4(2) and (3) of the *Admiralty*

There has been less occasion for the High Court to deal with the issue of the international sources of the maritime law of Australia. Admiralty and maritime jurisdiction, to the extent that Parliament has conferred or invested it, is federal jurisdiction. Therefore, ss 79 and 80 of the *Judiciary Act 1903* (Cth) are applicable. These important sections provide for the operative law in any dispute in federal jurisdiction.<sup>78</sup> Central to their operation is the (one) common law of Australia. The “common law” in this context is the general law. The unity of the general law in Australia is ensured by a national final court of appeal in all jurisdictions: federal, State and Territory.

In *Blunden v Commonwealth*<sup>79</sup> Gleeson CJ, Gummow J, Hayne J and Heydon J discussed the place of maritime law as part of the law of Australia. They did so by adopting and approving what Lord Diplock had said in *The ‘Tojo Maru’*.<sup>80</sup> This involved a rejection of any notion of a free-standing international maritime law affecting or creating municipal rights and obligations, as an external body of law, and of its own force. *Blunden* is not, however, a rejection, but on the contrary, a

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*Act*, that will give the court jurisdiction to hear an Admiralty or maritime matter not conferred or invested, but which could be, given the scope of s 76(iii).

<sup>78</sup> s 79 *State or Territory laws to govern where applicable*

*-The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.*

s 80 *Common law to govern*

*So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, **the common law in Australia** as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.*

—————[emphasis added]

<sup>79</sup> (2003) 218 CLR 330 at 337-338 [13].

<sup>80</sup> [1972] AC 242 at 290-291.

*“Outside the special field of ‘prize’ in times of hostilities there is no ‘maritime law of the world,’ as distinct from the internal municipal laws of its constituent sovereign states, that is capable of giving rise to rights or liabilities enforceable in English courts. Because of the nature of its subject matter and its historic derivation from sources common to many maritime nations, the internal municipal laws of different states relating to what happens on the seas may show greater similarity to one another than is to be found in laws relating to what happens upon land. But the fact that the consequences of applying to the same facts the internal municipal laws of different sovereign states would be to give rise to similar legal rights and liabilities should not mislead us into supposing that those rights or liabilities are derived from a ‘maritime law of the world’ and not from the internal municipal law of a particular sovereign state.”*



recognition, of the breadth and international character of the sources of maritime law. That this is so can be seen from the passages from *Moragne v States Marine Lines Inc*<sup>81</sup> cited by their Honours.<sup>82</sup>

In this context, and as an aside, it is beyond this lecture to discuss the debate on the question of a *lex mercatoria*, and, as part of that, a *lex maritima*, in particular in the context of international arbitration and the possibility of the development of a general maritime law as a supra-national law rather than as part of a body of national municipal law.<sup>83</sup>

The uncontroversial recognition of the separateness of the sources of maritime law can be seen in a number of areas. The law concerning the nature and creation of maritime liens and of the priorities between them is quite different to equitable and common law notions on cognate topics. The reasons for the differences arise from the different informing considerations of maritime affairs. The roots of salvage, general average and maintenance and cure are civilian.<sup>84</sup>

The question is not just historical. The need to have regard to the separate character of maritime law and its international sources arises not infrequently. The notion of a ship as a mere chattel can lead to mechanical application of land-based rules to that premise that are quite inappropriate. Whilst a ship is

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<sup>81</sup> 398 US 375 at 368-388 (1970). See also *The 'Lottawanna'* 88 US 558 at 573-575 (1875).

<sup>82</sup> *Moragne v States Marine Lines Inc* 398 US 375 (1970). *Moragne* at 386-388 which included the following statement by Harlan J delivering the opinion of the Court 386-387:

*"Maritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law; and, from its focus on a particular subject matter, it developed general principles unknown to the common law. These principles included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages. ... These factors suggest that there might have been no anomaly in adoption of a different rule to govern maritime relations, and that the common-law rule, criticized as unjust in its own domain, might wisely have been rejected as incompatible with the law of the sea."*

[footnotes omitted]

For a somewhat more pessimistic view as to the effect of Lord Diplock's views in *The 'Tojo Maru'*, see Zelling, H "Constitutional Problems of Admiralty Jurisdiction" 58 *ALJ* 8 at 12.

<sup>83</sup> For a helpful introduction to these questions, see Tetley, W "The General Law Maritime" (1994) 20 *Syracuse J Int'l L & Comm* 105 at 134.

<sup>84</sup> See Tetley, W "Maritime Law as a Mixed Legal System" (1995-1999) 23 *Tulane Law Rev* 317. For a helpful and illuminating discussion of the theoretical and practical significance of the broad international sources of maritime law, see Tetley, W *International Maritime and Admiralty Law* (Editions Yvon Blais 2002).

undoubtedly a chattel, it is, as Turner LJ said in *McLellan v Gumm*,<sup>85</sup> unlike any ordinary personal chattel. It is often a working commercial enterprise, the home and workplace to the ship's complement, engaging in activities that have inherent danger to those on board and to her physical surroundings, flying the flag of one country, plying the high seas and entering and leaving numerous national territorial seas.

An appreciation of these types of considerations assists in the development of the maritime law as a branch of the general law. For instance, the question of the proper law governing assignment of property in ships is surprisingly lacking in authority. Treating the ship as a chattel (like a necklace, a ring or a motor vehicle) one is directed by orthodox principle to the *lex situs* of the chattel. This can bring about absurd results as a principle translated into maritime law. Many countries have legislation dealing with registration of ships. Some provide for title by registration. Some provide for registration of title otherwise gained. All, however, direct themselves only to the ships that are, or should be, registered on that country's register. The flag of a ship is central to the notion of the nationality of a ship (a notion not without its complexity<sup>86</sup>). Why should the relevant law governing the sale of a Greek ship be governed by the law of Japan merely because she is lying off Yokohama? For the reasons given by the Full Court of the Federal Court in *The 'Cape Moreton'*,<sup>87</sup> the maritime considerations attending the registration, flagging and working of ships militate in favour of the law of the flag as the law governing the assignment of property in, and title to, the ship (subject to contrary local statute and public policy), not merely when the ship is on the high seas, but also when she is located in some national jurisdiction different from the flag state.<sup>88</sup>

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<sup>85</sup> (1866-1867) LR 2 Ch App 290.

<sup>86</sup> Meyers, H *The Nationality of Ships* (Martinus Nijhoff, The Hague 1967).

<sup>87</sup> (2005) 143 FCR 43 at 79-80.

<sup>88</sup> For a discussion of the case and related cases, see Myburgh, P "Arresting the Right Ship: Procedural Theory, the *In Personam* Link and Conflict of Laws" in Davies, M (Ed) *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honour of Robert Force* (Kluwer, 2005) at 283. As to the relationship of the local law, the law of the flag state and international law, see *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397.

Another example is the weight to be given to a master's view about the conduct of a ship when a passenger or cargo owner seeks an order requiring the master to do something about the affairs of the ship. The overriding of the master's judgment would be a serious matter.<sup>89</sup> The master is in charge of a ship, not a bus.

Thus, when the courts come to their task of ascertaining and declaring the law under the authority given by the grant of power in s 76(iii), it should be recognised that they are dealing with a branch of the general law (or for the purposes of s 80 of the *Judiciary Act*, the common law in and of Australia) which concerns itself with maritime affairs and which has its roots in the maritime affairs and commerce of nations. This separateness has always had a strong tradition in the United States.

*The existence of legislative power over the subject of Admiralty and maritime law*

The next issue discussed above in the United States context is whether the Commonwealth Parliament has authority to legislate for substantive Admiralty and maritime law.

In his work on the Constitution published in 1910,<sup>90</sup> Sir William Harrison Moore, after describing the implication of Congressional power found by the United States Supreme Court in the admiralty and maritime jurisdiction grant, expressed the view that a similar implication would be drawn in Australia.<sup>91</sup>

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<sup>89</sup> As to the authority of the master see *Halsbury's Laws of Australia*, Vol 17, [270-1165]; *Boyce v Bayliffe* (1807) 1 Camp 58; *Lima* (1837) 166 ER 434; *King v Franklin* (1858) 1 F & F 360; *Aldworth v Stewart* [1866] 4 F & F 957; *Hook v Cunard Steam Ship Co Ltd* [1953] 1 All ER 1021; and; *Bucknill, T T and Langley, J*; *Abbott's Law of Merchant Ships and Seaman* (13<sup>th</sup>-ed, 1892) at 211.

<sup>90</sup> [Sir William Harrison Moore](#) *The Constitution of the Commonwealth of Australia* (Melbourne, Maxwell, 1910).

<sup>91</sup> *The Constitution of Australia Ibid* at 562:

“[I]t is not likely that the Commonwealth power in respect to the modes and instruments of navigation will be more restricted than the power of Congress. The great practical difficulty of drawing a geographical line in matters of navigation and shipping, together with the importance of establishing a single authority thereon, would be strong reason for concluding that the whole matter belongs to the Federal Legislature.”

[footnotes omitted]

Shortly after the publication of Professor Harrison Moore's work, the High Court was given the opportunity of dealing with the question.

In *Owners of SS Kalibia v Wilson*<sup>92</sup> there was a challenge to the ability of the Commonwealth Parliament to provide for seamen's compensation beyond a foundation based on interstate and overseas trade and commerce. The Commonwealth sought to justify the legislation<sup>93</sup> on two bases. First, s 98 of the Constitution<sup>94</sup> was said to widen s 51(i).<sup>95</sup> Secondly, the Supreme Court's view of the role of Article III section 2 and the implication to be drawn from it and the Constitution as a whole were said to be directly applicable, citing Professor Harrison Moore and authority from the United States.

Both arguments appeared to have their merits. In all earlier drafts of the Constitution before Melbourne in 1898, the phrase "shipping and navigation" had appeared as a placitum of s 51. Its removal by the drafting committee in Melbourne and placement in s 98 and the ascribing of a relationship with s 51(i) was not accompanied in the debates by any recognition of a change of effect. The relationship between s 98 and s 51(i) could easily be seen as accommodated in a manner reflected by how the reach of the admiralty and maritime grant in Article III section 2 had developed by the late 19<sup>th</sup> century. Though the commerce power had been replaced by the admiralty grant as the source of power for admiralty and maritime legislation, a residual relationship between the two can be seen in the enunciation of the extent of the admiralty grant. The great modern scholars, Gilmore and Black, have described the reach of the admiralty grant (leaving aside the non-tidal issue) as follows:<sup>96</sup>

*"... [I]t extends to all waters,... which are in fact navigable in interstate or foreign water commerce, whether or not the particular body of water is*

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<sup>92</sup> (1910) 11 CLR 689.

<sup>93</sup> *Seamen's Compensation Act 1909* (Cth).

<sup>94</sup> "The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State."

<sup>95</sup> "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- (i) - trade and commerce with other countries, and among the States;"

<sup>96</sup> Gilmore, G and Black, C L *The Law of Admiralty* (2<sup>nd</sup> ed, Foundation Press, 1975<sup>2nd Ed 1975</sup>) pp 31-32; and see *The 'Daniel Ball'* 77 US 557 (1870); *Ex parte Boyer* 109 US 629 (1884); and *The 'Robert W Parsons'* 191 US 17 (1903).

*wholly within a state and whether or not the occurrence or transaction that is the subject matter of the suit is confined to one state.”*

One can see in this expression of the matter the residual role of the commerce power in the identification of the **water** as capable of carrying interstate or overseas sea trade, not the **ship** engaged in such trade. This was the accepted United States approach by 1900 to the residual relationship between the commerce power and the admiralty and maritime grant. The same could be easily accommodated in the relationship between ss 98 and 51(i).

Likewise, the argument based on s 76(iii) had strong and clear Supreme Court authority, (to which I have referred) for the use of which there was a clear foundation. Counsel for the Commonwealth began his argument with a reference to *D’Emden v Pedder*<sup>97</sup> in which Griffith CJ, in delivering the judgment of the Court had said:

*“...We think that, sitting here, we are entitled to assume - what, after all, is a fact of public notoriety - that some, if not all, of the framers of the Constitution were familiar, not only with the Constitution of the United States, but with that of the Canadian Dominion and those of the British colonies. **When, therefore, under these circumstances, we find embodied in the Constitution provisions undistinguishable in substance, though varied in form, from provisions of the Constitution of the United States which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation.**”*

[emphasis added]

A good start, one would have thought.

Both arguments were, however, rejected. The second (that favoured by the eminent Australian Constitution Scholar of the day, Professor Harrison Moore) was rejected by Griffith CJ as “untenable” without further discussion. The other justices were slightly less dismissive, but almost as unilluminating. Importantly, however, the reasoning of both Barton J and Isaacs J can be seen to be founded on Australia’s subordinate colonial status, and its lack of independent sovereignty.

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<sup>97</sup> (1904) 1 CLR 91 at 113.

Quite simply, the over-riding power for shipping, navigation and maritime law was Imperial. Embedded within the judgments was a premise of the vital importance of the subject to the Empire and Imperial power. As such, that power was, therefore, for the Imperial Parliament, not the Commonwealth Parliament.

The issue was revisited in 1921 in *Newcastle & Hunter River Steamship Co v Attorney-General (Cth)*<sup>98</sup> without any different result. In *R v Turner; Ex parte Marine Board of Hobart*,<sup>99</sup> Higgins J noted that the views of Griffiths CJ, Barton J and Isaacs J on the reach of s 76(iii) in *The 'Kalibia'* were *obiter*.

The legacy of *The 'Kalibia'* is the view that the Commonwealth Parliament had power to deal with the judicial jurisdiction of admiralty and maritime law (“its interpretation and enforcement”) but that it did not have power to alter admiralty and maritime law, other than by reliance on other heads of power in s 51, most notably trade and commerce and external affairs.<sup>100</sup>

As I said earlier, the grant in s 76(iii) is not merely procedural. It authorises courts and judges in the exercise of the judicial power of the Commonwealth to ascertain and declare the Admiralty and maritime law of Australia as part of the common law of Australia. Section 76(iii) recognises implicitly and directly the existence of substantive law of the same character. The question is, in such a vital sphere of the nation’s affairs, whether the text and structure of the Constitution is to be continued to be construed as denying to the Commonwealth Parliament the ability to legislate on the substantive branch of the common law of Australia which the Constitution, in terms, contemplates may be administered by federal judges, exclusively, if the Parliament so desires.

In *The 'Shin Kobe Maru'* Gummow J raised doubts about the continuing legitimacy of *The 'Kalibia'*.<sup>101</sup>

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<sup>98</sup> (1921) 29 CLR 357.

<sup>99</sup> (1927) 39 CLR 411 at 447-448.

<sup>100</sup> However, as Zelling pointed out in the 1981 Dethridge Memorial Address ((1982) 56 ALJ 101 at 106) one can see Dixon J in *Nagrind v The Ship 'Regis'* (1939) 61 CLR 688 at 696 linking s 76(iii) and s 51(xxxix) in a context of supporting a law of the Parliament about substantive law.

<sup>101</sup> He said in (1991) 32 FCR 78 at 86-87 the following:

It is not appropriate that I express a concluded view on this issue. *The 'Kalibia'* is High Court authority. Whether or not this aspect of the decision was *obiter*, it is a view that has, to a degree, shaped the approach of the legislature to maritime legislation. However, it is neither controversial nor inappropriate to identify the following considerations attending the approach to the construction and interpretation of the Constitution that might lead to the arguments rejected in *The 'Kalibia'* being viewed in a different light.

Australia is a fully independent nation state. An implication of a limitation on Commonwealth authority on a subject of vital national interest by reference to Australia's past subordinate colonial status is now not appropriate.<sup>102</sup> The Constitution is a document for a living organic political compact. The "changeable necessities" referred to by Alfred Deakin in his second reading speech on the Judiciary Bill in 1902<sup>103</sup> include the march of domestic and world affairs and the

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*"It therefore is apparent from a reading of s 6 of the Act that, putting to one side the effect of s 34, the Parliament has respected the view of three members of the High Court in Owners of the SS 'Kalibia' v Wilson (1910) 11 CLR 689, per Griffith CJ (at 699), per Barton J (at 703-704), per Isaacs J (at 715). This was that s 76(iii) of the Constitution does not imply a power in the Parliament to legislate substantively as to Admiralty and maritime law generally. However, it may be observed that Barton J rested his decision on the ground that, unlike the United States, Australia was not then a "separated nation of independent sovereignty in its relation to the United Kingdom" and that Griffith CJ merely said the contrary argument was "quite untenable". That Barton J's reasoning no longer represented the modern constitutional position was made apparent, even before the coming of the Australia Act 1986 (Cth), by the decision in Kirmani v Captain Cook Cruises Pty Ltd (No 1) (1985) 159 CLR 351. Further, in R v Turner; Ex parte Marine Board of Hobart (1927) 39 CLR 411 at 447-448, Higgins J treated as having been expressed obiter the views of Griffith CJ, Barton J and Isaacs J that s 76(iii) did not authorise the Parliament to make laws over a greater area of waters than it could make by virtue of the commerce power".*

<sup>102</sup> *Kirmani v Captain Cook Cruise Pty Ltd (No 1)* (1985) 159 CLR 351 at 379.

<sup>103</sup> Alfred Deakin:

*"...the nation lives, grows, and expands. Its circumstances change, its needs alter, and its problems present themselves with new faces. The organ of the national life which preserving the union is yet able from time to time to transfuse into it the fresh blood of the living present, is the Judiciary ... It is as one of the organs of Government which enables the Constitution to grow and to be adapted to the changeable necessities and circumstances of generation after generation that the High Court operates. Amendments achieve direct and sweeping changes, but the court moves by gradual, often indirect, cautious, well considered steps, that enable the past to join the future, without undue collision and strife in the present."*

Conroy:

*"But we cannot read into the Constitution something which is not there."*

Alfred Deakin:

*"Perfectly true. Yet if he takes the doctrine of implied powers as developed by the Supreme Court of the United States, I will undertake to say that the ablest of its earliest lawyers - even Hamilton or Madison - could not have discovered the faintest evidence of the existence of a power*

emergence of Australia as a nation state. This emergence of Australia as a nation state has led the High Court to recognise the concept of nationhood certainly as a factor in interpreting provisions of the Constitution, and even as an independent source of power.<sup>104</sup>

Also, the extent of utilisation of the incidental power (express and implied) is more fully developed now than it was in 1910. Notions of “imperative necessity” used by Barton J in *The ‘Kalibia’* are unlikely to be determinative today.<sup>105</sup> It is to be noted that the express recognition of the role of the “necessary and proper clause” (the United States equivalent of the incidental power) did not find its way clearly into the relevant American jurisprudence until after 1910.

Also, in other contexts, the High Court has clearly found the distinction between procedure and substance elusive and unhelpful.<sup>106</sup>

## Conclusion

Whether or not Australian Constitutional law will change course from *The ‘Kalibia’* remains to be seen.

One modern Constitutional consideration which may militate against such an occurrence was the off-shore Constitutional Settlement of 1979 which saw the Commonwealth give away the unity of the geographic and political control that it had won in the High Court<sup>107</sup> over the water and seabed from the low water mark.

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*which now authorises many of the greatest operations of its government, and which has been of incalculable advantage to the United States. Why? Because the law, when in the hands of men like Marshall or those trained in his school, or of the great jurists of the mother country, becomes no longer a dead weight. Its script is read with the full intelligence of the time, and interpreted in accordance with the needs of time. That task, of course, can be undertaken only by men of profound ability and long training. It is to secure such men that we desire the establishment of a High Court in Australia.”*

<sup>104</sup> See generally Zines, L *The High Court and the Constitution* (4<sup>th</sup> ed, 1977) at 297 ff; *Victoria v Commonwealth* (1975) 134 CLR 338; *Davis v Commonwealth* (1988) 166 CLR 79; and *NSW v Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337.

<sup>105</sup> See generally *Cunliffe v Commonwealth* (1993) 182 CLR 272; and *Davis v Commonwealth* (1988) 166 CLR 79.

<sup>106</sup> *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 542-544 [97]-[100].

<sup>107</sup> *New South Wales v Commonwealth (Seas and Submerged Lands Act Case)* (1975) 135 CLR 337; as to the Off-Shore Constitutional Settlement, see M White *Australian Off-Shore Laws* (Federation Press, 2009).



If that change is ever to occur, the 19<sup>th</sup> century United States' jurisprudence will be at its foundation.

# AUSTRALIAN INSURANCE LAW ASSOCIATION

20 July 2011

## Causation, Perils of the Seas and Inherent Vice in Marine Insurance

Justice James Allsop<sup>1</sup>

### Introduction

- 1 The above is a broad topic. I do not propose to deal with all issues concerning these matters. I wish to focus on two issues: first, the nature of the causal question in marine insurance, in the light of academic debate, statutory developments and judicial approach to the questions of causation in non-maritime contexts; and, secondly, a discussion of causation in the *Marine Insurance Act 1909 (Cth)*<sup>2</sup> and the relationship between it and perils of the seas, unseaworthiness and inherent vice, concluding with a discussion of the recent United Kingdom Supreme Court decision in *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The 'Cendor MOPU')* [2011] UKSC 5.
- 2 The conceptual and legal difficulties attending the notion of causation in the law are well-known. Dean Roscoe Pound once said that any systematic exposition of causation could be described as “unscrewing the inscrutable”.<sup>3</sup> It should also be stated at the outset that causation is but one of the considerations that takes its place in the process of attribution of legal responsibility for a variety of purposes. Causation (implying a scientific factual enquiry) can be seen as different from responsibility (implying a legal and evaluative enquiry). In tort, for instance, considerations beyond the relevant factual connection between act or

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<sup>1</sup> President, New South Wales Court of Appeal.

<sup>2</sup> Copied from the *Marine Insurance Act 1906 (UK)*.

<sup>3</sup> Roscoe Pound, “First Harry Schulman Lecture on Torts at Yale Law School” (1957-1958) 67 *Yale Law Journal* 1.

omission and damage including the scope of duty of care, foreseeability and remoteness, become relevant to legal responsibility. In a maritime context, causation operates against the backdrop of the *Marine Insurance Act* and well-known standard form policies and clauses.<sup>4</sup> *Global Process Systems* brings into focus the effect of the statutory framework on the operation of causation for the purposes of marine insurance.

## Recent academic and judicial writing on causation

3 Without seeking to deal with them, even at a superficial level,<sup>5</sup> it can be said that significant analytical and theoretical debate has taken place since the middle of the 20<sup>th</sup> century about the nature of, and legal approach to, causation. The works of Professors Hart and Honoré,<sup>6</sup> Wright<sup>7</sup> and Stapleton<sup>8</sup> have explored the linguistic and legal elements of the notion. Important in all these discussions is the place of separate considerations of the “but for” or *sine qua non* factual analysis, and of the moral and policy

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<sup>4</sup> Such as the Institute Clauses.

<sup>5</sup> See generally James Allsop “Causation in Commercial Law” Torts in Commercial Law Conference, Sydney 17 December 2010, Supreme Court Webpage:  
<[http://infolink/lawlink/supreme\\_court/ll\\_sc.nsf/vwFiles/allso171210.pdf/\\$file/allso171210.pdf](http://infolink/lawlink/supreme_court/ll_sc.nsf/vwFiles/allso171210.pdf/$file/allso171210.pdf)>.

<sup>6</sup> HLA Hart and AM Honoré, *Causation in the Law* (1<sup>st</sup> ed, 1959; 2<sup>nd</sup> ed, 1985, Oxford, Clarendon).

<sup>7</sup> Richard W Wright, “Causation in Tort Law” (1985) 73 *California Law Review* 1735; Richard W Wright, “Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis” (1985) 14 *Journal of Legal Studies* 435; Richard W Wright, “The Efficiency Theory of Causation and Responsibility: Unscientific Formalism and False Semantics” (1987) 63 *Chicago-Kent Law Review* 553; Richard W Wright, “Causation, Responsibility, Risk, Probability, Naked Statistics and Proof: Pruning the Bramble Bush by Clarifying Concepts” (1987–1988) 73 *Iowa Law Review* 1001; Richard W Wright “Once More into the Bramble Bush: Duty, Causal Contribution and the Extent of Legal Responsibility” (2001) 53 *Vanderbilt Law Review* 1071. For critical review of Wright’s causation analysis, in particular the necessary element in a sufficient set of conditions (“NESS”) test see Richard Fumerton and Ken Kress, “Causation and the Law: Preemption, Lawful Sufficiency, and Casual Sufficiency” (2001) 64 *Law and Contemporary Problems* 83.

<sup>8</sup> Jane Stapleton, “Law, Causation and Common Sense” 8 *Oxford Journal of Legal Studies* 111; Jane Stapleton, “Duty of Care and Economic Loss: A Wider Agenda” (1991) 107 *Law Quarterly Review* 249; Jane Stapleton, “Negligent Valuers and Falls in the Property Market” (1997) 113 *Law Quarterly Review* 1; Jane Stapleton, “The Normal Expectancies Measure in Tort Damages” (1997) 113 *Law Quarterly Review* 257; Jane Stapleton, “Risk Taking by Commercial Lenders” (1999) 115 *Law Quarterly Review* 527; Jane Stapleton, “Perspectives on Causation” in Jeremy Horder (ed), *Oxford Essays in Jurisprudence* (4<sup>th</sup> series, 2000) 61; Jane Stapleton, “Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences” (2001) 54 *Vanderbilt Law Review* 941; Jane Stapleton, “Unpacking Causation” in Peter Cane and John Gardner (Eds), *Relating to Responsibility: Essays for Tony Honoré on his Eightieth Birthday* (2001) 145; Jane Stapleton, “Cause in Fact and the Scope of Liability for Consequences” (2003) 119 *Law Quarterly Review* 388; Jane Stapleton, “Loss of the Chance of Cure from Cancer” (2005) 68 *Modern Law Review* 996; Jane Stapleton, “The Two Explosive Proof-of-Causation Doctrines Central to Asbestos Claims” (2008–2009) 74 *Brooklyn Law Review* 1011; Jane Stapleton, “Factual Causation and Asbestos Cancers” (2010) 126 *Law Quarterly Review* 351.

questions involved in the conclusions of both factual causation and legal responsibility. Much of the modern writing (in particular that of Professors Richard Wright and Jane Stapleton) seeks to separate and distinguish these aspects in order to understand more clearly what is involved in the ultimate conclusion of a causal relationship, and legal responsibility. Some of the earlier writing (in particular Hart and Honoré), whilst recognising the various strands or elements at work, infuses everyday notions of commonsense into the question of conclusions about causation.

## Recent legislative changes in a non-maritime context

- 4 These modern writings have had significant influence. The State and Territory legislation embodying “tort law reform”<sup>9</sup> after the Commonwealth enquiry under the leadership of Justice David Ipp<sup>10</sup> was influenced directly by the views of Professor Stapleton, expressly acknowledged in the Ipp Report.<sup>11</sup>
- 5 Division 3 of the *Civil Liability Act 2002* (NSW) contains two important provisions about causation: ss 5D and 5E, in the following terms:

### 5D General principles

- (1) A determination that negligence caused particular harm comprises the following elements:
  - (a) that the negligence was a necessary condition of the occurrence of the harm (factual causation), and
  - (b) that it is appropriate for the scope of the negligent person’s liability to extend to the harm so caused (scope of liability).
- (2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation,

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<sup>9</sup> Exemplified for present purposes by the *Civil Liability Act 2002* (NSW).

<sup>10</sup> *Review of the Law of Negligence – Final Report*, September 2002.

<sup>11</sup> *Review of the Law of Negligence – Final Report*, September 2002 at 109, fn 6.

the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

- (3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:
  - (a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and
  - (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.
- (4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

#### **5E Onus of proof**

In determining liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

6 Section 5D provides for separate and distinct statutory enquiries. The pre-existing common law embodied in the influential decision of *March v E and MH Stramare Pty Ltd*,<sup>12</sup> whilst recognising the at times sophisticated elements making up the enquiry, including the but for test and question of policy, emphasised the critical place of the operation of commonsense in coming to a conclusion of fact. In reaching this conclusion, Mason CJ was influenced by cases which included marine insurance cases, in particular *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd*.<sup>13</sup>

7 One important aspect of recent judicial statements on causation has been the emphasis upon framing the causal question by reference to the correct rule of legal responsibility. Lord Hoffmann in *Environment Agency v*

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<sup>12</sup> [1991] HCA 12; 171 CLR 506, in particular Mason CJ, with whom Toohey J and Gaudron J agreed.

<sup>13</sup> [1918] AC 350.

*Empress Car Co (Abertillery) Ltd*<sup>14</sup> made the point that commonsense approaches gave different answers to the same problem depending upon the question asked, the purpose of the question and the relevant legal rule of responsibility. Some justices of the High Court have since emphasised this in exploring the, at times, different approaches to causation in different fields.<sup>15</sup>

## Causation in marine insurance

8 What of causation in marine insurance? There is a framework of a codifying statute. The *Marine Insurance Act 1906* (UK) was the last of the great codifications of Sir Mackenzie Dalzell Chalmers.<sup>16</sup> It was adopted around the Commonwealth.<sup>17</sup> It remains a model upon which modern codes are drafted.<sup>18</sup> The language of the Act, in terms of the precise expressions used to establish causation, is necessarily the reference point for any conclusion of causation in the attribution of legal responsibility to the insurer. Section 55(1) of the UK Act [s 61(1) of the *Marine Insurance Act 1909* (Cth)<sup>19</sup>] provides that subject to the provisions of the Act and the terms of the policy, the insurer is only liable for a loss “proximately caused by a peril insured against”. In the immediately following subsection, clarification is given as to what the insurer is not liable for by reference to language of loss “attributable to” as well as “proximately caused”. The Act elsewhere uses other language: “caused”: s 64 [s 70], “caused by or directly consequential on”: s 66 [s 72]. I will say something of these different expressions in a moment. The current versions of the Institute Clauses use expressions “caused by”, “attributable to”, “reasonably

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<sup>14</sup> [1999] 2 AC 22.

<sup>15</sup> *Chappel v Hart* [1998] HCA 55; 195 CLR 232 at 256 [63]-[64], 285 [122]; *Henville v Walker* [2001] HCA 52; 206 CLR 459 at 491 [99], 496 [115]; *Marks v GIO Australia Holdings Ltd* [1998] HCA 69; 196 CLR 494 at 532 [109]; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41; 210 CLR 109 at 128 [56]; *Tame v New South Wales* [2002] HCA 35; 211 CLR 317 at 403 [251]; *Rosenberg v Percival* [2001] HCA 18; 205 CLR 434 at 460 [85]; *Travel Compensation Fund v Tambree (t/as R Tambree & Associates)* [2005] HCA 69; 224 CLR 627 at 642 [45].

<sup>16</sup> See also the *Bills of Exchange Act 1882* (UK) and the *Sale of Goods Act 1873* (UK).

<sup>17</sup> In Australia as the *Marine Insurance Act 1909* (Cth).

<sup>18</sup> See the similarities in the *Maritime Code of the People's Republic of China*, arts 216–256.

<sup>19</sup> Given my discussion later of *Global Process Systems* I will use references to the UK statute as the primary references with equivalent Commonwealth Act provisions in brackets.

attributable to”, “in consequence thereof”, “consequent on”, and “arising from”.

- 9 Marine insurance concerns damage to hull, machinery, cargo, loss of freight, and liability for loss or damage, usually in a commercial context. What is required, as a matter of legislative command, is that the loss or damage be “proximately caused”.<sup>20</sup>
- 10 As Arnould says<sup>21</sup> this has a dual operation - limiting insurer’s liability to only sufficiently efficient causes to be “proximate”, but eliminating causes that might be less efficient (and thus expanding insurer’s liability).
- 11 The *locus classicus* of the notion of “proximate cause” is *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd*.<sup>22</sup> The ship (*Ikaria*) was torpedoed well forward by a German submarine. With the assistance of tugs, though beginning to settle by the head, she limped into Le Havre harbour where she berthed at a quay. A gale sprang up, causing her to bump against the quay. The harbour authorities feared she might sink and block the quay and so ordered her to a mooring inside the outer breakwater. While moored there, she took the ground at each ebb tide, floating with the flood tide. This placed strain on her structure and, after two days, her bulkheads gave way and she sank, becoming a total loss. The policy covered perils of the sea, but had a war exclusion. Each of their Lordships<sup>23</sup> said the answer was to be given by the commonsense response to the facts properly understood. Lord Shaw of Dunfermline’s famous discussion<sup>24</sup> made clear that fine distinctions were to be avoided, the proximate cause was not to be judged as the nearest in time,<sup>25</sup> but as

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<sup>20</sup> For the place of proximate cause in insurance law generally, see Martin Davies, “Proximate Cause in Insurance Law” (1995) 7 *Insurance Law Journal* 284; Malcolm Clarke, “Insurance: The proximate Cause in English Law” (1981) 40 *Cambridge Law Journal* 284. See *Global Process Systems* for an extensive discussion of causation in maritime insurance.

<sup>21</sup> Mustill and Gilman, *Arnould’s Law of Marine Insurance* (16<sup>th</sup> ed) Vol 2 [763].

<sup>22</sup> *Leyland Shipping* [1918] AC 350; and see *P Samuel & Co v Dumas* [1924] AC 431 at 468.

<sup>23</sup> Lord Finlay LC, Viscount Haldane, Lord Dunedin, Lord Atkinson and Lord Shaw of Dunfermline.

<sup>24</sup> *Leyland Shipping* [1918] AC 350 at 368-370.

<sup>25</sup> As it had been held in some cases such as *Pink v Fleming* (1890) 25 QBD 396. See the comments of Lord Mance in *Global Process Systems* at [49].

“proximate in efficiency”, that is not “destroyed” or “impaired” by other causes, but rather the question was as to the efficiency of the operating factor upon the result. If one cause has to be selected (as it was in *Leyland* for the reasons below) it is done by reference to the qualities of “reality, predominance and efficiency”,<sup>26</sup> in accordance with the “principles of a plain business transaction”. For there to be recovery in *Leyland* it was necessary to persuade the Court that the loss was proximately caused by the perils of the seas and was not proximately caused by war because of the exclusion of the latter risk from the cover. Not surprisingly, that attempt failed.

- 12 The principle in *Leyland* that proximate means predominant or efficient has been applied invariably since.<sup>27</sup> It is not particularly profitable to multiply factual examples. One starts with the recognition that there is a business contract among participants in the maritime commercial community. The attribution of the notion of proximate, or real or effective cause to such persons involves “the commonplace tests which the ordinary business person conversant with such matters would adopt”<sup>28</sup> or “what a business or seafaring man would take to be the cause without too microscopic analysis but on a broad view”.<sup>29</sup>
- 13 In some of the cases and commentary, the view was expressed that the notion of “proximate cause” bore within it the assumption that, for answering a question about the response of an insurance policy, there could be only one proximate cause.<sup>30</sup> That is not, however, what the statute says. It uses an adjectival phrase “any loss **proximately caused**”.

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<sup>26</sup> Adopting the approach that had rejected the time of the cause as determinant: *Reischer v Borwick* [1894] 2 QB 548.

<sup>27</sup> *Board of Trade v Hain Steamship Co Ltd* [1929] AC 534; *Lanasa Fruit Steamship Importing Co v Universal Insurance Co* 302 US 556 (1938); *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] AC 691; *Ashworth v General Accident Fire and Life Assurance Corp* [1955] IR 268; *Gray v Barr* [1971] 2 Lloyd’s Rep 1; *Global Process Systems* at [19], [49], [95].

<sup>28</sup> *Yorkshire Dale Steamship* [1942] AC 691 at 702 per Lord Macmillan.

<sup>29</sup> *Yorkshire Dale Steamship* [1942] AC 691 at 706 per Lord Wright.

<sup>30</sup> *Smith, Hogg & Co Ltd v Black Sea & Baltic General Insurance Co Ltd* [1940] AC 997 at 1006; *Howard Fire Insurance Co v Norwich and New York Transportation Company* 79 US 194 (1870); Raoul P Colinvaux, *The Law of Insurance* (4<sup>th</sup> ed, 1979) [4.32].



Modern cases do not make this demand.<sup>31</sup> Nor does it appear to have been a rule of law before codification.<sup>32</sup> Two proximate causes are to be distinguished from one cause amounting to two perils properly characterised.<sup>33</sup> That said, when there are a number of contributing causes, the initial step is to see if one is proximate in efficiency as the dominant cause of the loss: *The 'Aliza Glacial'*;<sup>34</sup> *The 'Kastor Too'*;<sup>35</sup> FD Rose, *Marine Insurance Law and Practice* (LLP, 2004); and see also A Parks, *The Law and Practice of Marine Insurance and Average* (Stevens, 1987) Vol I at 410-412.

- 14 Where there is more than one proximate cause recovery depends upon the proper construction of the policy. If one proximate cause is a relevant peril and the other is not (but not an excluded peril), the policy will respond;<sup>36</sup> if one is an insured peril, but the other is an excluded peril (as was the case in *Leyland*), the policy will not respond.<sup>37</sup> (This is why the Court was looking for one cause in *Leyland*. If a proximate cause was war, the policy did not respond.)
- 15 The requirement of proximateness, efficiency and reality relevant for insurance, here marine insurance, stems from the underlying rule of responsibility that, unless the parties agree otherwise, it is to be taken that the insured peril had to have that degree of reality or efficiency in a

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<sup>31</sup> *JJ Lloyd Instruments v Northern Star Insurance Co (The 'Miss Jay Jay')* [1987] 1 Lloyd's Rep 32; *Heskell v Continental Express* [1950] 1 All ER 1033; *Ocean Steamship Co Ltd v Liverpool and London War Risks Association Ltd* [1946] KB 561 at 575; *Global Process Systems* at [22] and in a non-marine context, see *McCarthy v St Paul International Insurance* [2007] FCAFC 28; 157 FCR 402 at 430-438 [89]-[116]; see *Arnould's Law of Marine Insurance* (16<sup>th</sup> ed) Vol 2 [775].

<sup>32</sup> *Vallejo v Wheeler* (1774) 1 Cowp 143; 98 ER 1012; *Goldschmidt v Whitmore* (1811) 3 Taunt 508; 128 ER 202; *Hagedorn v Whitmore* (1816) 1 Stark 157; 171 ER 432; *Everth v Hannam* (1815) 2 Marsh R 72; and 6 Taunt 375; 128 ER 1080; *Walker v Maitland* (1821) 5 B & Ald 171; 106 ER 1155; *Blyth v Shepherd* (1842) 9 M & W 763; 152 ER 323; *Arcangelo v Thompson* (1811) 2 Camp 620; 170 ER 1272; *Heyman v Parish* (1809) 2 Camp 149; 170 ER 1111, *Grill v General Iron Screw Collier Co Ltd* (1866) LR1 CP 600, 611; *Dudgeon v Pembroke* (1877) 2 App Cas 284 at 297; *Reischer v Borthwick* [1894] 2 QB 548 at 551.

<sup>33</sup> *Atlantic Maritime Co Inc v Gibbon* [1954] 1 QB 88; *Kuwait Airways Corporation v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664.

<sup>34</sup> *Handelsbanken ASA v Dandridge* [2002] 2 Lloyd's Rep 421.

<sup>35</sup> *Kastor Navigation Co Ltd v AGF MAT* [2004] 2 Lloyd's Rep 119.

<sup>36</sup> *The Miss Jay Jay* [1987] 1 Lloyd's Rep 32.

<sup>37</sup> *Wayne Tank and Pump Co Ltd v Employers Liability Insurance Corporation Ltd* [1973] QB 57; and see the discussion in *McCarthy v St Paul International Insurance* [2007] FCAFC 28; (2007) 157 FCR 402 at 429-438 [88]-[116].

business or commercial sense in order for the policy to respond. Once that rule of responsibility is grasped, the answer to the causal question is one, made upon examination of the facts, which is “broad”, “commonsense” and “in accordance with business realities”. The answer may be contestable, the logic to reach the answer may be diffuse, but what else is there to say? What intellectual process has been disguised? The marine claims manager has his or her answer, and gets on with business in the market. The commonsense test reflects the fact that until not so distantly the question and answer were ones for a jury.

- 16 What of the variously expressed phrases other than “proximately caused”? It can be taken from *George Cohen, Sons and Co v Standard Marine Insurance Co*<sup>38</sup> that “attributable to” in s 39(5) [s 45(5)] encompasses something less than proximate cause - a cause or part of the cause.<sup>39</sup> That the unseaworthiness (to which the insured is privy in s 39(5) [45(5)]) need not be “proximate” but may have some lesser degree of causal potency for the purposes of “attributable to” can be seen from the remarks of Lord Penzance in *Dudgeon v Pembroke*,<sup>40</sup> and from *Thompson v Hopper*<sup>41</sup> and *Trinder Anderson & Co v Thames & Mersey Marine & North*

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<sup>38</sup> (1925) 21 LIL Rep 30.

<sup>39</sup> See the discussion by Roche J at 25 LIL Rep at 36 of the confusing cases of *Thomas & Son Shipping Co Ltd v London & Provincial Marine & General Insurance Co Ltd* (1914) 30 TLR 595 and *Thomas v Tyne & Wear Steamship Freight Insurance Association* [1917] 1 KB 938, dealing differently with the consequences of the same causality.

<sup>40</sup> (1877) 2 App Cas 284 at 297 referring to *Thompson v Hopper*.

<sup>41</sup> (1856) 6 El & Bl 937 at 950; 119 ER 828 at 1117-1118 per Lord Campbell CJ in the Court of Queen’s Bench: “... We think that, for this purpose, the misconduct need not be the *causa causans*, but that the assured cannot recover if their misconduct was *causa sine qua non*. In that case, they have brought the misfortune upon themselves by their own misconduct, and they ought not to be indemnified. The very object of insurance is to indemnify against fortuitous losses which may occur to men who conduct themselves with honesty and with ordinary prudence. If the misconduct is the efficient cause of the loss, the assurers are not liable ... The question, therefore, seems to be, not whether the wrongful act or neglect of the assured was the proximate cause or *causa causans* of the loss, but whether it was a cause without which the loss would not have happened.” See also (1858) EB & E 1038 at 1054; (1858) 120 ER 796 at 802 per Cockburn CJ in the Exchequer Chamber: “... I am of the opinion that the judgment of the Court of Queen’s Bench should be reversed. Although it may no longer be open to dispute that there is no warranty of seaworthiness in a time policy, I concur with the Court of Queen’s Bench (and for the reasons set forth in their judgment) in thinking that, if a ship, insured in a time policy, is knowingly sent to sea by the assured in an unseaworthy state, and is lost by means of the unseaworthiness, the assured ought not to be allowed to recover on the policy. And, further, I agree that, to constitute a defence in an action on such a policy, it is not necessary that the unseaworthiness should have been the proximate and immediate cause of the loss, provided it can be shown to have been so connected with the loss as that it must necessarily have led to it.”

*Queensland Insurance Company*.<sup>42</sup> These authorities may, however, rest on the exploded notion of proximate cause being a temporal concept.<sup>43</sup> Other cases appear to support the reading of “attributable to” as causal: *Symington & Co v Union Insurance Society of Canton Ltd*;<sup>44</sup> *Shell International Petroleum Co Ltd v Gibbs (The ‘Salem’)*;<sup>45</sup> and see H Bennett, *The Law of Marine Insurance*.<sup>46</sup>

- 17 If unseaworthiness is the only proximate cause, there may be no need for an enquiry about privity, under provisions such as s 39(5) [s 45(5)], depending on the terms of the policy. It is generally only if unseaworthiness is a concurrent proximate cause or a concurrent cause having some relevant degree of potency, that s 39(5) [s 45(5)] or similar provision arises. It is at this point that the rule of responsibility might be seen to be relevant: why should an insured, privy to unseaworthiness or guilty of “wilful misconduct”: s 39(5) [s 45(5)] or s 55(2)(a) [s 61(2)(a)] recover if that element has any causal potency at all – as Lord Campbell CJ in the Court of Queen’s Bench and Cockburn CJ in the Exchequer Chamber said in *Thompson v Hopper*, where their Lordships spoke in terms of “but for”, not proximate cause.
- 18 The language “caused by” (s 55(2)(b) [s 61(2)(b)], s 64(1) [s 70(1)], s 66(1) [s 72(1)]) and the phrase “arising from” in the Institute Clauses mean “proximately caused by”.<sup>47</sup>
- 19 The language “in consequence thereof” may be seen to have a broader context than “caused by”, but in *Britain Steamship Co Ltd v King, ‘Petersham’*; *Green v British Indian Steam Navigation Co Ltd, ‘Martiana’*<sup>48</sup> Lord Sumner, relying on *Ionides v Universal Marine Insurance Co*<sup>49</sup> said that “in consequence thereof” was not a different causal phrase from

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<sup>42</sup> [1898] 2 QB 114 at 123.

<sup>43</sup> See Lord Mance in *Global Process Systems* at [57].

<sup>44</sup> (1928) 34 Com Cas 23.

<sup>45</sup> [1982] QB 946 at 998.

<sup>46</sup> (Oxford University Press, 2006) pp 133-134.

<sup>47</sup> *Coxe v Employers’ Liability Assurance Corporation Ltd* [1916] 2 KB 629 at 634 per Scrutton J.

<sup>48</sup> [1921] 1 AC 99.

proximately caused; rather it denoted a different class of perils (all consequences of hostilities or other wartime operations).<sup>50</sup>

- 20 The phrase “consequent on” in cl 15 of the Institute Time Clauses – Freight, the Loss of Time Clause, is not a causal expression.<sup>51</sup>

## Marine perils, unseaworthiness and inherent vice

- 21 Prior to *Global Process Systems*, the question of the relationship of seaworthiness and perils of the seas, in particular in hull insurance, and of cargoworthiness and perils of the seas in cargo insurance was not clear. There were passages in some cases and writings that appeared to suggest that a finding of unseaworthiness or lack of cargoworthiness was a defence simpliciter to a claim under a policy for loss or damage caused by perils of the seas. As will be seen that is not the law.
- 22 In particular, in *Mayban General Assurance BHD v Alston Power Plants Ltd*,<sup>52</sup> Moore-Bick J concluded that the inability of a valuable piece of machinery to withstand the effects of the ordinary wind and sea conditions of the voyage meant that the loss was caused by inherent vice. The case was neatly summarised by Lord Saville in *Global Process Systems*<sup>53</sup> as follows:

“In [*Mayban*] the cargo was a transformer, which was seriously damaged by the violent movements of the vessel due to the action of the wind and sea. However, Moore-Bick J held that goods tendered for shipment must be capable of withstanding the forces that they can ordinarily be expected to encounter in the course of the voyage and that if the conditions encountered by the vessel were no more severe than could reasonably have been expected, the conclusion must be that the real cause of the loss was the inherent inability of the goods to withstand the ordinary incidents of

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<sup>49</sup> (1863) 14 CB (NS) 274.

<sup>50</sup> See also *Liverpool and London War Risks Association Ltd v Ocean Steamship Co Ltd ‘Priam’* [1948] AC 243 at 265 per Lord Parker.

<sup>51</sup> See *Bensaude v Thames and Mersey Marine Insurance Co Ltd* [1897] AC 609 at 613; *Russian Bank for Foreign Trade v Excess Insurance Company Ltd* [1918] 2 KB 123 at 128 and *Naviera de Canarias SA v Nacional Hispanica Aseguradora SA (The ‘Playa de las Nieves’)* [1978] AC 853 at 881.

<sup>52</sup> [2004] 2 Lloyd’s Rep 609.

<sup>53</sup> at [33].

the voyage. The judge went on to find that the conditions encountered were neither extreme nor unusual in the sense that they were encountered often enough for mariners to regard them as a normal hazard. He accordingly held that the insurers were not liable for the damage, since the cover excluded loss damage or expense caused by inherent vice or nature of the subject-matter insured. In the present case Blair J regarded this case as applying the correct test; the Court of Appeal declined to do so.”

- 23 The starting point is, of course, the *Marine Insurance Act*.
- 24 The *Marine Insurance Act*, s 55 [s 61] and the Rules of Construction appended thereto, provide the framework for the operation of marine policies, such as the Institute Clauses. A **contract of marine insurance** is one for the indemnification of the insured against **marine losses**, being the losses incident to **marine adventure**: s 5 [s 7]. There is a marine adventure where ship, goods and other movables (insurable property) are exposed to **maritime perils** or the earning of freight, passage money, commission, profit or other pecuniary benefit, or the security for advancement of money is engendered by exposure of insurable property to maritime perils or liability to a third party may be incurred by the owner of or person interested in or responsible for insurable property by reason of maritime perils. “Maritime perils” means perils consequent on or incidental to **navigation of the sea**, that is to say, **perils of the seas**, fire, war perils, pirates, rovers, thieves, captures, seizure, restraints, detainments of princes and people, jettison, barratry, and any other perils, either of the like kind, or designated by the policy: s 3 [s 9].
- 25 “Perils of the seas” are thus one category of “maritime perils” or the “perils insured against” in a marine policy.
- 26 Rule 7 of the Rules of Construction states that the phrase “perils of the seas” refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and the waves.
- 27 How does unseaworthiness affect conclusions about perils of the seas and responsibility of an insurer for a casualty? What is the inter-relationship

between inherent vice or the nature of the subject matter insured and perils of the seas?

28 The place of seaworthiness and inherent vice can be seen in ss 39 [45], 40 [46] and 55 [61].

- (a) In a voyage policy, there is an implied warranty that at the commencement of the voyage the ship is seaworthy: s 39(1) [s 45(1)].
- (b) In a time policy, there is no such implied warranty, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss **attributable** to unseaworthiness: s 39(5) [s 45(5)].
- (c) In any policy on goods, there is no implied warranty that the goods are seaworthy: s 40(1) [s 46(1)].
- (d) In a voyage policy on goods, the implied warranty is not merely that the ship is seaworthy as a ship, but also that she is reasonably fit to carry the goods to the destination: s 40(1) [s 46(2)].
- (e) Subject to the Act and the policy, the insurer is liable for any loss proximately caused by a peril insured against, but is not liable for any loss which is not proximately caused by a peril insured against: s 55(1) [s 61(1)].
- (f) In particular:
  - (i) the insurer is not liable for any loss attributable to the wilful misconduct of the assured: s 55(2)(a) [s 61(2)(a)]; and
  - (ii) unless policy otherwise provides, the insurer of ship or goods is not liable for ordinary wear and tear, ordinary leakage and

breakage or inherent vice or nature of the subject matter insured: s 55(2)(c) [s 61(2)(c)].

- 29 One must recognise that seaworthiness and unseaworthiness are relative terms, having, in any particular case, a close relationship with the purpose of the use of the ship, the voyage, the time of year and geographical location. An unseaworthy ship may still sink because of perils of the seas: see s 39(5) [s 45(5)]. Another unseaworthy ship may sink, the sole proximate cause being the unseaworthiness that allows water to ingress by the ordinary action of the waves (Rule 7) or by ordinary wear or tear or ordinary leakage: s 55(2)(c) [s 61(2)(c)]. If the unseaworthiness in a particular case is the cause there may be no fortuity, or no loss by an insured marine peril. The differences between the cases are often confusing, but there is less confusion if one recalls that they are factual evaluations.
- 30 Take some examples. In *CCR Fishing Ltd v Tomenson Inc, La Pointe*,<sup>54</sup> *La Pointe* was repaired negligently with the wrong type of bolt being used on valve flanges which failed. She developed a list at her moorings and sank. The Court held the loss fortuitous (though negligently caused) and a product of a peril of the seas by the ingress of seawater, though, undoubtedly the ship as repaired was unseaworthy. The loss was not caused by **ordinary** wear and tear or inherent vice. It was not the operation of the inherent qualities of the ship, but the ingress of water from the external and fortuitous negligence of the repairs that caused the loss.
- 31 *E D Sassoon & Co v Western Assurance Co*<sup>55</sup> concerned opium that was stored in a hulk moored in a river. Water leaked into her hull, damaging the opium. The poor condition of the hull had been kept from view by the copper bottom or sheathing. There was no peril of the seas, Lord Mersey saying:<sup>56</sup>

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<sup>54</sup> [1991] 1 Lloyd's Rep 89, Sup Ct Canada.

<sup>55</sup> [1912] AC 561.

<sup>56</sup> [1912] AC 561 at 563.

“...There was no weather, nor any other fortuitous circumstance, contributing to the incursion of the water; the water merely gravitated by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to perils of the sea. Although sea water damaged the goods, no peril of the sea contributed either proximately or remotely to the loss.”

- 32 *55693 BC Ltd v Allianz Insurance Co of Canada*<sup>57</sup> concerned a wooden barge that sank in calm water. The hull was rotten. The pumps failed. The barge sank. The British Columbia Court of Appeal found no fortuity. The power loss to the pumps was not a peril of the seas.
- 33 *Wadsworth Lighterage and Loading Co v Sea Insurance Co*<sup>58</sup> concerned a wooden steam barge that sank at her moorings on a calm night after 50 years' service. The Court of Appeal found the cause of the loss to be ordinary wear and tear. The entry of seawater was insufficient to conclude that there was a peril of the seas.
- 34 See also *Samuel v Dumas*,<sup>59</sup> *Skandia Insurance Co Ltd v Skoljarev*,<sup>60</sup> and *Lloyd (JJ) Instruments Ltd v Northern Star Insurance Co Ltd (The 'Miss Jay Jay')*<sup>61</sup> for discussions of the relationship between unseaworthiness and perils of the sea.

### ***Global Process Systems***

- 35 An oil rig “*Odin Liberty*” was laid up in Galveston, Texas. In May 2005, it was purchased to be converted into a mobile offshore production unit (a “MOPU”) for use in the Cendor Field off the coast of east Malaysia. It was renamed “Cendor MOPU”. The purchasers insured the rig under a marine policy on cargo incorporating the Institute Cargo Clauses (A) of 1 January 1982, covering “all risks of loss or damage to the subject matter insured

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<sup>57</sup> 275 DLR (4<sup>th</sup>) 748.

<sup>58</sup> (1929) 15 Com Cas 1.

<sup>59</sup> (1924) 18 LIL Rep 211.

<sup>60</sup> [1979] HCA 45; 142 CLR 375.



except as provided” in a number of clauses, including cl 4.4 that excluded “loss, damage or expense caused by inherent vice or nature of the subject matter insured”. The policy covered the loading, carriage and discharge of the rig on a towed barge from Galveston to Lumut in Malaysia.

- 36 The rig was old, having been built in Singapore in 1978. It consisted of a watertight working platform (the jackhouse) which could be moved (jacked) up and down with three legs to the seabed. The legs were massive tubular structures of welded steel with a diameter of 12 feet and a length of 312 feet. Each leg weighed 404 tons. The jacking system worked by engaging steel pins into pinholes in the legs, of which there were 45 sets, 6 feet apart. The rig was carried on the barge with the three legs extended some 300 feet in the air above the jackhouse.
- 37 The voyage began on 23 August, reaching Saldanha Bay just north of Capetown on 10 October. There, repairs were done, the voyage resuming on 28 October. In the evening of 4 November, north of Durban, the starboard leg broke off at the 30 foot level, and fell into the sea. The following evening the forward leg broke off at the same level. Only 30 minutes later, the port leg broke off at the 18 foot level. These two legs also fell into the sea.
- 38 The claim under the policy was for the three lost legs.
- 39 The loss resulted from metal fatigue, the initial cracking occurring in the corners of the pinholes, being the stress raising feature. The cracking propagated from there until subjected to a leg-breaking stress that fractured the leg. Once the first leg failed, the stresses on the remaining legs increased. The stresses were generated from the effect that the height and direction of the waves had on the pitching and rocking motion of the barge and thus on the legs.

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<sup>61</sup> [1985] 1 Lloyd's Rep 264; [1987] 1 Lloyd's Rep 32.

- 40 It was common ground that the weather experienced on the voyage was within the range that could reasonably have been contemplated for the voyage.
- 41 The risk of cracking was understood. Expert surveyors appointed by the insured and approved by the insurers had inspected the rig at Galveston. They approved the arrangements for the tow; and, as a condition of their Certificate of Approval, required that the legs be reinspected at Cape Town for any crack initiation in specified levels of pinholes.
- 42 The inspection at Saldanha Bay found considerable fatigue cracking around the pinholes. The repairs carried out were directed to these areas.
- 43 The insurers rejected the claim as the product either of inevitability or inherent vice. The former was rejected by the trial judge, saying that failure was “very probable, but ... not inevitable”. The trial judge concluded, however, in favour of the insurers (to quote Lord Saville in the Supreme Court judgment at [15]):
- “ ... that the insurers had proved that ‘the proximate cause of the loss was the fact that the legs were not capable of withstanding the normal incidents of the insured voyage from Galveston to Lumut, including the weather reasonably to be expected.’ In his judgment this meant that the cause of the loss was inherent vice within the meaning of the policy and that accordingly the insurers were not liable for the claim.”
- 44 The Court of Appeal disagreed, concluding that the proximate cause of the loss was an insured peril being the “leg breaking wave” on the starboard leg.
- 45 The insurers appealed. The Supreme Court was unanimous in its dismissal of the appeal. Without disrespect to Lord Collins who wrote a short concurring judgment, I will concentrate on the three very helpful (if I may respectfully say so) judgments of Lord Saville, Lord Mance and Lord

Clarke (all of whom had and have deep experience in insurance and maritime disputes as practitioners and judges).<sup>62</sup>

- 46 Lord Saville accepted the well-settled authority of *Leyland* that proximate cause is proximate in efficiency and not time, and, as Bingham LJ had said in *T M Noten BV v Harding*,<sup>63</sup> this is to be answered by applying the commonsense of a business or seafaring person.
- 47 The essential proposition of the insurers was that a loss was caused by inherent vice if the natural behaviour of the goods is such that they suffer a loss in circumstances in which they are expected to be carried. Lord Saville rejected that proposition. It was not supported by cases put forward to support it, including in particular the judgment of Lord Diplock in *Soya GmbH Mainz Kommanditgesellschaft v White*<sup>64</sup> and of Bingham LJ in *T M Noten*. Critical to the finding of inherent vice in those cases was the absence of an external fortuitous event or series of events that could sensibly be described as the proximate cause.
- 48 The proposition of the insurers was, however, supported by the judgment of Moore-Bick J in *Mayban General Assurance v Alston Power Plants Ltd*.<sup>65</sup> Lord Saville said *Mayban* was wrong.
- 49 Lord Saville said that the proposition would deny cargo insurance to loss or damage other than loss or damage caused by perils of the seas that were exceptional, unforeseen or unforeseeable. (A position reflecting the American, but not English meaning of the perils of the seas: see the discussion in *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad*.<sup>66</sup>)

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<sup>62</sup> Lord Dyson agreed with all four judgments.

<sup>63</sup> [1990] 2 Lloyd's Rep 283 at 286-287.

<sup>64</sup> [1983] 1 Lloyd's Rep 122.

<sup>65</sup> [2004] 2 Lloyd's Rep 609.

<sup>66</sup> [1998] HCA 65; 196 CLR 161 at 176-181 [38]-[51], 197-199 [97]-[104], 215-220 [140]-[149].

- 50 His Lordship further noted that if the proposition were correct the ordinary form of cargo insurance would not provide insurance for unseaworthiness (or cargoworthiness) of the cargo caused by the cargo being unable to withstand the ordinary perils of the seas. (Thus inherent vice becomes aligned with unseaworthiness of cargo.)
- 51 Lord Saville then undertook an examination of the *Marine Insurance Act* to demonstrate that this last proposition cannot be true. He looked at s 55(2)(c) [s 61(2)(c)], s 39(5) [s 45(5)] and s 40(1) [s 46(1)]. The last provision, that there is no implied warranty in a goods policy that the goods are seaworthy would be inconsistent with the proposition. Further, if inherent vice is to be effectively equated with unseaworthiness then contrary to s 39(5) [s 45(5)], the insurer could escape liability under a time policy for unseaworthiness, even without privity.
- 52 Ultimately, Lord Saville applied the definition of inherent vice enunciated by Lord Diplock in *Soya v White*:<sup>67</sup>

“This phrase (generally shortened to ‘inherent vice’) where it is used in section 55(2)(c) refers to a peril by which a loss is proximately caused; it is not descriptive of the loss itself. It means the risk of deterioration of the goods shipped as a result of their natural behaviour in the ordinary course of the contemplated voyage without the intervention of any fortuitous external accident or casualty.”

- 53 Lord Saville said:<sup>68</sup>

“In my judgment what Lord Diplock was saying, as the assured submitted, was that where goods deteriorated, not because they had been subjected to some external fortuitous accident or casualty, but because of their natural behaviour in the ordinary course of the voyage, then such deterioration amounted to inherent vice or nature of the subject-matter insured.”

- 54 Lord Mance wrote a detailed and scholarly judgment. He immediately recognised that the consequence of the insurer’s argument was to present

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<sup>67</sup> [1983] 1 Lloyd’s Rep 122 at 126.  
<sup>68</sup> at [45].

a rule of law (not found in the *Marine Insurance Act*) that fitness of goods for the weather and sea foreseeably to be met or “cargoworthiness” was a condition precedent to recovery. The insurer’s argument had, sensibly, drawn back from such a rule, saying that the inability of the cargo to withstand the anticipated perils was a “powerful pointer” to a conclusion of loss by inherent vice.

55 Lord Mance undertook a detailed analysis of the Act and the authorities. It repays the most careful reading. In particular the authority of the Court of Appeal in *The ‘Miss Jay Jay’* is in significant doubt in the light of his reasons. There the Court of Appeal had analysed the position differently to Mustill J (as he then was) at first instance who had said:<sup>69</sup>

“... it is clearly established that a claim of causation running – (i) initial unseaworthiness, (ii) adverse weather; (iii) loss of watertight integrity of the vessel; (iv) damage to the subject-matter insured – is treated as a loss by perils of the seas, not by unseaworthiness ...”

56 The Court of Appeal had rejected any proposition that unseaworthiness was irrelevant and reinterpreted the above passage of Mustill J.<sup>70</sup> Lord Mance described at [77] the Court of Appeal’s approach in *The ‘Miss Jay Jay’*:

“The court rejected a submission that any prior unseaworthiness could be disregarded as irrelevant, but it interpreted the passage on p 271 in Mustill J’s judgment consistently with that rejection. It understood him as having been concerned simply to identify whether perils of the sea were a proximate cause of the loss, not as suggesting that “unseaworthiness, followed by a loss due to a peril of the seas, can never be relevant”: [1987] 1 Lloyd’s Rep 32, 37, 41 per Lawton and Slade LJJ. The question on this basis was “whether on the evidence the unseaworthiness of the cruiser due to the design defects was such a dominant cause that a loss caused by the adverse sea [conditions] could not fairly and on commonsense principles be considered a proximate cause at all” (p 37, per Lawton LJ). Slade LJ took the same view, regarding it as clear on “a commonsense view of the facts” that “both these two causes were .... equal, or at least nearly equal, in their efficiency in bringing about the damage” (p 40). That being so, the

<sup>69</sup> [1983] 1 Lloyd’s Rep 264 at 271.

<sup>70</sup> [1987] 1 Lloyd’s Rep 32.

court referred to the general principle of insurance law that, where there are two proximate causes of a loss, one insured under and the other not expressly excluded from the policy, the assured will be able to recover: see p 40, per Slade J.”

57 Lord Mance recognised that this approach of the Court of Appeal in *The ‘Miss Jay Jay’* gave the insurers their best argument, since the proximate cause was to be identified by the commonsense of the seafaring person, here posited by the Court of Appeal to be a claim between unseaworthiness and perils of the seas. The potential for error in the approach of the Court of Appeal was to fail to apply properly Lord Diplock’s formulation in *Soya v White*<sup>71</sup> in respect of s 55(2)(c) [s 61(2)(c)] set out earlier. Lord Mance said<sup>72</sup> that Lord Diplock’s reference to “the ordinary course of the contemplated voyage” was not intended to embrace the foreseeable conditions on the voyage, but be a counterpoint to a voyage on which some fortuitous external accident or casualty occurred. Thus Lord Mance said:<sup>73</sup>

“... anything that would otherwise count as a fortuitous external accident or casualty will suffice to prevent the loss being attributed to inherent vice. On this interpretation, Lord Diplock was laying down a test which appears to me consistent with the reasoning in *Dudgeon v Pembroke* 2 App Cas 284, the *Xantho* 12 App Cas 503, *Grant Smith and Co and McDonnell Ltd v Seattle Construction and Dry Dock Co* [1990] AC 162 and of Mustill J in the *Miss Jay Jay* [1985] 2 Lloyd’s Rep 264. It fits with Tucker J’s identification in *Neter* [1944] All ER 341, 343 of the ‘stoving in due to the weather, which is something beyond the ordinary wear and tear, of the voyage’ as ‘something which could not be foreseen as one of the necessary incidents of the adventure’. It fits with the definition in the 1906 Act of perils of the seas as not including ‘the ordinary action of the winds and waves’, a definition which draws attention to the question whether the winds and waves have had some extraordinary effect, rather than whether they were extraordinary in themselves.”

58 Lord Mance concluded:<sup>74</sup>

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<sup>71</sup> [1983] 1 Lloyd’s Rep 122 at 126.

<sup>72</sup> at [80].

<sup>73</sup> at [80].

<sup>74</sup> at [81].

“On this basis, it would only be if the loss or damage could be said to be due either to uneventful wear and tear (or "debility") in the prevailing weather conditions or to inherent characteristics of the hull or cargo not involving any fortuitous external accident or casualty that insurers would have a defence. In the scheme of the 1906 Act, that would not appear to me surprising, bearing in mind the case law against the background of which the Act was enacted and the juxtaposition in section 55(2)(c) of "ordinary wear and tear, ordinary leakage and breakage" with "inherent vice or nature of the subject-matter insured" as well as with "any injury to machinery not proximately caused by maritime perils". While not myself attempting any exact definition, ordinary wear and tear and ordinary leakage and breakage would thus cover loss or damage resulting from the normal vicissitudes of use in the case of a vessel, or of handling and carriage in the case of cargo, while inherent vice would cover inherent characteristics of or defects in a hull or cargo leading to it causing loss or damage to itself - in each case without any fortuitous external accident or casualty.”

59 This approach, which accords with that of Lord Saville, makes it difficult or impossible for inherent vice and perils of the seas to be concurrent causes.

60 On the facts, although the analysis was in Lord Mance’s view on balance a fine one, there was the breaking action of the sea as an external fortuitous event.

61 Lord Clarke viewed the facts as throwing up two physical causes of the loss – (a) the physical state of rig; and (b) the leg-breaking stress of the sea. His Lordship’s view was that the factual findings pointed to the leg-breaking wave, that was not inevitable, as the proximate cause.

62 Lord Clarke directed himself, as Lord Saville and Lord Mance had, to the definition of inherent vice proffered by Lord Diplock in *Soya v White*. He accepted the argument of the insured that:

“It was submitted that it follows from Lord Diplock’s definition that, where a peril of the seas is a proximate cause of the damage, there is no inherent vice because inherent vice refers to the inherent condition of the goods that is the sole cause of loss or damage. Otherwise the words ‘without the intervention of any fortuitous external accident or casualty’ would be given no meaning. It would have been sufficient to say that inherent vice means the risk of the deterioration of the goods shipped as a result

of their natural behaviour in the ordinary course of the contemplated voyage.”

This gave no room for inherent vice and perils of the seas as concurrent causes.

- 63 This approach led to the conclusion that *Mayban* was wrongly decided as was the decision of Donaldson LJ in *Soya v White*. (In this last respect the 17<sup>th</sup> edition of Arnould Vol II paras 22-26 was wrong.)
- 64 Their Lordships’ reasons make good the following propositions. Inherent vice is to be understood by reference to what Lord Diplock said in *Soya v White*, recognising that the risk of deterioration as a result of natural behaviour does not encompass the effects of anticipated weather on seas. Lack of cargoworthiness is not to be equated with inherent vice. If the loss is proximately caused by a fortuitous external accident or casualty, to be understood as within the meaning of perils of the seas and thus not “the ordinary action of the wind and waves”, it is “difficult” to conclude that (Lord Saville at [47] and Lord Mance at [80]) or “there [is] no room for the conclusion that” (Lord Clarke at [111]) there can be concurrent causes of inherent vice and perils of the seas.
- 65 *Global Process Systems* has brought simplicity and clarity to the operation of inherent vice and removed the confusion between inherent vice and cargoworthiness. What remains, of course, are the fine distinctions between many of the conclusions in the cases. What should always be remembered is that the so-called distinctions are different factual conclusions, involving evaluations and characteristics of inter-connected events and strands of causal considerations. Take the facts in *T M Noten*. Industrial leather gloves were shipped from Calcutta to Rotterdam. On out-turn the gloves were wet, stained, mouldy, and discoloured. The finding of the trial judge (Phillips J) was that this had been caused by moisture being absorbed by the gloves in the humid Calcutta atmosphere, which had evaporated and then condensed on the inside top of the



container, before falling back on the gloves and damaging them. Phillips J decided that the proximate cause of the damage was external to the goods – the dripping from the container top, even if a characteristic of the gloves had helped create that external cause. Bingham LJ disagreed. He thought that the damage occurred because the goods were shipped wet. The distinction suggested by Phillips J's reasons Bingham LJ said owed "more to the subtlety of the legal mind than to the commonsense of the mercantile".

- 66 What must be consistently resisted is the formulation of false legal principle out of factual disagreement over the basic rule properly formulated. *Global Process Systems* helps with the recognition of the basic rule. Contestable decisions of fact and disagreement about them will always be with us.

Sydney 20 July 2011

## **Speech on the retirement of Spigelman CJ 31 May 2011**

- 1 **ALLSOP P: Your Excellency:**This sitting of the Supreme Court marks the end of 13 years and 13 days of James Jacob Spigelman in the office of Chief Justice of the Supreme Court of New South Wales.
  
- 2 I have been asked to tender the apologies of Justices Heydon, Bell, Beazley, Campbell, Whealy, Handley, Hall, Brereton and Rein and the Hon Simon Sheller.
  
- 3 The privilege and honour fall to me to speak about you, Chief Justice, on this occasion. The fulfilment of that task is made difficult by the shortness of time permitted to me. There is so much that should be said. Most people here know of your extraordinary achievements and service in your life since coming to Australia with your parents from war-torn Europe in 1949 as small child of 3 before coming to the Court as its Chief Justice in 1998. Reference should be made to the speech of the then Attorney, the late JW Shaw for an insight up to 1998. My principal task is to speak of your work on the Court.

4 That undertaking, however, cannot be done adequately without appreciating the features and characteristics which, up to 1998, had marked your life as a brilliant student (double honours in one year in Arts, the Medal in Law, with only a passing acquaintance with the lecture rooms), nascent politician, author, brilliant lawyer and advocate and participant and administrator in so many aspects of this society's cultural and intellectual life and which continued to mark your work as a judge, a leader of this Court and a colleague, these features being:

- courage and boldness of approach;
- a huge intelligence and an enormous capacity to express yourself with clarity and pungency;
- a deep sense of justice and a strong antipathy to any form of meanness or bigotry;
- a strong belief in the capacity of our legal system based on the rule of law, rigorous judicial technique and parliamentary democracy to provide a just framework for a healthy, fair and diverse society;
- an international and not provincial outlook, based on a deep appreciation of the widest range of

cultural, artistic and social life in society, but an outlook that never lost sight of the essential task of those in public life of serving the people of Australia or of the fact that it is the lives of ordinary people that matter; and

- a consummate political skill (using that phrase in the broadest sense) based on all the above characteristics, made effective by a calm decency and fairness with which you treat everyone.

5 Your work on the Court has been remarkable. I propose to finish, not start, with the judgments you have written in both criminal and civil law. Let me say, however, at the outset, that your work as a jurist in the primary task of crafting judgments has produced one of the finest bodies of judicial work in Australia's legal history. You stand as one of the best judges ever to have served this nation. I use no hyperbole here.

6 It is first necessary to say something of your work as an administrator of the Court. You have managed the Court during an important period of change. The *Civil Procedure Act 2005* has brought about important modernisation and reform of procedure in this State. Your energy and perception of the need for cost and

time reduction in litigation was instrumental in bringing forward statutory, professional and cultural change. The process had begun in this Court in the late 1970s. The *Civil Procedure Act* took those changes to the level of written law. There remains work to be done, but it was never a one-person task and you played more than one person's role.

- 7 Though you have a well-known suspicion of statistics, you have in fact marshalled them to be used wisely in the management of the two divisions and two appeal courts that comprise this Court. Your skilled and careful management has been marked by calmness and an intimate grasp of detail. You also have a remarkable skill of perceiving conflict emerging amongst people, defusing it and solving the problem, never letting it lie to fester and arise on a later and more bitter occasion. You do not impose your will, but your choices, always wise, usually prevail.
- 8 Underlying this skilful management of the Court has been your perception of the need to develop collegiality and congeniality within the Court. The carrying on of judicial education and judges' conferences, the latter involving partners of judges attending, has been feature

of this. May I take this opportunity at this point to pay tribute to your wife Alice, who has played such an important part in this process. This has created a happy court in which mutual respect is the pervading social and working ethos. And as you no doubt appreciate, such a milieu tends to promote productivity in judges and to provide a more civil and civilised experience for litigants and the profession than perhaps was the case during some periods in the preceding forty years.

- 9 Secondly, this managerial skill has been matched by your skill and acumen in dealing with government and Attorneys-General. Your ability to work with them, but maintaining independence from the executive, has led to the healthy working relationship between the Courts and the other branches of government, consistent with judicial independence, to the great advantage of the people of New South Wales.
- 10 Thirdly, and I exclude myself from this comment, you have been able to influence critically the appointment of a remarkably talented body judges. This is a court of international stature and reputation. That is based on

that judicial talent. This was a legacy you inherited, which you pass on enhanced.

- 11 Fourthly, you have been instrumental in taking the Australian legal system, through this Court and its judges, into the Asia Pacific region and the wider world. You understand the importance of the Australian judiciary being recognised around the world for its quality and taking its place in the training of, and engagement with, the judiciary in other countries. This is not an exercise in legal jingoism or judicial hubris or the promotion of judicial holidays. Rather, you recognise that if the Australian legal system does not embrace and engage with counterparts in Asia and the wider world, it, its judges and its practitioners will be left to their life of tranquil provincialism, over time eroding the quality of justice administered by them.
- 12 To this end, you have been active in developing and strengthening the relationships between the Supreme Court and Chinese courts and judges. Judges from the Court have, on an annual basis, taught at the National Judicial College in Beijing. You have recently effected memoranda of understanding with the courts of Hubei and Shanghai to co-operate on judicial exchange.

Similar memoranda of understanding are likely with Guangdong courts and the Chinese National Judicial College.

- 13 Together with the present Chief Justice of Hong Kong you began and developed a regional conference of commercial law judges every eighteen months to two years. These meetings have involved commercial judges from China, Japan, Korea, Hong Kong, Singapore, Malaysia, Thailand, India, Pakistan, Bangladesh, Australia and New Zealand. The next conference is in Singapore. This is now a standing forum for commercial law in the region.
- 14 You have put in place memoranda of understanding with Singapore and New York courts regarding the proof of foreign law by judicial declaration rather than the use of expert evidence.
- 15 As President of the Judicial Commission you have supervised and guided the important work of that body in particular in encouraging and fostering its role as a judicial educator in New South Wales and in many other places in the region and in fostering greater awareness



of the issues affecting indigenous people in this State and the legal system.

- 16 You have fostered a regular exchange of judges between the United Kingdom and this country to maintain and broaden the bonds that lie between our two systems.
- 17 All this, and I have yet to mention your work as a public intellectual through your many speeches and publications as Chief Justice since 1998 and as a commandingly great judge.
- 18 You have in thirteen years delivered dozens of speeches. All have been of the highest intellectual quality. They range over many topics – history and historical reflections, the rule of law, judicial administration, the legal profession, criminal and civil law, public law, human rights and other issues important to our society. Some, such as your speeches on construction and interpretation of contracts and statutes, have been influential in affecting the law's direction. All have been influential on the profession in this country and wherever jurisprudence in the English language is read.

- 19 Your historical works on Beckett and Henry, Bacon and Coke are not only significant historical interpretations in themselves, but they also speak to modern society and those interested in its development. When I read the book on Beckett and Henry some years ago the only comparison I thought appropriate to draw was with the work of the great medievalist Professor Richard Southern. The comparisons were clear – his work and yours revealed a simply-expressed grasp of power, law, government, history and humanity. It awaits a further occasion to explore the extent to which these works of history illuminate your work as a great Chief Justice.
- 20 Your judgments have been outstanding. All crafted with great intellect and remarkable speed. They reveal the strongest possible attachment to precedent and legal principle. Never, however, did that see them take the form of gnarled shapes of weather beaten rules determined by the ratio decidendi of past cases. Rather, your sense of principle and insightful intelligence always produced a clearly written and elegantly formed piece of work reflecting the common law as it stood by reference to precedent or with incremental change born of contemporary legal policy.

Your judicial technique was founded on a respect for the intellectual labour of others, including colleagues and predecessors and was directed to the creation of coherent legal principle, not merely to the destruction of contrary views or the expungement of error.

- 21 Within months of your swearing in you initiated a series of important criminal sentencing judgments. Over the years, this body of work (*Jurisic, Henry, Ponfield, Wong and Leung, Whyte, Attorney-General's Applications No 1, 2 and 3 of 2002*) has had a lasting significance on the law of sentencing.
  
- 22 Numerous other notable decisions on the criminal law reflect your important work on the Court. Perhaps your decisions on open justice (*John Fairfax Publications v District Court* as an example) best illustrate your capacity to write commanding and comprehensive judgments that state the field. Other cases, such as *JW*, reveal not only a consummate command of legal technique, but your humanity towards those unfortunate enough to be the necessary subject of legal technique in criminal law.

- 23 You also took the Court of Criminal Appeal to regional centres of New South Wales bringing the work of the Court to the people it affected.
- 24 Your work in civil law in the Court of Appeal has been similarly influential. You sat over the full range of the Court's jurisdiction and have contributed to the jurisprudence of this country in many subjects, administrative law, constitutional law, corporations law, contracts, equity, environment and planning law, evidence, industrial law, contractual and statutory interpretation, private and public international law, real property, torts and workers compensation.
- 25 The important series of cases concerning the Industrial Commission and Industrial Court and its jurisdictional relationship with this Court, ultimately endorsed by the High Court, are of immense importance to the administration of justice and the resolution, in particular, of commercial disputes in this State.
- 26 Your judgments and other writing on statutory interpretation have given penetrating and sure guidance to the principles, as well as explaining the, at times, less

than clear expressions of others in the legal firmament on the subject.

- 27 Your command of principle and logic allowed you to write the great judgments of *O'Halloran* and *Seltsam* in the fields of equity and common law, both dealing with the questions of causation, now made less intractable by your work, and the illuminating expression of equitable principle in *Rob Evans* on equitable remedies.
- 28 This is an entirely inadequate expression of the breadth and quality of your judgment writing.
- 29 Your decision to have a welcome to country at the beginning of this sitting reveals that you still recognise, just as you did in 1965, the year of the Freedom Ride, the existence of a foundational issue confronting this society: the just reconciliation of those who have come to this ancient land in the past 223 years, and their descendants, with the original inhabitants who lived here for tens of thousands of years, and their descendants. This is a profound and difficult issue, involving, in part, the recognition that a legal system founded on the rule of law and constitutional traditions of centuries must provide a framework of justice,

fairness and human dignity for all, so that all may commit their loyalty to the legal system out of respect and consent, not imposition of will of others. These notions, together with those aspects to which I referred earlier, have attended your work and time on the bench.

30 Australia is an immeasurably better place for your work as a judge, as a leader of this Court and as a public intellectual.

31 On behalf of all judicial officers in this State and those who play their part in the administration of justice, I thank you for your work and time as Chief Justice of this State.

32 On behalf of the Judges of this Court and their partners, I thank you and Alice for all that you have both done in and for the life and well-being of this Court.

## CIArb's Asia Pacific Conference 2011

### Investment & Innovation: International Dispute Resolution in the Asia Pacific

#### International Arbitration and the Courts: the Australian Approach

*Justice James Allsop*

*President, NSW Court of Appeal<sup>1</sup>*

#### INTRODUCTION

In this paper I have sought to show the clear trend in judicial thinking about arbitration in Australia - from suspicion, to respect and support. I have sought to do this by reference to four areas where courts are given a margin of operation in judicial technique enabling them to choose a strict and limiting, or liberal and expansive, role for arbitration: construction of arbitration clauses; arbitrability; public policy; and separability and competence. I have not sought to analyse exhaustively all relevant Australian authority on international commercial arbitration. To do so within the confines of a paper such as this would have been an unrealistic task. If I have been selective in my coverage it is because I have chosen to focus on topics which bear out that trend. I begin this paper with a general overview of the structure of arbitration in Australia and the issues which it has faced in terms of its relationship with the courts, before turning to the jurisprudence on the areas previously mentioned.

#### I. THE FORMAL STRUCTURE OF ARBITRATION IN AUSTRALIA

Before one can appreciate the issues arising from the relationship between arbitration and the courts, some explanation of the general landscape of arbitration in Australia is necessary. Australia has a federal political system with federal and state legislatures, executives and court systems. The legislation applicable to arbitrations in Australia distinguishes between arbitrations concerning both domestic and international

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<sup>1</sup> I express my debt and thanks to my tipstaff, Ms Louise Dargan, for her assistance in the research for, and drafting of, this paper.

disputes.<sup>2</sup> Broadly, the former are the domain of the States and Territories and the latter of the Commonwealth. There is a single Commonwealth statute, the *International Arbitration Act 1974* (“the IAA”) for international arbitration; domestic arbitrations are governed by the Acts in force in the various States and Territories. In order to prevent inconsistencies between jurisdictions in respect of domestic arbitrations, the legislation enacted at the state level is or is at least intended to be uniform. Should a dispute fall within the scope of both the domestic and international regimes, the IAA will be the governing Act by virtue of s 21 which states that the Model Law covers the field.

Both the state and federal laws have been the subject of recent inquiry and reform. On 21 November 2008, the Commonwealth Attorney-General, the Hon Robert McClelland, announced a review of the international legislative regime<sup>3</sup> and, subsequently, the then New South Wales Attorney-General, the Hon John Hatzistergos, undertook a similar project, on behalf of the Standing Committee of Attorneys-General (“SCAG”). The products of those initiatives are the amendments to the IAA and the new proposed uniform state laws, agreed to in principle by SCAG<sup>4</sup> but currently in force only in New South Wales:<sup>5</sup> the *Commercial Arbitration Act 2010* (NSW) (“the CAA”). The reforms seek to implement a regime that is substantially similar for domestic and international arbitrations.

The reforms to the CAA and IAA aim to align Australia’s domestic laws more fully with international standards as expressed in the principal legal instruments: the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards

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<sup>2</sup> Unlike the legislative regime in England: *Arbitration Act 1996* (UK); and Hong Kong: Ordinance No. 17 of 2010, s 5(1) (which will come into force in June 2011) which provide a single governing law for arbitration in those jurisdictions. For a discussion of the Hong Kong Ordinance see J Saunders, “Arbitration in Hong Kong”, paper delivered at the International Commercial Law, Litigation and Arbitration Conference, Sydney, 5-7 May 2011.

<sup>3</sup> The Hon R McClelland, “Simply Resolving Disputes”, Address at International Commercial Arbitration Conference: “Making it Work for Business”, Sydney, 21 November 2008.

<sup>4</sup> SCAG, Summary of Decisions, April 2009.

<sup>5</sup> Although Tasmania and South Australia have introduced Bills conforming to the new regime *Commercial Arbitration Bill 2010* (Tas); *Commercial Arbitration Bill 2011* (SA). The former uniform legislation still in force in jurisdictions except for New South Wales consists of the *Commercial Arbitration Act 1984* (NSW) (repealed); *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 1985* (WA); *Commercial Arbitration Act 1985* (NT); *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration Act 1986* (ACT); and the *Commercial Arbitration Act 1990* (Qld).



1958 (“the New York Convention”) and the UNCITRAL<sup>6</sup> Model Law on International Commercial Arbitration 1985 as amended in 2006 (“the Model Law”).<sup>7</sup>

The broad principles and objectives which underpin the Model Law and New York Convention (expressly and implicitly) are also contained in Australia’s national laws, albeit that both legislative regimes contain substantive additions and departures from those instruments.

Foremost of the broad international principles is the principle of the sanctity of contract or *pacta sunt servanda* and party autonomy. Arbitration is the process by which a dispute is resolved (decided) by a person or persons to whom the parties have entrusted that task. The foundation of arbitration is contractual; the agreement between the parties is the source of the position of arbitrator and of his or her powers; it also defines the scope of those powers. The first necessary adjunct to the contractual foundation of arbitration is the freedom of the parties to choose the applicable procedure. Procedural flexibility is particularly important in an international or multinational context in accommodating parties who may come from very different legal systems.<sup>8</sup> This principle is reflected in the legislation in a number of ways. Subject to certain procedural safeguards and minimum standards of fairness,<sup>9</sup> the parties may decide the manner in which the arbitration is to be conducted.<sup>10</sup> There are also a number of provisions that the parties may exclude by agreement, or which will only apply if the parties agree expressly to be bound by them.<sup>11</sup> By enabling parties to

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<sup>6</sup> United Nations Commission on International Trade Law.

<sup>7</sup> By virtue of the IAA, s 16, the Model Law has the force of law and the CAA is, to a large degree, a direct transposition of it.

<sup>8</sup> G Herrmann, “The UNCITRAL Model Law on International Commercial Arbitration: Introduction and General Provisions” in P Šarčević (ed) *Essays on International Commercial Arbitration* (Graham & Trotman Limited, 1989) p 9:

“The most fundamental principle underlying the Model Law is that of the autonomy of the parties to agree on the ‘rules of the game’. Such recognition of the freedom of the parties is not merely a consequence of the fact that arbitration rests on the agreement of the parties but also the result of policy considerations geared to international practice.”

<sup>9</sup> The requirement that each party be treated equally and afforded a reasonable opportunity of presenting its case: IAA, s 18C and CAA, s 18. The Model Law, Art 18, uses the expression “full opportunity”.

<sup>10</sup> Model Law, Art 19 and CAA, s 19.

choose the procedure to govern the arbitration, the Acts allow the parties to harness the advantages of arbitration over litigation; this being one of arbitration's most distinguishing features.

The second aspect of *pacta sunt servanda* is the obligation on domestic courts to enforce foreign arbitration agreements and recognise and enforce foreign arbitral awards. Those duties are contained in Arts II and V of the New York Convention, Arts 8 and 36 of the Model Law and are expressed in ss 7 and 8 of the IAA and now apply in respect of domestic awards in New South Wales according to the CAA, ss 8 and 36 respectively. The rationale for these provisions and one of the defined objects of the IAA, taken from the New York Convention, is to uphold contractual arrangements between parties entered into in the course of international trade.<sup>12</sup> This is to recognise that arbitration may not be the optimally preferred method of dispute resolution for each party, but it is the contractually bargained for method.<sup>13</sup> An efficient dispute resolution process culminating in an enforceable award is an essential underpinning of commerce. Parties should be held to arbitration agreements, awards should be final and readily enforceable. However, these statements are not without appropriate qualification, including for reasons of public policy, denial of natural justice, the subject matter of the dispute being one reserved for resolution by the courts or other statutory bodies, or invalidity of the arbitration agreement.<sup>14</sup>

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<sup>11</sup> The law in some instances will allow the parties to agree on a procedure but provide a fall-back or default position or procedure where no agreement is reached as is the case regarding the composition of the arbitral tribunal: Model Law, Art 10 and CAA, s 10. In terms of the IAA, most of the additional provisions in Pt III, Div III are optional and are divided between those which must be expressly excluded and those which must be expressed to apply. For example, the confidentiality provisions of the IAA, ss 23C-23G, will only apply if the parties agree to be bound by them but under the CAA, ss 27E-27I will apply unless the parties agree to exclude them. The IAA, s 23, which allows the parties to apply to a court to issue a subpoena, will apply unless the parties agree otherwise. The provisions dealing with default of a party may also be excluded by agreement: IAA, s 23B and CAA, s 25. Under the CAA, s 34A, the parties may only seek leave to appeal on a question of law arising out of the award where they have agreed to this avenue of redress being available.

<sup>12</sup> See IAA, s 2D and *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 per Foster J at [126], discussed below.

<sup>13</sup> *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; (2006) 157 FCR 45 at 94-95 [192].

<sup>14</sup> See e.g. Departmental Advisory Committee on Arbitration Law Report on The Arbitration Bill, February 1996, Chaired by the Hon Lord Justice Saville at [19]: "[i]n some cases, of course, the public interest will make inroads on complete party autonomy, in much the same way as there are limitations on freedom of contract" at [19]; New York Convention, Art V; Model Law Arts 18, 34 and 36 and CAA ss 18, 34 and 36.

## II. THE ROLE OF THE COURTS

The most recent round of legislative reform and the motivations for it have refocused attention on the question of the legitimate function of the courts in respect of arbitral proceedings and the appropriate balance to be struck between curial resolution and arbitration.

The reforms have redefined this relationship. The boundaries have been moved, perhaps modestly, or perhaps not, but certainly towards less intervention. However, the principles which the reforms affirm are hardly nascent. The original enactment of the IAA in 1974 was to give effect to Australia's core obligations under the New York Convention to recognise and enforce arbitral agreements and awards.<sup>15</sup> The amendments to the IAA in 1984 incorporated the Model Law, including the provisions regarding flexibility of procedure. Procedural flexibility was expressly contained in the prior uniform domestic regime<sup>16</sup> and the grounds for judicial review of awards were intended to be limited.<sup>17</sup> However, notwithstanding the introduction of legislative regimes supportive of arbitration in Australia, the impetus for the introduction of the IAA and the former uniform regime at the state level was the same as that which led to calls for its reform. Arbitration in Australia has at times not functioned consistently with the principles upon which it is founded. When the Hon Robert McClelland announced the inquiry into amending the IAA, he cited the need to ensure arbitral proceedings would be "just *and* efficient" and "fair *and* economical".<sup>18</sup> The emphasis is his own. At the opening of law term dinner in 2009, Chief Justice Spigelman said of the domestic regime: "[t]he focus on commercial arbitration as a form of commercial dispute resolution has always offered, but rarely delivered, a more cost effective mode of

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<sup>15</sup> The Hon R McClelland, "Simply Resolving Disputes", Address at International Commercial Arbitration Conference: "Making it Work for Business", Sydney, 21 November 2008.

<sup>16</sup> See e.g. *Commercial Arbitration Act 1984* (NSW) (repealed), ss 14, 19 and 27.

<sup>17</sup> See V Donnenberg, "Judicial Review of Arbitral Awards under the Commercial Arbitration Acts" (2008) 30 *Australian Bar Review* 177-200.

<sup>18</sup> The Hon R McClelland, "Simply Resolving Disputes", Address at International Commercial Arbitration Conference: "Making it Work for Business", Sydney, 21 November 2008.

resolution of disputes”.<sup>19</sup> This begs the question why, if the tools are there and have been there to enable a robust arbitration practice and are and have been at the disposal of arbitrators, that potential has not always been realised. In an article published in 2009 titled “What Has Gone Wrong with Arbitration and How Can We Repair it?” P Megens and B Cubitt identified the intervention of the courts as being an impediment to the ability of arbitrators to distinguish the process from litigation. They remarked:

“The extent to which a Court will intervene in the arbitral process depends on how widely or narrowly the Courts interpret these provisions and it is in the interpretation, rather than the provisions themselves, that the problem lies.”<sup>20</sup>

Although the provisions to which the authors referred have been amended, the sentiment is still pertinent. The central concepts that affect the success of arbitration procedures and the degree to which courts will assist or impede arbitration are open to a significant degree of interpretation. Depending upon the courts’ intellectual predisposition or predilection widely different approaches are possible to the same problem at hand.

I do not suggest that arbitration should be completely independent of the judicial system.<sup>21</sup> That view is not universally accepted. Nevertheless, the place of the courts and their role in preserving minimum standards form an essential agreed guarantee under the Model Law and New York Convention. Courts can strengthen a jurisdiction’s attraction as an arbitral venue by helping to promote probity as well as efficiency. This role was incorporated after an extensive consultative process between representatives of many countries and reports of the Working Group established by the United Nations. Observance of the agreed upon international standards of fairness is not only for the benefit of the parties to the arbitration, but also for the benefit of the institution of

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<sup>19</sup> The Hon J J Spigelman AC, Address at the Opening of Law Term Dinner, The Law Society of New South Wales, Sydney, 2 February 2009.

<sup>20</sup> P Megens and B Cubitt, “Meeting Disputants’ Needs in the Current Climate: What Has Gone Wrong with Arbitration and How Can We Repair It?” (2009) 28 *The Arbitrator and Mediator* 115 at 127.

<sup>21</sup> The Hon P A Keane, “Judicial Support for Arbitration in Australia” (2010) 23 *Australian Bar Review* 1 at 2:

“There is, therefore, a legitimate place for some intervention by the judicial organ of states in which arbitrations are conducted or sought to be enforced to ensure that the arbitration process is conducted fairly in conformity with the reasonable expectations of the parties to the dispute”

arbitration more generally. The courts' supervisory role is expressly defined and circumscribed in the conventions and legislation but its scope is subject to the courts' interpretation of the conventions and the legislative provisions and their approach to interpreting the agreement between the parties.

In terms of intervention, restraint is essential. Arbitration depends for its success on the informed and sympathetic attitude of the courts to concepts such as the construction of arbitration agreements; arbitrability; public policy; and separability. These concepts, depending on their interpretation can see arbitration flourish or suffocate.

The attitude of the Australian courts to arbitration can be seen in the jurisprudence on these topics.

## **1. CONSTRUCTION OF THE ARBITRATION CLAUSE**

The first topic in respect of which a practical judicial approach is necessary in order to give effect to the reasonable commercial expectations of the parties is in the construction of arbitration agreements. Sometimes referred to as "subjective arbitrability",<sup>22</sup> the construction of the arbitration agreement is a question of contractual interpretation concerned with the matters which the parties intended to be governed by the agreement, having regard to the form of words adopted in the context of the contract as a whole.<sup>23</sup> The importance of the construction of an arbitration clause is perhaps self-evident. It need always be remembered, however, that an express ground for review of an award or for refusal of enforcement of it is that the award goes beyond the contractual submission to arbitration.<sup>24</sup>

There is as yet no statement of principle from the High Court of Australia regarding the approach to construction of arbitration agreements.

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<sup>22</sup> S Greenberg, C Kee and J R Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2011) pp 182-186.

<sup>23</sup> *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; (2006) 157 FCR 45.

<sup>24</sup> CAA, ss 34(2)(a)(iii) and 36(1)(a)(iii); Model Law, Arts 34(2)(a)(iii) and 36(1)(a)(iii); New York Convention, Art V(1)(c).

Prior to 2006, there was a degree of divergence in Australia as to the proper approach to the construction of arbitration clauses. The powerful decision of Gleeson CJ in the New South Wales Court of Appeal in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd*<sup>25</sup> exhorting a broad and liberal approach based on the assumption that the parties to the clause in all likelihood intended one, not two, possible venues for the resolution of any disputes, did not hold the field. Other courts tended to adopt a more precise textual (and often narrower) approach.<sup>26</sup> The wider approach was adopted by the Full Court of the Federal Court in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*.<sup>27</sup> *Francis Travel* and *Comandate Marine* must be followed by other intermediate appellate courts in Australia unless considered plainly wrong.<sup>28</sup> According to these cases, the courts should adopt a liberal approach to the construction of an arbitration agreement, aligned with the sensible commercial presumption that the parties did not intend the inconvenience (or expense) of having possible disputes arising out of the same transaction being heard in different places. That may not amount to a legal presumption that all matters fall within the scope of the arbitration clause unless otherwise proven,<sup>29</sup> being the expression of the matter in the United States.<sup>30</sup> However, in *Fiona Trust & Holding Corp v Privalov*,<sup>31</sup> Lord Hoffmann, having referred to the conflicting authorities on the construction of arbitration clauses in

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<sup>25</sup> (1996) 39 NSWLR 160.

<sup>26</sup> *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* (1998) 90 FCR 1 per Emmett J; *Mir Brothers Developments Pty Ltd v Atlantic Constructions Pty Ltd* (1984) 1 BCL 80 per Samuels JA; *Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd* (1993) 43 FCR 439 per French J (as he then was).

<sup>27</sup> [2006] FCAFC 192; (2006) 157 FCR 45.

<sup>28</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151-152 [35].

<sup>29</sup> Cf *Ashville Investments Ltd v Elmer Contractors Ltd* [1998] QB 488; *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40; [2008] 1 Lloyd's Rep 254. In *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 Austin J rejected a presumption in favour of arbitrability at [136].

<sup>30</sup> *AT&T Technologies Inc v Communications Workers of America*, 475 US 643 (1986); *Threlkeld & Co Inc v Metallgesellschaft Ltd (London)*, 923 F 2d 245 (2d Cir 1991).

<sup>31</sup> [2007] UKHL 40; [2008] 1 Lloyd's Rep 254.

England stated it was time to “draw a line under the authorities to date and make a fresh start.”<sup>32</sup> He held:

“...the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.”<sup>33</sup>

Lord Hope of Craighead referred to foreign decisions including *Comandate Marine* and decisions of the United States Supreme Court and the Second Circuit Court of Appeals,<sup>34</sup> and held:

“This approach to the issue of construction is now firmly embedded as part of the law of international commerce. I agree with the Court of Appeal that it must now be accepted as part of our law too.”<sup>35</sup>

Now is not the time to say something about Lord Hope's (no doubt carefully chosen) words, “law of international commerce”. Lord Hoffmann also referred to sections of the English legislation intended to give effect to the reasonable commercial expectations of the parties and the need to ensure those expectations were not defeated.<sup>36</sup> The same may be said of an approach to construction under the IAA and CAA in conformance with the stated objectives of the legislation to encourage the use of arbitration (per the IAA, s 2D) and facilitate the “fair and final” resolution of disputes without unnecessary delay or expense (per the CAA, s 1C).

Whilst it is trite to recall the basal principle of contractual interpretation that the precise scope of the agreement will turn on the words used in the context of the particular contract as a whole, many different kinds of contracts have their own particular features,

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<sup>32</sup> [2007] UKHL 40; [2008] Lloyd's Rep 254 at 257 [12].

<sup>33</sup> [2007] UKHL 40; [2008] Lloyd's Rep 254 at 257 [13].

<sup>34</sup> *AT&T Technologies Inc v Communications Workers of America*, 475 US 643 (1986) and *Threlkeld & Co Inc v Metallgesellschaft Ltd (London)*, 923 F 2d 245 (2d Cir 1991).

<sup>35</sup> [2007] UKHL 40; [2008] Lloyd's Rep 254 at 260 [31].

<sup>36</sup> [2007] UKHL 40; [2008] Lloyd's Rep 254 at 257 [12], referring to the *Arbitration Act 1996* (UK), s 7, concerning the separability of an arbitration clause.

including context and purpose, and there is much to be said for the approach of Lord Hope and Lord Hoffmann in *Fiona Trust* which places no emphasis on fine distinctions or shades of meaning between particular prepositional phrases, preferring an approach that accords with commercial practicality. This is especially so when, in many cases, standard forms are used regularly between parties whose first language is not English. It is also desirable, given the removal of the discretion to refuse an application to stay judicial proceedings under the IAA, s 7 and CAA, s 8 such that where parts of a controversy are not covered by an arbitration clause the parties would be placed in the invidious position of having to arbitrate a claim based on breach of contract whilst having to litigate a claim arising under statute.

## 2. ARBITRABILITY

The second aspect of whether a claim is arbitrable concerns “objective arbitrability”, that is the matters which the parties are permitted by law to refer to arbitration. Irrespective of how widely an arbitration clause is drafted, the parties are not competent to entrust an arbitrator to decide some disputes. This is reflected in the New York Convention,<sup>37</sup> the Model Law<sup>38</sup> and provisions of the IAA.<sup>39</sup> Given the nature of arbitration as the *private* resolution of *private* disputes by *private* agreement between the parties, it can be understood why arbitration is not an appropriate forum for all matters.<sup>40</sup> Arbitrators are not repositories of administrative or judicial powers. They cannot commit a person for contempt, impose a fine or prison term, or otherwise exercise punitive jurisdiction.<sup>41</sup> Such matters are reserved for determination through the system of justice administered by the arm of the state: the judiciary (or in some cases a specialist body or tribunal).

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<sup>37</sup> Articles II(1) and V(2)(a).

<sup>38</sup> Articles 34(2)(b)(i) and 36(1)(b)(i).

<sup>39</sup> Sections 7 and 8.

<sup>40</sup> The question whether a dispute is “capable of settlement by arbitration” has its origins in the *Geneva Convention on the Execution of Foreign Arbitral Awards 1927* (signed 26 September 1927).

<sup>41</sup> Sir M Mustill and S Boyd, *Commercial Arbitration* (Butterworths London, 1989, 2<sup>nd</sup> ed) p 149. See also G Born, *International Commercial Arbitration* (Kluwer Law International, 2009) Vol I pp 789-790. The IAA and CAA are expressed to apply to “commercial” (that is civil) disputes, but that term is to be construed broadly: see P Binder *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet and Maxwell 2010, 3<sup>rd</sup> ed) pp 22-23.



Even within the commercial sphere, there are necessary policy considerations which may make some disputes incapable of settlement by arbitration.<sup>42</sup> As the source of an arbitrator's powers is contractual, an arbitrator cannot render a decision binding on any person not party to the agreement. Arbitral proceedings are not subject to principles of open justice.<sup>43</sup> Proceedings are conducted in private and the reasons of the arbitrator do not become publicly available when an award is rendered.

Areas in respect of which this issue has arisen or may arise are competition law, claims arising under the *Corporations Act 2001* (Cth) (where such claims concern the winding up of a company or *in rem* relief),<sup>44</sup> disputes concerning taxation,<sup>45</sup> the grant of patents and trade marks,<sup>46</sup> determinations of insolvency and workplace disputes.<sup>47</sup> The common element to the notion of non-arbitrability is the legitimate public interest in the resolution of such matters in the judicial system (as an arm of the state) and the identification and control of them being within the purview of the courts or national

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<sup>42</sup> For a discussion of arbitrability generally see *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* [2011] NSWSC 268 per Hammerschlag J at [64]:

“Non-arbitrable matters include criminal prosecutions, determination of status such as bankruptcy, divorce, and the winding up of corporations in insolvency, and certain types of dispute concerning intellectual property such as whether or not a patent or trade mark should be granted. These matters are plainly for the public authorities of the state. Patents and trade marks are monopoly rights which only the state may grant.”

Other discussions of arbitrability may be seen in N Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009, 5<sup>th</sup> ed) p 123 et seq; F Mádl, “Competence of Arbitral Tribunals in International Commercial Arbitration” in P Šarčević (ed), *Essays on International Commercial Arbitration* (Graham & Trotman Ltd, , 1989) p 95; G Born, *International Commercial Arbitration* (Kluwer Law International, 2009) Vol I p 766 et seq.

<sup>43</sup> Report No 83 of the New Zealand Law Reform Commission, *Improving the Arbitration Act 1996* (2003) Pt 3. The confidentiality of arbitral proceedings is touted as an important commercial advantage of this forum of dispute resolution in preference to judicial proceedings. The confidentiality (as opposed to privacy) of proceedings as an implied term of the contractual submission to arbitration was rejected by the High Court of Australia in *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10; see also *Commonwealth v Cockatoo Dockyards Pty Ltd* (1994) 35 NSWLR 704. The reforms to the IAA introduced ss 23C-23G which allow the parties to agree that “confidential information”, a term defined to include statements of claim and defence, evidence, transcripts of proceedings and awards shall not be disclosed. Similar provisions exist in respect of the CAA, ss 27E-27I, but apply automatically unless the parties choose to exclude them.

<sup>44</sup> *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896; *A Best Floor Standing Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170.

<sup>45</sup> *AED Oil Ltd v Puffin FPSO Ltd* [2009] VSC 534.

<sup>46</sup> See *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* [2011] NSWSC 268.

<sup>47</sup> *Metrocall Inc v Electronic Tracking Systems Pty Ltd* (2000) 52 NSWLR 1.

legislatures.<sup>48</sup> Of course the possibility of these matters being wide or narrow depends on the relevant legal and social system and its values.

This is an area in respect of which the recent trend in judicial reasoning supports arbitration. The courts may be called upon to determine the suitability of the substance of a dispute for arbitration. They may do so in the course of an application to stay judicial proceedings and refer the parties to arbitration (the means by which an arbitration agreement is enforced)<sup>49</sup> or the issue may arise in an appeal against an arbitrator's ruling on jurisdiction or in an application to set aside or resist the enforcement of an arbitral award as contrary to public policy.<sup>50</sup>

If the courts were to take a broad approach to this topic, disputes concerning those areas of commercial law previously mentioned might be viewed as, by their nature, incapable of settlement by arbitration. This would significantly reduce the types of disputes which could be arbitrated, particularly in light of the frequency of claims for misleading and deceptive conduct, which fall within the legislative regime governing competition disputes. However, the body of recent Australian jurisprudence demonstrates that the courts will approach the task by reference to the particular dispute at hand.<sup>51</sup> This approach to the arbitrability of statutory claims generally is also reflective of a more liberal construction of the arbitration clause as previously discussed.<sup>52</sup>

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<sup>48</sup> *Comandate Marine Corp v Pan Australia Shipping Ltd* [2006] FCAFC 192; (2006) 157 FCR 45.

<sup>49</sup> If the IAA, s7(2)(b) applies and see *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; (2006) 157 FCR 45 at 97 [197].

<sup>50</sup> In terms of the IAA, s 7 "Enforcement of foreign arbitration agreements" makes the duty on the court to stay judicial proceedings and refer the parties to arbitration conditional on the arbitration concerning "...the determination of a matter that, in pursuance of the agreement, is *capable of settlement by arbitration*" per s 7(2)(b) (emphasis added). There is no express reference to arbitrability in the CAA, s 8. The suitability of the subject matter of a dispute for resolution by arbitration is a discretionary consideration which the court will consider in determining whether or not to stay judicial proceedings under s 53 of the Acts in force in the other States and Territories.

<sup>51</sup> *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; (2006) 157 FCR 45 at 93 [186].

<sup>52</sup> *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896; *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466; *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160. In *Allergan Pharmaceutical Inc v Bausch & Lomb Inc* [1985] ATPR 40-636 at 47,173 Beaumont J was of the view that claims arising under the *Trade Practices Act* and *Patents Act 1952* (Cth) were not controversies "arising out of or relating to" the relevant contract because they were statutory causes of action based on consumer protection provisions which existed independently of the private contract between the parties. That decision has not been

The attitude towards determining arbitrability may be seen in two recent Australian decisions, one of the Federal Court concerning competition law and another of the New South Wales Supreme Court concerning patents.

In *Nicola v Ideal Image Development Corp Inc*<sup>53</sup> Perram J held that it was not contrary to public policy to arbitrate disputes for misleading and deceptive conduct under s 52 of the *Trade Practices Act 1974* (Cth) or claims for unconscionable conduct under s 51AC. The non-arbitrability of competition law has a long history internationally, particularly in the United States.<sup>54</sup> Some competition disputes are not capable of settlement by arbitration as the determination of them affects more than the interests of the private parties to the dispute. If they concern claims of anti-competitive behaviour, a plaintiff who asserts his or her rights under the legislation may be likened to a private Attorney-General protecting the interests of the public at large.<sup>55</sup> However, the breadth of matters governed by the competition and consumer legislation is such that not all disputes will be competition disputes in the relevant sense and not all will involve the interests of the public or of others in the public. Even though some provisions of the *Trade Practices Act* and its successor the *Australian Consumer Legislation* are directed to protecting consumers, much of the litigation under them concerns the rights between private parties and will not possess the sufficient element of public interest to militate in favour of curial resolution. This was the approach taken by Perram J who acknowledged that Pts IVA and V of the *Trade Practices Act* served the public interest by fostering competition<sup>56</sup>, but went on to say:

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followed subsequently and tends to be confined to its particular facts, an approach which supports the interpretation in *Allergan Pharmaceuticals* as being too legalistic.

<sup>53</sup> [2009] FCA 1177.

<sup>54</sup> Originally, the position of the United States Supreme Court was that set out in *American Safety Equipment Corp v JP Maguire & Co Inc* 391 F 2d 821 at 827 (2<sup>nd</sup> Cir, 1968) that claims under the Sherman Act were not arbitrable. This position was altered by *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc* 473 US 614 (1985). This issue has also been considered by the European Court of Justice in *Eco Swiss China Time Ltd v Benetton International NV* [1999] European Court Reports I-3035, which held that Art 81 of the EU Treaty was a matter of public policy. See M Bonnell, "Arbitrability of Competition Disputes in Australia" (2005) 79 *Australian Law Journal* 585-591.

<sup>55</sup> *American Safety Equipment Corp v JP Maguire & Co Inc* 391 F 2d 821 at 827 (2<sup>nd</sup> Cir, 1968).

<sup>56</sup> As was accepted in *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526 per Lockhart J at 532.

“There is absent from such suits the element of broad public interest in the outcome to warrant the conclusion that only the local national courts should be involved in their resolution. In the case of Pt V of the TPA, the standards which are imposed are clearly set; the arbitrator will not be called upon to assess the nature of the public interest thereby protected nor is it likely that any determination by the arbitrator is likely to have an impact beyond the parties to the arbitration. The same may be said of the claim under Pt IVA.”<sup>57</sup>

In *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd*<sup>58</sup> Hammerschlag J considered the arbitrability of a dispute arising under the *Patents Act 1990* (Cth). The questions contained in the notice of dispute in the arbitral proceedings included whether the defendant was required to make the plaintiff the owner of certain patents in a form of renewable energy. The argument against such claims being arbitrable is that patents are monopoly rights which only the Commonwealth may grant.<sup>59</sup> Under the Commonwealth legislation, the Commissioner of Patents exercises this function. Citing the modern trend to facilitate and promote the use of arbitration, Hammerschlag J found the dispute to be arbitrable. His Honour held that the notice did not require the determination of the eligibility for or grant of a patent, but it concerned the resolution of the private rights between the parties and did not impinge upon the powers and functions reserved to the Commissioner or the Federal Court.<sup>60</sup>

*Larkden* and *Nicola* provide support for the proposition that it is incumbent upon a party seeking a stay of judicial proceedings to demonstrate *why* the resolution of the particular dispute by private arbitration would be injurious to the public interest, or impermissibly encroach upon the rights of third parties, or otherwise justify curial resolution. It is not sufficient simply to point to an area of (commercial) law at a high level of abstraction and assert it is, *ipso facto*, “off limits” to arbitrators.

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<sup>57</sup> [2009] FCA 1177 at [61].

<sup>58</sup> [2011] NSWSC 268.

<sup>59</sup> N Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009, 5<sup>th</sup> ed) p 125.

<sup>60</sup> [2011] NSWSC 268 at [70]-[80].

It is important at this point to recognise that the phrase used to express arbitrability, “not capable of settlement by arbitration”<sup>61</sup> does not refer to the non-resolution of a basis of an issue by the arbitration which would be resolved by a national court. In *Comandate Marine*<sup>62</sup> the argument was put that the claim under the statute of the forum (the *Trade Practices Act*, s 52) would not be resolved by the arbitration in London applying the chosen proper law, English law. Thus, it was said, this issue was “not capable of settlement by arbitration”. The Court refused to accept that meaning for the phrase treating the phrase as “arbitrability” in the sense discussed above. There the dispute was quintessentially arbitrable, being a time charter dispute.

### 3. PUBLIC POLICY

The interpretation of the public policy exception to the principle of finality of awards probably provides the greatest scope for difference in judicial approaches to the meaning of that term. This exception, the genesis of which is Art V(2)(b) of the New York Convention, grants a discretionary power to the court to set aside an award or refuse recognition or enforcement of it if it is contrary to public policy.<sup>63</sup> The difficulty in defining the amorphous expression is well known.<sup>64</sup>

There is significant academic and judicial support for a construction of the term “public policy” in the context of international arbitrations as constituting only international public policy.<sup>65</sup> This is a more limited term which includes “only matters which are essential to the forum state’s legal system, and considered mandatory even in international or

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<sup>61</sup> See New York Convention, Art V(2)(a) and IAA, ss 7 and 8.

<sup>62</sup> [2006] FCAFC 192; (2006) 157 FCR 45.

<sup>63</sup> This ground is contained in the IAA, s 8(7)(b) and the CAA, ss 34(2)(b)(ii) and 36(1)(b)(ii).

<sup>64</sup> In *Richardson v Mellish* (1824) 2 Bing 229; 130 ER 294, Burrough J at 252 (Bing), described public policy as an “unruly horse” as “when you get astride it you never know where it will carry you.” See also D Jones, *Commercial Arbitration in Australia* (Thomson Reuters, 2011) at [10.300]; G Born, *International Commercial Arbitration* (Kluwer Law International, 2009) Vol II p 2625: “[i]t is trite to observe that application of the public policy doctrine is potentially unpredictable and expansive.” The various attempts to define public policy are outlined in A Sheppard, “Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards” (2003) 19(2) *Arbitration International* 217-248 including in *Egerton v Brownlow* (1853) 4 HLC 1 as “that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good”.

<sup>65</sup>; See A Sheppard, “Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards” (2003) 19(2) *Arbitration International* 217-248.

transnational settings.<sup>66</sup> A narrow reading of public policy, underpinned by international comity is to recognise that laws may differ between jurisdictions, but finality should prevail unless these basic norms are contravened. This method is contained in the French New Code of Civil Procedure, which refers specifically to international public policy as the relevant exception,<sup>67</sup> as does the Portuguese Code.<sup>68</sup> Some other jurisdictions adopt a deliberately narrow approach to the term, including the United States. In the oft-cited decision of *Parsons & Whittemore Overseas Co, Inc v Société Générale De L'Industrie Du Papier* the Second Circuit Court of Appeals concluded:

“... the [New York] Convention’s public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state’s most basic notions of morality and justice.”<sup>69</sup>

A similar interpretation was made by the Supreme Court of Ontario in *United Mexican States v Marvin Roy Feldman Karpa*<sup>70</sup> which stated that the award had to be contrary to the “essential morality” of the state.

A restrictive reading of public policy has not been universally adopted internationally. Debate over whether a contravention of public policy should be limited to the award so that the exception will only operate where the award is itself a contravention of the laws of the state or, alternatively, whether public policy may be infringed by reference to the substance of the action underlying the award has tended to favour the broader inquiry.<sup>71</sup> This is the case in India. In *Oil and Natural Gas Corporation v Saw Pipes Ltd*<sup>72</sup> the

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<sup>66</sup> G Born, *International Commercial Arbitration* (Kluwer Law International, 2009) Vol II pp 2622-2623 (citations omitted).

<sup>67</sup> French Decree Law No 81-500 of 12 May 1981, Arts 1502(5) and 1504 cited in G Born, *International Commercial Arbitration* (Kluwer Law International, 2009) Vol II p 2621.

<sup>68</sup> Portuguese Code of Civil Procedure (1986) Art 1096(f) cited in A Sheppard, “Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards” (2003) 19(2) *Arbitration International* 217-248.

<sup>69</sup> 508 F 2d 969 (2d Cir, 1974) at 974. Other United States cases support a narrow construction of public policy: see *United Paperworkers International Union v Misco, Inc* 484 US 29, 42 (US Sup Ct 1987) and *Karaha Bodas Co, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 364 F 3d 274 at 306 (2004).

<sup>70</sup> IIC 159 (2003) at [87].

<sup>71</sup> G Born, *International Commercial Arbitration* (Kluwer Law International, 2009) Vol II p 2623.

<sup>72</sup> AIR 2003 SC 2629.

Supreme Court held if an award were “patently illegal” and the illegality went to the root of the matter, it would be contrary to public policy. In so finding, the Court expanded the grounds for refusing enforcement on the basis of public policy set out in *Renusagar Power Co v General Electric Co*.<sup>73</sup>

The English courts have also been divided over the approach to illegality, public policy and enforcement. *Soleimany v Soleimany*<sup>74</sup> concerned the enforcement of a contract for smuggling carpets out of Iran that was found by the arbitrator to be illegal under Iranian law but enforceable under Jewish law. As the law governing the substance of the dispute was Jewish law, this was not found by the arbitrator to prevent an award being rendered. The English Court of Appeal refused to enforce the award and Waller LJ stated in obiter that if there were *prima facie* evidence that the underlying contract was illegal, the enforcement court should review the matter. Reservations to this approach, in the absence of fresh evidence, were expressed by Mantell LJ in *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd*.<sup>75</sup>

*Soleimany v Soleimany* was considered in the New South Wales Supreme Court in *Corvetina Technology Ltd v Clough Engineering Ltd*,<sup>76</sup> in which McDougall J held that it was, in principle, open to a party to raise the defence of illegality at the stage of enforcement, even if the facts were argued before and the matter decided by the arbitrator. His Honour stated the need to ensure the New York Convention was not frustrated but that it was necessary “for the court to be master of its own processes and to apply its own public policy”.<sup>77</sup> A liberal interpretation of public policy was also adopted by Lee J in the Supreme Court of Queensland decision of *Re Resort Condominiums International Inc*.<sup>78</sup> There his Honour found an award to violate public policy where the

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<sup>73</sup> (1994) Supp (1) SCC 644.

<sup>74</sup> [1999] QB 785.

<sup>75</sup> [2000] 1 QB 288 at 316.

<sup>76</sup> [2004] NSWSC 700.

<sup>77</sup> [2004] NSWSC 700 at [18].

<sup>78</sup> [1995] 1 Qd R 406.

orders were not orders which a Queensland court would make.<sup>79</sup> These cases raise important questions about the standard of public policy to be applied. *Corvetina* and the English authorities considered also raise concerns about the ability of a court to review a finding of fact by an arbitrator if the arbitrator has found the contract not to be illegal.<sup>80</sup>

A narrower approach to the concept of “public policy” was taken by Foster J in the Federal Court in *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd*.<sup>81</sup> In response to submissions that the arbitrator had committed an error of law in assessing the quantum of damages awarded, Foster J held:

“Section 8(5) of the Act does not permit a party to a foreign award to resist enforcement of that award on such a ground. *Nor is it against public policy for a foreign award to be enforced by this Court without examining the correctness of the reasoning or the result reflected in the award.* The whole rationale of the Act, and thus the public policy of Australia, is to enforce such awards wherever possible in order to uphold contractual arrangements entered into in the course of international trade, in order to support certainty and finality in international dispute resolution and in order to meet the other objects specified in s 2D of the Act.”<sup>82</sup>

Foster J further held that whilst the public policy exception:

“... has to be given some room to operate, in my view, *it should be narrowly interpreted consistently with the United States cases.* The principles articulated in those cases sit more comfortably with the purposes of the Convention and the objects of the Act. To the extent that McDougall J might be thought to have taken a different approach, I would respectfully disagree with him.”<sup>83</sup>

There thus appears to be room for appellate resolution of this matter in Australia.

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<sup>79</sup> See R Garnett and M Pyles, “Enforcement of Foreign Awards in Australia and New Zealand” in L Nottage and R Garnett, *International Arbitration in Australia* (Federation Press, 2010) pp 76-77.

<sup>80</sup> See R Garnett and M Pyles, “Enforcement of Foreign Awards in Australia and New Zealand” in L Nottage and R Garnett, *International Arbitration in Australia* (Federation Press, 2010) p 77. See also J Poudret and S Besson *Comparative Law of International Arbitration* (Sweet and Maxwell, 2007, 2<sup>nd</sup> ed) p 860: “[I]f much ink has been spilled over the foundation and the content of public policy, the question of the power of the judge when reviewing this ground has not caught the attention of legal scholars”.

<sup>81</sup> [2011] FCA 131.

<sup>82</sup> [2011] FCA 131 at [126] (emphasis added).

<sup>83</sup> [2011] FCA 131 at [132] (emphasis added).



#### 4. KOMPETENZ-KOMPETENZ AND SEPARABILITY

A discrete but related consideration to the matters which may be arbitrated as a matter of law is the reception of the concept that an arbitration clause is severable and distinct from the contract of which it forms a part. This doctrine, known as separability,<sup>84</sup> operates to prevent an arbitrator from being denied jurisdiction to decide a dispute in circumstances where the validity of the contract containing the arbitration clause is challenged.<sup>85</sup> Were the arbitration clause not severable, but held to stand or fall with the main agreement, a claim that the contract was avoided, if successful, would mean the arbitration clause was also void. If this were the case, the potential for a finding by the arbitrator the consequence of which would be to nullify his or her jurisdiction could logically bar the arbitrator from deciding the claim and require it to be referred to a court. The doctrine of separability, in its widest form, preserves the jurisdiction of the arbitrator by positing that the invalidity of the principal agreement (even *ab initio*) will not necessarily spell the death of the arbitration clause. Each constitutes, in principle, a separately executed, self-sufficient whole.<sup>86</sup> Some have called this a “fiction”<sup>87</sup> but though not self-evidently syllogistically logical, it is a sound legal rule.<sup>88</sup> However, the separate or auxiliary nature of the arbitration clause is not itself sufficient to empower the arbitrator to determine the validity of the principal contract and/or the arbitration clause. Separability operates alongside the doctrine of “kompetenz-kompetenz” which states that an arbitrator is competent to make a ruling as to his or her jurisdiction.<sup>89</sup>

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<sup>84</sup> Also known as severability or the autonomy of the arbitration clause.

<sup>85</sup> The doctrine of separability is only relevant where the arbitration clause forms part of the main written agreement. See the discussion of this issue in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1992] 1 Lloyd's Rep 81 per Steyn J at 85-86.

<sup>86</sup> P Mayer, “The Limits of Severability of the Arbitration Clause” in A J van den Berg, *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Kluwer Law International, 1999) p 261.

<sup>87</sup> A Baron, “Arbitration and the Fiction of Severability” (1999) 19 *Australian Bar Review* 49.

<sup>88</sup> See the discussion in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; (2006) 157 FCR 45 at 104-105.

<sup>89</sup> On the distinction between kompetenz-kompetenz and separability see A Dimolitsa, “Separability and Kompetenz-Kompetenz” in A J van den Berg, *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Kluwer Law International, 1999) p 217: “[t]here is sometimes confusion

The reason kompetenz-kompetenz and separability have evolved to become elementary doctrines of international arbitration is expediency.<sup>90</sup> If an arbitrator were not capable of ruling on his or her jurisdiction and a jurisdictional challenge were made, the proceedings would be delayed pending the decision of the relevant court. If the arbitration clause were not treated as a separate agreement to the contract containing it, a party could avoid arbitration by claiming the contract to be avoided. However, even accepting the doctrines of kompetenz-kompetenz and separability, it does not follow that an arbitrator is competent to determine a dispute which falls outside the scope of the submission, nor will an arbitrator's jurisdiction survive a successful challenge to the validity of the arbitration agreement itself. These principles do not enlarge the jurisdiction of an arbitrator. Nor do they empower an arbitrator to decide the question once and for all.<sup>91</sup> The courts are the ultimate arbiters of the jurisdiction of an arbitrator and a party may appeal against an arbitrator's ruling on jurisdiction.<sup>92</sup> Thus, while there may be consequences of these doctrines, such as the ability of an arbitrator to grant

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between the two rules, for both concern the jurisdiction of arbitrators. Although they maybe applied in conjunction with each other and both contribute to the effectiveness of arbitration agreements, they are in fact distinct. To speak of autonomy is to consider the arbitration clause as separate from the main contract, whereas competence-competence means giving arbitrators the power to rule on their own jurisdiction, without being under any obligation to stay proceedings if a court is concurrently seized"; Departmental Advisory Committee on Arbitration Law Report on The Arbitration Bill, February 1996, Chaired by the Hon Lord Justice Saville at [43] "it seems to us that the doctrine of separability is quite distinct from the question of the degree to which the tribunal is entitled to rule on its own jurisdiction...".

<sup>90</sup> See Departmental Advisory Committee on Arbitration Law Report on The Arbitration Bill, February 1996, Chaired by the Hon Lord Justice Saville at [138] "The great advantage of [kompetenz-kompetenz] is that it avoids delays and difficulties when a question is raised as to the jurisdiction of the tribunal"; *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co* [1992] 1 Lloyd's Rep 81 per Steyn J at 83: "[t]he approach in English law is simple, straightforward and practical. As a matter of convenience arbitrators may consider, and decide, whether they have jurisdiction or not...". See also C Svernlöv, "What Isn't Ain't – The Current Status of the Doctrine of Separability" (1991) 8 *International Arbitration* 37.

<sup>91</sup> Departmental Advisory Committee on Arbitration Law Report on The Arbitration Bill, February 1996, Chaired by the Hon Lord Justice Saville at [138]. "for this would provide a classic case of pulling oneself up by one's own bootstraps".

<sup>92</sup> Model Law, Arts 16, 34 and 36. CAA ss 16, 34 and 36; *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co* [1992] 1 Lloyd's Rep 81 per Steyn J at 83 "...it is well settled in English law that the result of such a preliminary decision has no effect whatsoever on the legal rights of the parties. Only the Court can definitively rule on issues relating to the jurisdiction of arbitrators"; *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 per Lord Collins at [85] "... in most national systems, arbitral tribunals are entitled to consider their own jurisdiction, and to do so in the form of an award. But the last word as to whether or not an alleged arbitral tribunal actually has jurisdiction will lie with the courts of the arbitral seat, where the determination may be set aside or annulled, or in a challenge to recognition or enforcement abroad."

remedies under the former *Trade Practices Act* for a contract found to be *void ab initio*, kompetenz-kompetenz and separability are primarily procedural mechanisms. Nevertheless, respect for them is crucial to ensuring the efficiency and continuity of proceedings.

The doctrine of kompetenz-kompetenz has been generally accepted in Australian jurisprudence, being adopted from the English courts.<sup>93</sup> Separability has, historically, encountered more resistance. The Australian position has here been informed by the English authorities, which warrant some discussion.

The classic statement of principle rejecting separability is the decision of the Judicial Committee in *Hirji Mulji v Cheong Yue Steamship Co Ltd*,<sup>94</sup> in which Lord Sumner found that the frustration of a charterparty containing an arbitration clause brought to an end the entire agreement, including the submission to arbitration. In the course of his reasons, his Lordship stated that the arbitration clause “is but part of the contract and, unless it is couched in such terms as will except it out of the results, which follow from frustration, generally, it will come to an end too”.<sup>95</sup> As in *Hirji Mulji* performance was executory at the time of frustration, Lord Sumner found that the arbitrator had no jurisdiction to decide the dispute. That decision was not followed by Viscount Simon LC in *Heyman v Darwins*,<sup>96</sup> who held that there was no reason why an arbitration clause, if widely drawn, should not cover the question of frustration, “whether the time for performance has already arrived or not”.<sup>97</sup> He distinguished frustration from two other

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<sup>93</sup> The principle that an arbitrator is competent to determine jurisdiction in the first instance, subject to review by the courts at common law was expressed in *Christopher Brown Ltd v Genossenschaft Oesterreicher Waldbesitzer R GmbH* [1954] 1 QB 8. In *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 Lord Collins at [80] referred to the principle being used as early as 1797 to the case of *The Betsy* where it the Commissioners under the Jay Treaty of 1794 were competent to determine their jurisdiction.

<sup>94</sup> [1926] AC 497.

<sup>95</sup> [1926] AC 497 at 505.

<sup>96</sup> [1942] AC 356.

<sup>97</sup> [1942] AC 356 at 366. At 365 Viscount Simons LC stated:

“Lord Sumner’s judgment contains an elaborate and authoritative exposition of the nature of frustration, and a contrast between the operation of frustration, which is automatic and the consequence of wrongful repudiation, which depends on the choice of the other party. On this point, the judgment has always been

situations, first a dispute as to whether the contract containing the arbitration clause had been entered into at all, stating this to be incapable of resolution by an arbitrator “for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission”.<sup>98</sup> Secondly, Viscount Simon LC distinguished the situation where one party contended the contract was *void ab initio* “for on this view the clause itself also is void”.<sup>99</sup>

From that decision developed the English position of separability in a narrower form, such that an arbitrator could not determine the essential validity of the substantive contract but could determine a dispute if the contract, acknowledged to be binding at inception, was discharged by subsequent events.<sup>100</sup> However, in 1993, the English Court of Appeal held this distinction did not form part of the *ratio decidendi* of *Heyman v Darwins*, and should not be followed. In *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd*<sup>101</sup> the Court of Appeal upheld the expression of view of Steyn J at first instance<sup>102</sup> that separability extends to questions of the initial validity of the contract even in the absence of express words to that effect in the arbitration clause. Steyn J stated this proposition to be “sound in legal theory” and in line with the public interest in making arbitration effective.<sup>103</sup> In accepting Steyn J’s position, Leggatt LJ noted that “it would ill become the courts of this country, by setting

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regarded as a pronouncement of the highest authority, but I confess to considerable difficulty in accepting the conclusion that the dispute whether such a requisition had frustrated the performance of the charterparty, or whether on the other hand, the ship owner was entitled to damages for the charterers’ refusal to take delivery of the ship when she was at length released, was not a “dispute arising under this charter.”

<sup>98</sup> [1942] AC 356 at 366.

<sup>99</sup> [1942] AC 356 at 366.

<sup>100</sup> Sir M Mustill and S Boyd, *Commercial Arbitration* (Butterworths London, 1989, 2<sup>nd</sup> ed) p 7, fn 6 stating “The doctrine of the separability of the arbitration clause has not been espoused in the wider form in which it is known in other jurisdictions. But the narrower English form leads in many cases to the same result.”

<sup>101</sup> [1993] QB 701.

<sup>102</sup> Steyn J considered himself bound by *David Taylor & Sons Ltd v Barnett Trading Co Ltd* [1953] 1 WLR 562 not to accept the principle of separability allowed an arbitrator to determine the initial validity of the contract. The Court of Appeal upheld Steyn J’s statement of principle and overturned *David Taylor*.

<sup>103</sup> [1992] 1 Lloyd’s Rep 81 at 93.

their face against this jurisdiction, to deprive those engaged in international commerce of the opportunity of entrusting such disputes to English commercial arbitrators without the need for arbitration clauses containing elaborate self-fulfilling formulae".<sup>104</sup> Only where the ground of invalidity for the main contract directly impeached the arbitration clause could the arbitrator's jurisdiction be called into question. That statement was recently affirmed by the House of Lords in *Fiona Trust Holding Corp v Privalov*,<sup>105</sup> (see below) in light of the subsequent express inclusion of separability in the *Arbitration Act 1996* (UK), s 7.<sup>106</sup>

The Australian courts have likewise moved from a position of rejection to recognition of separability. In *IBM Australia Ltd v National Distribution Services Ltd*<sup>107</sup> before the New South Wales Court of Appeal Clarke JA stated that an arbitrator does not have jurisdiction to determine whether the arbitration clause is *void ab initio*.<sup>108</sup> Handley JA agreed.<sup>109</sup> Kirby P did not decide the issue. Clarke JA referred to comments made by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*<sup>110</sup> which expressed agreement with the statements by Viscount Simon LC in *Heyman v Darwins*. The Federal Court took a different view in *QH Tours Ltd v Ship Design And Management (Aust) Pty Ltd*.<sup>111</sup> The New South Wales Court of Appeal in *Ferris v*

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<sup>104</sup> [1993] QB 701 at 719. See also per Ralph Gibson LJ at 711.

<sup>105</sup> [2007] UKHL 40; [2008] 1 Lloyd's Rep 254.

<sup>106</sup> The terms of that section being as follows:

*"Section 7 Separability of an arbitration agreement*

Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

<sup>107</sup> (1991) 22 NSWLR 466.

<sup>108</sup> (1991) 22 NSWLR 466 at 485.

<sup>109</sup> (1991) 22 NSWLR 466 at 487.

<sup>110</sup> (1982) 149 CLR 337 at 365.

<sup>111</sup> (1991) 33 FCR 227.

*Plaister*,<sup>112</sup> just three years after *IBM Australia*, revisited the issue. Upholding the decision of Young J at first instance that the statements in *Codelfa Constructions* and *IBM Australia* were obiter and not binding upon the Court, Kirby P held the acceptance of separability was supported by the trend of legal authority, by reasons of practicality, by analogies in other areas of the law, by the desirability of a common approach and by the passage of Federal legislation.<sup>113</sup> Mahoney JA and Clarke JA agreed, the latter recanting his earlier views. The Federal Court followed this approach in *Comandate Marine*.<sup>114</sup>

The argument against the acceptance of the doctrine of separability and in favour of the “orthodox” view in *Heyman v Darwins* is, or is presented as being, one of logic.<sup>115</sup> If the agreement never existed, neither did the arbitration clause it contained. Nothing can come from nothing. *Ex nihilo nil fit*. However, as Kaplan J has stated “commercial reality is to be preferred to logical purity”.<sup>116</sup> In *Comandate Marine* I described separability as “an approach by the law to accommodating commercial practicality and common sense to the operation of legal rules”<sup>117</sup> applied better to give effect to the intentions of the parties.

The approach of the Federal Court and the New South Wales Court of Appeal are now aligned, although the doctrine of separability has not been considered by the High Court. However, the words of Art 16(1) Model Law, as adopted by the IAA, and reflected in substance in s 16 of the CAA are clear. That is:

“The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as

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<sup>112</sup> (1994) 34 NSWLR 474.

<sup>113</sup> (1994) 34 NSWLR 474 at 485.

<sup>114</sup> [2006] FCAFC 192; (2006) 157 FCR 45 at 104-105 [228].

<sup>115</sup> See A Baron, “Arbitration and the Fiction of Severability” (1999) 19 *Australian Bar Review* 49.

<sup>116</sup> *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd* [1991] HKFCI 190 at [61].

<sup>117</sup> *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; (2006) 157 FCR 45 at 104-105 [228].

an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.”

Some questions regarding separability remain for consideration, in Australia at least. The limits of the principle are yet to be articulated. Clearly, some challenges to the principal contract may apply equally to the arbitration clause. Examples of these were considered by Lord Hoffmann in the House of Lords decision of *Fiona Trust & Holding Corp v Privalov*.<sup>118</sup> There the appellants’ case was that the contract containing the arbitration clause was procured by bribery, giving rise to a right of rescission. They argued that this claim had to be determined by a court. Accepting the principle of severability, Lord Hoffmann held the arbitration clause could only be void or voidable on grounds which related to it directly. There was no such relationship between the alleged bribery and the arbitration clause. That is it could not be shown that the appellants were bribed to enter into the arbitration clause as opposed to the main agreement. His Lordship gave examples of when the clause would be invalid, including a claim that the signature to the principal contract was forged. Such a ground would also attach to the arbitration clause, whether the clause were considered a separately executed agreement or not. However, as his Lordship stated “the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a ‘distinct agreement’, was forged.” Further his Lordship said:

“On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorised or for improper reasons, that is not necessarily an attack on the arbitration agreement. It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have had no authority to enter into an arbitration agreement. Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.”<sup>119</sup>

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<sup>118</sup> [2007] UKHL 40; [2008] 1 Lloyd’s Rep 254 at 257-258 [17]-[21].

<sup>119</sup> [2007] UKHL 40; [2008] 1 Lloyd’s Rep 254 at 258 [18].

The argument that, but for the bribery, the owners would not have entered into any contract and therefore would not have entered into the arbitration clause was rejected by his Lordship as “exactly the kind of argument” which section 7 of the *Arbitration Act 1996* (UK) containing the principle of separability was intended to prevent.<sup>120</sup> Lord Hope of Craighead said that the appellants’ argument was one of causation and they contended no distinction needed to be drawn between the various situations in which consent to the principal contract would be lacking.<sup>121</sup> His Lordship rejected that argument and stated that allegations “parasitical to a challenge to the validity to the main agreement will not do.”<sup>122</sup>

There may indeed be instances where a lack of voluntary assent invalidates all provisions of an agreement, including an arbitration clause.<sup>123</sup> In such cases, the arbitrator, absent some fresh agreement between the parties, will be deprived of jurisdiction. There are also other issues which the doctrine of separability enlivens, including the relationship between the ability of the courts to determine the validity of an arbitration clause on an application to stay curial proceedings and the power of an arbitrator to determine his or her own jurisdiction in the first instance.<sup>124</sup> The resolution of these issues waits another day. However, the approach to the question of the limits of severability in *Fiona Trust* requiring “direct impeachment” of the arbitration clause addresses the objects of the legislation and the general considerations previously discussed regarding the presumed intention of the parties to deal with all disputes in one place at one time.

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<sup>120</sup> [2007] UKHL 40; [2008] 1 Lloyd’s Rep 254 at 258 [19].

<sup>121</sup> [2007] UKHL 40; [2008] 1 Lloyd’s Rep 254 at 260 [33].

<sup>122</sup> [2007] UKHL 40; [2008] 1 Lloyd’s Rep 254 at 261 [35].

<sup>123</sup> See e.g. P Mayer, “The Limits of Severability of the Arbitration Clause” in A J van den Berg, *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Kluwer Law International, 1999) pp 264-266 for a discussion of this issue.

<sup>124</sup> *Downing v Al Tameer Establishment* [2002] EWCA Civ 721 per Potter LJ; *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd* [1991] HKFCI 190 at [61]. R Merkin, *Arbitration Law* (LLP, London, 2004) [8.28]-[8.30] and see the cases cited in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; (2006) 157 FCR 45 at 101 [216].



### III. CONCLUSIONS

It is necessary at this point to say something about the coverage of this paper. There are other recent and relevant decisions to which I have not adverted, primarily because they do not fall neatly within the topics I have chosen to discuss. However, it would be remiss of me not to mention the recent case of *Altain Khuder LLC v IMC Mining Inc*<sup>125</sup> before the Hon Justice Croft. His Honour's judgment affirmed that the grounds for the refusal of recognition and enforcement in the IAA, s 8 are exhaustive and will require strict proof, and are not to be used as a means to re-agitate issues which were put before and decided by the arbitrator.<sup>126</sup> Another significant decision is that of Ward J in *Cargill International SA v Peabody Australia Mining Ltd*<sup>127</sup> in which her Honour held that the adoption of institutional rules does not constitute an implied exclusion of the Model Law. In that regard, her Honour expressed the view that the decision in *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH*<sup>128</sup> was plainly wrong.<sup>129</sup> Given the amendments to the IAA, s 21, this may be a point no longer to arise, but Ward J's argument regarding the distinction between procedural rules and *lex arbitri* is well made. There is also a body of authority on appeals against an error of law in respect of domestic awards. In this regard there are a number of recent decisions, including *Gordian Runoff Ltd v Westport Insurance Corporation*<sup>130</sup> and the decision of Croft J in *Thoroughvision Pty Ltd v Sky Channel Pty Ltd*<sup>131</sup> which affirm the limited circumstances in which leave to appeal may be granted and consider the standard of reasons required of an arbitrator. The different views on these issues (in particular the

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<sup>125</sup> [2011] VSC 1.

<sup>126</sup> [2011] VSC 1 at [69].

<sup>127</sup> [2010] NSWSC 887.

<sup>128</sup> [2001] 1 Qd R 461.

<sup>129</sup> [2010] NSWSC 887 at [37]. *Eisenwerk* was distinguished by the Queensland Court of Appeal in *Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS* [2010] QCA 219, their Honours finding it "inappropriate" to make a finding as to the correctness of the decision.

<sup>130</sup> [2010] NSWCA 57.

<sup>131</sup> [2010] VSC 139; see also *Winter v Equuscorp Pty Ltd* [2010] VSC 419.

extent of reasons required by arbitrators) are currently before the High Court of Australia in an appeal from *Gordian Runoff*. I have not included discussion of them in this paper.

It is evident from the body of more recent jurisprudence that judicial attitudes to arbitration have changed. There has been a palpable shift from suspicion to support. The Chief Justice of the High Court of Australia, the Hon Robert French, commented extra-curially in an address in 1992 (when a judge of the Federal Court):

“In times not so far in the past, the arbitrator was seen in some circles as a dubious, below stairs figure, requiring close curial supervision, a quasi-judicial equivalent of Uriah Heap. He operated what was regarded by legal elites as a second rate system of backyard justice.”<sup>132</sup>

He contrasted that unfavourable portrait with the modern arbitrator “clothed in the armour of enhanced arbitral autonomy”.<sup>133</sup>

In 1856, Lord Campbell (perhaps somewhat unfairly) identified the genesis of the longstanding distrust of arbitration by the judiciary as being the competition between the institutions for revenue. That competition dates to an era in which judges’ salaries were not fixed but derived from fees payable for resolving individual disputes and therefore proportionate to the number of disputes they determined.<sup>134</sup> The desire to keep as many disputes as possible within the pool from which the spoils could be obtained may have been the reason, prior to the historic decision in *Scott v Avery*,<sup>135</sup> that contractual clauses making arbitration a precondition to litigation were held to an ouster of the courts’ jurisdiction and therefore impermissible. Lord Campbell’s comment was noted by Spigelman CJ and Mason P in *Raguz v Sullivan*.<sup>136</sup> They compared that statement

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<sup>132</sup> The Hon R S French AC, “Arbitration – the Court’s Perspective” (1992) *The Arbitrator* 130.

<sup>133</sup> The Hon R S French AC, “Arbitration – the Court’s Perspective” (1992) *The Arbitrator* 130 (there speaking of the domestic regime).

<sup>134</sup> *Scott v Avery* (1856) 5 HLC 811; 10 ER 1121.

<sup>135</sup> (1856) 5 HLC 811; 10 ER 1121.

<sup>136</sup> [2000] NSWCA 240; (2000) 50 NSWLR 236 at 247-248 [47]-[51]. It was also noted in a Keynote Address by the Hon K Mason at the Conference on International Commercial Arbitration, Sydney, 9 March 1999.

with the revised version of his Lordship's reasons that appeared in later reports, omitting the pecuniary justification as indicative of the stir it must have generated at the time.<sup>137</sup> However, their Honours went on to note that the legislatures and (afterwards) the judiciary had since, "sat up and listened"<sup>138</sup> to the commercial community by offering renewed support for arbitration. A number of cases bear out that proposition, including those discussed herein.<sup>139</sup>

Notwithstanding the commendable headway which has been made, there is still a way to go. There is a need for greater coherency and uniformity. To date, only New South Wales has enacted the reforms agreed upon for domestic arbitrations. Domestic arbitrations in the remaining jurisdictions continue to be governed by the prior uniform regime, which provides considerably greater scope for judicial intervention both in terms of supervision of the conduct of the arbitration and in the means by which an award may be challenged. The domestic as well as the international legislative regimes need to function smoothly if arbitration in Australia is to succeed. This is not only to ensure a consistent approach for all disputes resolved by this method but also because "domestic" disputes may arise between subsidiaries of multinational companies and

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<sup>137</sup> [2000] NSWCA 240; (2000) 50 NSWLR 236 at 248 [48]:

"This frank self-revelation must have caused quite a stir, which is probably the reason why it does not appear in later, revised reports of the decision. Contrast 28 LT 207 at 211 and 5 HLC 811 at 853 where the passage has been replaced with 'It probably originated in the contests of the different courts in ancient times for extent of jurisdiction, all of them being opposed to anything that would altogether deprive every one of them of jurisdiction'."

<sup>138</sup> [2000] NSWCA 240; (2000) 50 NSWLR 236 at 248 [50].

<sup>139</sup> See particularly the cases cited in *Raguz v Sullivan* [2000] NSWCA 240; (2000) 50 NSWLR 236 at 248 [51]: *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 166, *Promenade Investments Pty Ltd v State of New South Wales* (1991) 26 NSWLR 184 per Rogers CJ (Comm D) at 203; *Natoli v Walker* (1994) 217 ALR 201 per Kirby P at 212-213. See also Sir M Mustill and S Boyd, *Law and Practice of Commercial Arbitration* (Butterworths London, 1989, 2<sup>nd</sup> ed) p 28 who cited the passage of the *Arbitration Act 1979* (UK) as evidence of a "profound psychological change" between the courts and arbitral process; Justice Asche, "Appeals from Awards/Judicial Review" (1991) *The Arbitrator* 59 at 60: "The assumption plainly is that the legal system and the commercial arbitration system can coexist without radical damage being done by one to the other"; *National Distribution Services Ltd v IBM Australia Ltd* (unreported, NSW SC, 5 October 1990) BC9001922 per Rogers CJ (Comm D) at 14; *Qantas Airways Ltd v Dillingham Corp* (1985) 4 NSWLR 113 per Rogers J (as he then was) at 118:

"It is now more fully appreciated than used to be the case that arbitration is an important and useful tool in dispute resolution. The former judicial hostility to arbitration needs to be discarded and a hospitable climate for arbitral resolution of disputes created."

have international economic repercussions. Getting the domestic regime in order will provide greater certainty for the finality of awards and consistency between regimes may encourage parties to nominate Australia as the forum state for international disputes.<sup>140</sup>

In order to achieve consistency education of the judiciary is important. For that purpose, a Judicial Liaison Committee has been established comprised of judges of each jurisdiction and chaired by the Hon Murray Gleeson AC to meet, report on and promote uniform procedure. This initiative should encourage understanding in the judicial community of the vital and widespread role of commercial arbitration and the role that a competent and knowledgeable court system plays. Through education the courts will be better placed to strike the appropriate balance between expedition and economy and the preservation of the necessary standards of fairness.

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<sup>140</sup> For this reason it is important that uniformity between the State regimes is achieved, which will also achieve greater consistency between the domestic and international regimes. Save for provisions allowing leave to appeal against an error of law: CAA, s 34A, the CAA and IAA are substantively similar. The disparity between the domestic and international regimes has previously been noted as a concern. On the advantages of a uniform set of state laws, see for example the comment of the Hon J Kennan, former Attorney-General of Victoria in *Parliamentary Debates*, Legislative Assembly, 2 May 1984, p 2063:

“Commercial enterprises operating throughout Australia should greatly appreciate the availability of a uniform system of arbitration, for which the Bill is the model. Commercial contracts will be able to be drawn to include a reference to arbitration in the event of a dispute and the parties to those agreements will be assured that the law will be consistently applied throughout Australia.”

See also: Comments by the Chief Justices of the States and Territories to the Commonwealth Attorney-General on the Review of the International Arbitration Act 1974, 10 December 2008, available at [www.ag.gov.au/internationalarbitration](http://www.ag.gov.au/internationalarbitration):

“Creating a barrier between international and domestic commercial arbitration systems, in a way that does not exist, most relevantly, in Hong Kong and Singapore, would constitute a significant disadvantage. Any attempt to hold out Australia as a centre for international arbitration will not succeed if the domestic arbitration system does not operate consistently with the international arbitration regime.”

**Torts in Commercial Law Conference  
Sydney, 17 December 2010**

**Causation in Commercial Law**

**Justice James Allsop\***

**Introduction**

Causation cannot be discussed in connection with commercial law without addressing considerations of general application and importance. There are, of course, a number of issues of particular interest to commercial law, but understanding their significance is assisted by first directing oneself to general questions that have relevance to other legal topics and law generally.

Legal notions of cause grow from sometimes competing conceptions in science, philosophy, everyday life, morality and law. Causation is an element in all legal and human questions that involve understanding, and attribution of responsibility for, some aspect of the past. Its central importance makes it no less elusive. As Dean Pound said in 1957,<sup>1</sup> any systematic exposition of causation could be described as “unscrewing the inscrutable”.

Causation takes its place along with other considerations such as remoteness, foreseeability and, increasingly, scope of duty in the attribution of legal responsibility and awarding of compensation for acts and omissions. The

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\* President, New South Wales Court of Appeal. I wish to thank, and acknowledge the assistance of, my researcher, Ms Anna Garsia, for her work and insights that have been invaluable in developing the paper.

<sup>1</sup> Roscoe Pound, “First Harry Schulman Lecture on Torts at Yale Law School” (1957–1958) 67 *Yale Law Journal* 1.

courts have used these mechanisms both to control and to expand responsibility. When one mechanism is used (for example scope of duty) it often has a direct effect on the operation of other mechanisms (including causation). Further, some approaches to causation<sup>2</sup> combine causation, foreseeability and remoteness in one stage of an enquiry as to liability, which is better described as scope of liability, after the satisfaction of a minimum requirement of “but for” factual causation or factual involvement.

Discussion and debate about causation in the 20<sup>th</sup> century have reflected broader patterns of thinking about the law generally: legal realism, legal positivism, corrective justice, law and economics and modern realism.<sup>3</sup> The developments in approach to the causal analysis by scholars, the judiciary and Parliament within the last 20 years have encouraged a more explicit illumination of the place of corrective justice in torts, which has not been restricted to personal injury, affecting responsibility in commercial contexts.<sup>4</sup>

### **Academic and extra-curial writing**

I do not propose to undertake an exhaustive review of the work of scholars and judges writing extra-curially, but rather to sketch, by way of introductory framework, the contribution of some of the most influential writers for our common law legal tradition, in particular, Professors Hart and Honoré,<sup>5</sup> Wright<sup>6</sup> and Stapleton.<sup>7</sup> I apologise to others to the extent that this choice

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<sup>2</sup> In particular that of Professor Stapleton, below n 7, and of the various Australian State and Territory Parliaments in the *Civil Liability Acts*, below n 94.

<sup>3</sup> For a summary of the main theoretical accounts see Jane Stapleton, “Choosing what we mean by ‘Causation’ in the Law” (2008) 73 *Modern Law Review* 433.

<sup>4</sup> See in particular in relation to the operation of the *Trade Practices Act 1974* (Cth).

<sup>5</sup> HLA Hart and AM Honoré, *Causation in the Law* (1<sup>st</sup> Ed, 1959; 2<sup>nd</sup> Ed, 1985, Oxford, Clarendon).

<sup>6</sup> Richard W Wright, “Causation in Tort Law” (1985) 73 *California Law Review* 1735; Richard W Wright, “Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis” (1985) 14 *Journal of Legal Studies* 435; Richard W Wright, “The Efficiency Theory of Causation and Responsibility: Unscientific Formalism and False Semantics” (1987) 63 *Chicago-Kent Law Review* 553; Richard W Wright, “Causation, Responsibility, Risk, Probability, Naked Statistics and Proof: Pruning the Bramble Bush by Clarifying Concepts” (1987–1988) 73 *Iowa Law Review* 1001; Richard W Wright “Once More into the Bramble Bush: Duty, Causal Contribution and the Extent of Legal Responsibility” (2001) 53 *Vanderbilt Law Review* 1071. For critical review of Wright’s causation analysis, in particular the necessary element in a sufficient set of conditions (“NESS”) test see Richard Fumerton and Ken Kress, “Causation and the Law: Preemption, Lawful Sufficiency, and Casual Sufficiency” (2001) 64 *Law and Contemporary Problems* 83.

might be taken to contain within it a value judgment on their work. That is not intended. Limits of space and time for present purposes and my personal debt of gratitude for the illumination their work has given me persuade me to focus on their work at the outset. I will include in this introductory section some discussion of the extra-curial writing of Lord Hoffmann.<sup>8</sup> If I may say so, the clarity and illumination of his influential articles and his judicial opinions reflect an enormous contribution to the law in this area of discourse.

One advantage in even a brief discussion of these writings is the uncovering and discussion of key concepts and organisational theories which inhere in both judicial and statutory expressions of rules of causation. Indeed, one of the key insights of Professor Stapleton that assists in the avoidance of confusion is the use of the notion of “involvement” of the relevant act or omission with the relevant result, rather than expressions such as cause-in-fact. This helps to illuminate the legal reality that Lord Hoffmann has made clear that there is no such thing as causation as an existing essential concept in law to which additions or subtractions must be made depending on the legal context.<sup>9</sup> Rather, by reference to proved involvement of the act or omission with the result, or the relationship between them, the relevant legal rules of responsibility (in particular the content of any relevant duty) and of compensation and consequential conforming rules of scope will be applied to assess responsibility. Basal to that function and that analysis will be the

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<sup>7</sup> Jane Stapleton, “Law, Causation and Common Sense” 8 *Oxford Journal of Legal Studies* 111; Jane Stapleton, “Duty of care and Economic Loss: A Wider Agenda” (1991) 107 *Law Quarterly Review* 249; Jane Stapleton, “Negligent Valuers and Falls in the Property Market” (1997) 113 *Law Quarterly Review* 1; Jane Stapleton, “The Normal Expectancies Measure in Tort Damages” (1997) 113 *Law Quarterly Review* 257; Jane Stapleton, “Risk Taking by Commercial Lenders” (1999) 115 *Law Quarterly Review* 527; Jane Stapleton, “Perspectives on Causation” in Jeremy Horder (Ed), *Oxford Essays in Jurisprudence* (4<sup>th</sup> series, 2000), 61; Jane Stapleton, “Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences” (2001) 54 *Vanderbilt Law Review* 941; Jane Stapleton, “Unpacking Causation” in Peter Cane and John Gardner (Eds), *Relating to Responsibility: Essays for Tony Honoré on his Eightieth Birthday* (2001), 145; Jane Stapleton, “Cause in Fact and the Scope of Liability for Consequences” (2003) 119 *Law Quarterly Review* 388; Jane Stapleton, “Loss of the Chance of Cure from Cancer” (2005) 68 *Modern Law Review* 996; Stapleton, above n 3; Jane Stapleton, “The Two Explosive Proof-of-Causation Doctrines Central to Asbestos Claims” (2008–2009) 74 *Brooklyn Law Review* 1011; Jane Stapleton, “Factual Causation and Asbestos Cancers” (2010) 126 *Law Quarterly Review* 351.

<sup>8</sup> Lord Hoffmann, “Common Sense and Causing Loss” (Lecture to the Chancery Bar Association, 15 June 1999); Lord Hoffmann, “Causation” (2005) 121 *Law Quarterly Review* 592 (the text of the article was delivered as the Blackstone Lecture at Pembroke College, Oxford, 14 May 2005).

<sup>9</sup> See for example, *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19; [2002] 2 AC 883, 1105–1106 [127]–[130] (“*Kuwait Airways*”).

infusion of the common sense of the milieu in which the question is being asked. This is perhaps to say nothing more (except in more words) than that causation cannot be divorced from the legal framework that gives rise to the cause of action;<sup>10</sup> or to say nothing more (but with less grace) than did Mahoney JA in *Barnes v Hay*<sup>11</sup> or Sopinka J in *Farrell v Snell*<sup>12</sup> or Hope and Priestley JJA in *Barnes v Hay*.<sup>13</sup>

### **Hart and Honoré**

Hart and Honoré's great work, *Causation in the Law*, can be seen to embody at least two principal aims: first, to analyse the use of causal language in everyday and judicial life to ascertain whether a conceptual framework could be constructed or extracted from such usage, in order to identify the sources of the uncertainties and confusion which they saw as surrounding the use of causal language; and, secondly, to deal with the legal realist theories that sought to reduce causation to a minimal "but for" enquiry, after which all was policy.<sup>14</sup> The first aim underpinned the anchoring of causation for legal purposes in "common sense" in the attribution of responsibility. They sought a principled basis upon which to use causal language to attribute responsibility. As Lord Hoffmann has said,<sup>15</sup> a great achievement of Hart and Honoré was to

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<sup>10</sup> McHugh J in *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459, 491 [98] citing Lord Hoffmann in *Environment Agency v Empress Car Co (Arbortillery) Ltd* [1998] UKHL 5; [1999] 2 AC 22, 29 ("*Empress Car Co*"); and Gummow J in *Chappel v Hart* [1998] HCA 55; (1998) 195 CLR 232, 255 [62].

<sup>11</sup> *Barnes v Hay* (1988) 12 NSWLR 337, 353:

"[T]he determination of a causal question involves ... a normative decision as to whether, for the purposes of the case, the precedent act for which the defendant is responsible should be seen as causal to the plaintiff's loss. And, in my opinion, that evaluation is made, not by a 'test' or 'guide' such as the 'but for' test, but by a functional evaluation of the relationship and the purposes and policy of the relevant part of the law."

<sup>12</sup> *Farrell v Snell* [1990] 2 SCR 311, 326:

"Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former."

<sup>13</sup> *Barnes v Hay* (1988) 12 NSWLR 337, 339:

"Few judges have the time to plumb these philosophical depths by giving a full consideration to the conceptual issues involved. What happens in practice and what we think the law requires is that the court decides whether the connection of the negligent act or omission of the defendant to the plaintiff's loss was such that the defendant should be made liable for it. In the present case we would conclude that the defendants' negligence was sufficiently connected with the plaintiff's loss to be regarded as a cause of it."

<sup>14</sup> See Stapleton, "Law, Causation and Common Sense", above n 7, 112.

<sup>15</sup> Lord Hoffmann, "Causation", above n 8, 593.



unpack the concept of causation when used in language to attribute responsibility by reference to factual and moral notions.

Hart and Honoré viewed as essential the formulation of a legal rule as to legal responsibility that was able to be easily comprehended by ordinary people. This was a central attribute of law. Causal language, often in the form of metaphors, was the attempt by the courts to express common sense notions of cause. The common sense notion of causation involved the notion of causally relevant factors as part of the sufficient necessary conditions to produce a result. First, they identified as a causal connection cause and effect through deliberate voluntary acts or abnormal contingencies interfering with the ordinary course of events, as opposed to mere conditions precedent within the environment; such deliberate human acts or abnormal contingencies may likewise negative or put an end to a causal connection otherwise established. Secondly, they identified as a causal connection the explanation for an act through interpersonal transactions: X did something persuaded by the advice of Y. Thirdly, they identified as a causal connection the provision of an opportunity or means to do something – so-called “occasioning” of harm.

Hart and Honoré rejected the notion that the “but for” analysis was the only factual enquiry involved before the application of policy in determining the scope of the liability by reason of the particular legal rule. They accepted that policy was relevant, but not necessarily at the stage of the enquiry after the satisfaction of the “but for” test. They sought to isolate causal from policy questions. Once an affirmative answer to the “but for” test was found, the remaining issues involved two distinct issues: causation and policy. Causation at this point was influenced by common sense notions. Only after this was there the separate issue of whether the law will restrict (or enlarge<sup>16</sup>) liability by reference to the found causal connection by rules about scope (based on policy). These causal and policy or scope reasons may inform such

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<sup>16</sup> At this point it is worth noting *Fairchild v Glenhaven Funeral Services Ltd & Ors* [2002] UKHL 22; [2003] 1 AC 32 (“*Fairchild*”) as perhaps an illustration of this enlargement of responsibility independently of a causal connection.

expressions as “proximate” or “legal” cause. They are also important to keep separate because of the variety of influences from policy or scope depending upon the subject matter and the moral, legal and societal content of the rule.

Hart and Honoré thus identified a three stage approach: the “but for” analysis, causal connection using common sense notions and then policy or scope limitations. Highly relevant to the consideration of causal link was the risk created by the wrongful conduct, foreseeability and an intuitive sense of fairness. They contested, however, the view that foreseeability should govern the extent of responsibility once negligence is shown.<sup>17</sup>

In the preface to the second edition, Hart and Honoré accept more readily how policy issues impinge on the determination of causal issues: (a) a policy or external legal rule may affect or determine the grounds of legal responsibility and thus how the causal requirement appears and in what shape; (b) liability can be truncated by policy;<sup>18</sup> (c) the merger of causal with non-causal issues in legal thinking, for example remoteness or foreseeability as an element of common sense causal connection of occasioning harm and as part of a rule of truncation or limitation; and (d) the existence of policy rules in proof of factual connection and causation, such as onus rules.

Central to the work of Hart and Honoré were common sense notions of causation expressed in language reflecting a core of commonly agreed meaning and the pivotal place of the voluntary human act.

### **Wright**

In the 1980s, in Chicago, Richard Wright published a number of powerful articles on causation in the law of torts both building on and criticising the work of Hart and Honoré. Wright saw three elements: (a) an enquiry as to whether there was tortious conduct; (b) the causal enquiry; and (c) an enquiry

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<sup>17</sup> The first edition of *Causation in the Law* was published in 1959, just before *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The “Wagon Mound” (No 1))* [1961] UKPC 1; [1961] AC 388 (“*Wagon Mound (No 1)*”).

about applicable policy or principle – the “proximate cause” enquiry. In Wright’s view, it was crucial to keep these enquiries separate.

Amongst Wright’s criticisms of Hart and Honoré, central was his view that the common sense causal enquiry over-emphasised the factual enquiry and under-emphasised policy. This was brought about, in significant part, by failing to keep separate the three enquiries referred to and a confusion between causation and responsibility.

The first element is the tortious conduct enquiry. This focuses the enquiry, giving it content and purpose. Was X’s conduct tortious and in what respect? The second element is the causal enquiry which he develops as a “necessary element of sufficient set” (a NESS enquiry). The NESS enquiry is a development of a “but for” test to deal with the problems of over-determined or duplicative<sup>19</sup> and pre-emptive<sup>20</sup> causation. Wright acknowledges the importance of Hart and Honoré as the foundation for his approach.<sup>21</sup> By the NESS test, a particular condition was a cause of a specific consequence if, and only if, it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence.<sup>22</sup> Thereafter policy was applied.

### **Stapleton**

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<sup>18</sup> indeed enlarged: *Fairchild* [2003] 1 AC 32.

<sup>19</sup> Richard W Wright, “Causation in Tort Law”, above n 6, 1791–4 for discussion of how the NESS test is suitable for dealing with cases of over-determined causation. Wright looks at the examples of over-determined causation of the case where C and D independently start separate fires, each of which would have been sufficient to destroy a plaintiff’s house and the fires converge and burn down the house and the case where a cable with a maximum safety load capacity of one tonne was weakened by C, such that it would break if subjected to a one tonne load and then D negligently puts a two tonne load on the cable, which would have caused it to break even if it were not weakened, and the cable breaks at the *weakened point*. Another archetypal example of over-determined causation is that of the two careless hunters who shoot a walker in the forest and it is impossible to tell which bullet killed the walker, with evidence that either bullet wound would have been sufficient to bring about the death.

<sup>20</sup> *Ibid*, 1794–5 for discussion of how the NESS test is suitable for dealing with pre-emptive causation. Wright looks at the example of pre-emptive causation of the case where D shoots and killed P just as P is about to drink a cup of tea that has been poisoned by C. Wright also notes that in the case of the weakened cable (see discussion above n 17), if the cable breaks other than at the weakened point, the case is one of pre-emptive causation.

<sup>21</sup> *Ibid*, 1788–91.

<sup>22</sup> *Ibid*, 1790.

In an important body of work over 20 years, Professor Stapleton has put forward an influential account of causation, which embraces Wright's NESS test as a useful tool, though rejecting it as a comprehensive test of causation.<sup>23</sup>

The starting point for causal analysis is the choice of interrogation perspective in order that the enquiry as to the "involvement" of specified factors can be understood. The interrogation may be directed to explanation, blame, scientific or physical role or relative involvement. This can be viewed, as Wright viewed the enquiry as to tortious conduct, as the purpose or focus of the enquiry; and it is to be specified at the outset. It frames the enquiry about involvement. Stapleton argues that the law should use the widest interrogation to capture all ways in which the factors are involved using the physical laws of nature and evidence of behaviour. She sees "involvement" as including three forms: (a) necessity; (b) duplicative necessity; and (c) contribution.

Necessity is where the factor is necessary for the existence of the phenomenon. Duplicative necessity is where the phenomenon would have still occurred but only because of the presence of another specified factor. This is the so-called "over-determined outcome".<sup>24</sup> Contribution is where the

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<sup>23</sup> In "Causation in Tort Law", above n 7, 1789–90 Wright had argued that the NESS test accorded with the traditional Humean philosophical account of the meaning of causation. He then concluded the extended discussion of the NESS test at 1802 with:

"It should be clear by now that the NESS test not only resolves but also clarifies and illuminates the causal issues in the problematic causation cases that have plagued tort scholars for generations. It does so because it is not just a test for causation, but is itself the meaning of causation."

In "Choosing what we mean by 'Causation' in the Law", above n 3, 472–3, Stapleton accepts the critique of Fumerton and Kress, above n 6, of Wright's characterisation of the NESS test. For Stapleton the NESS test is not the meaning of causation, although it is of "potential practical value ... to the lawyer".

<sup>24</sup> Stapleton, "Choosing what we mean by 'Causation' in the Law", above n 3, 438 and 442 where Professor Stapleton gives the example of duplicative necessity of the case where "due to the carelessness of each of two unrelated hunters, a mountain walker is simultaneously shot by both and the medical evidence is clear that either shot would have been sufficient to result in instantaneous death" – neither shot is necessary for the death being duplicated by the other shot yet absent the other shot, each shot would have been necessary for the death.

phenomenon would occur without the presence of the specified factor but only because of the existence of other like contributing factors.<sup>25</sup>

This wide factual interrogation of involvement accommodates what might be the very diverse range of enquiries that the law may make of the factual involvement. This wide factual interrogation also ensures that normative concerns are located elsewhere in the legal analysis.

Once the wide investigation of involvement has been undertaken, the normative questions in respect of responsibility based on duty, breach, inducement, duress or complicity can be addressed. These legal questions permit the individuation of the conduct (breach of contract, duty at law or in equity) and the identification of the “specified factor” for causal analysis and hypothesis. This individuation of the breach or conduct then makes irrelevant many factors that make up the factual involvement.

This first factual analysis of involvement is not entirely free of normative rules. Historical involvement of some factor may be more or less difficult to prove. Rules of evidence and onus formulated by reference to policy considerations may make proof more or less difficult. The principal place, however, for normative rules is in the second enquiry, after that of factual involvement, in the enquiry as to the scope of liability.

Relevant both to the formulation of any rules of proof and to the assessment of the scope of liability is the purpose of the relevant cause of action or legal context in which the question of causation is being asked. Stapleton’s view is that the cause-in-fact question of involvement and the scope of liability question into which normative and policy issues intrude should be kept separate.

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<sup>25</sup> Ibid, 443 where Professor Stapleton describes the notion of “contribution” by considering the case where nine members of a club’s governing committee unanimously vote to expel a member in circumstances where a majority of six was all that was needed under the club rules – the vote of committee member number one was neither necessary nor sufficient to pass the motion and the

The appropriate scope of liability for consequences is to be decided upon after factual involvement is determined (with or without rules of evidence or onus of proof of facts). The scope rules discussed by Professor Stapleton incorporate not only questions that are sometimes referred to as legal causation or proximate cause, but also remoteness of damage. Thus this “scope of liability” enquiry takes up all broader normative questions (including foreseeability) as to legal responsibility that were previously in both a causation analysis and a remoteness analysis.<sup>26</sup>

Professor Stapleton discusses<sup>27</sup> a number of approaches to the ascertainment of the “appropriate” scope of liability for the consequences of tortious conduct. She begins by asserting the inadequacy of “crude slogans” such as the damage being “within the scope of risk” created by the conduct or “within the scope of duty”.<sup>28</sup> The task of assessing the appropriate scope is to truncate the infinite stream of consequences of wrongful conduct by reference to the perceived purpose of the tort and “a range of associated legal rules and concerns”.<sup>29</sup> Professor Stapleton discusses appropriate scope by reference to three general areas: (a) normative choices relating to the position of normal expectancies and to the concept of damage; (b) the requirement that the consequences of the tort be a reasonably foreseeable type of loss; (c) other legal “concerns” that shape a court’s response to assessing the appropriate scope of liability.

Given the incorporation of Professor Stapleton’s ideas into the *Civil Liability Acts*,<sup>30</sup> it is appropriate to explore these ideas a little further. Normal

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same could be said for each member’s vote, yet the motion passed. In Professor Stapleton’s terms each voting member’s role in the voting made a “contribution” to the outcome.

<sup>26</sup> See *March v Stramare (E & MH) Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506, 515 and 522–3 (“*March v Stramare*”); *Bennett v Minister of Community Welfare* [1992] HCA 27; (1992) 176 CLR 408, 412–3 (“*Bennett*”); *Chappel v Hart* (1998) 195 CLR 232, 243 [24].

<sup>27</sup> Stapleton, “Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences”, above n 7; Stapleton, “Cause in Fact and the Scope of Liability for Consequences”, above n 7.

<sup>28</sup> cf *March v Stramare* (1991) 171 CLR 506 at 535 (McHugh J); *Roe v Minister for Health* [1954] 2 QB 66, 85; *Hughes v Lord Advocate* [1963] UKHL 1; [1963] AC 837; *Nader v Urban Transit Authority of New South Wales* [1985] 2 NSWLR 501.

<sup>29</sup> Stapleton, “Cause in Fact and the Scope of Liability for Consequences”, above n 7, 412.

<sup>30</sup> The contribution of Professor Stapleton’s work to the thinking of the committee was expressly recognised in the Ipp Report (*Review of the Law of Negligence – Final Report* (September 2002) (“*Review of the Law of Negligence*”), [7.27], fn 6. The recommendations on causation made in the

expectancies and damage elaborate upon and qualify the factual “but for” analysis. The basic scope rule based on normal expectancies is that a defendant is at most liable for additional injury produced by the tort and not for the consequences that would have occurred anyway. In particular types of factual situations, however, the law faces normative choices about this, that is about the operation of the “but for” test: for example so-called “over-determined” outcomes where the same loss would have occurred by reason of other tortious conduct. The scope rule here is to ignore the other tort. A second scope rule concerns where the same loss would not have occurred, but a substantially identical or equivalent loss would have occurred. A third scope rule is where there is no clear substitute to assess the “but for” test: Is the question what would have happened had no conduct occurred or is it what would have happened had the conduct been different and not tortious? Foreseeability is discussed as relevant in an orthodox way for remoteness. The other “concerns” that are dealt with by Professor Stapleton are: (a) foreseeable but indirect consequences, such as what to do when a reasonable person in the defendant’s position would not have done more to protect the plaintiff from the consequences of what the defendant did; (b) whether to distinguish and shield particular defendants; (c) intervening factors – how the circumstances of the particular case and the normative considerations under the relevant cause of action influence the determination of the appropriate scope of liability such as the honesty of the tortfeasor, intervening acts and attenuation over time. Importantly, Stapleton is of the view that the place of intervening factors should not, as Hart and Honoré provide for, be packed into a factual enquiry under so-called causal common sense. Rather, the focus should be on substantive normative arguments about responsibility under the relevant cause of action or legal framework that explain conclusions that may be different in different legal frameworks.

In the scope of liability discussion, Professor Stapleton does not posit new rules of responsibility; but rather discusses the approaches the courts have taken to causation and responsibility (beyond the question of factual

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Ipp Report were in essence adopted in the statutory reforms in the *Civil Liability Acts*, below n 94, enacted across the Australian states.

involvement) in a taxonomical context avowedly suited to the making of normative judgments by the courts.<sup>31</sup>

### **Lord Hoffmann**

In 1999,<sup>32</sup> Lord Hoffmann delivered a lecture to the Chancery Bar Association entitled “Common Sense and Causing Loss”. In 2005, his Lordship wrote an article in the *Law Quarterly Review* entitled “Causation”. These papers made a number of points of significant force and penetration.

First, the phrase “common sense” in this context can be, and often is, used to hide the true process of reasoning, conscious or subconscious. Secondly, though causation is a question of fact, too often not enough attention is paid to identifying what the relevant question is. Until one knows the correct question, common sense is not going to help one with the correct answer. Thirdly, essential to the articulation of the correct question is the identification of the correct rule of law of responsibility (which includes the relevant rule of compensation). Fourthly, error in reaching an answer to a causal question is often not because the facts have been misunderstood, or common sense was lacking, but because the wrong question has been asked, because an error has been made with the legal rule: that is, the true scope of the rule which imposes liability has been misunderstood. Fifthly, the true scope of the rule will generally involve two questions: (a) the grounds upon which the rule imposes liability; and (b) the kind of loss for which it provides compensation. The importance of this fifth element is to be understood by reference to similar injuries or losses following breaches of different kinds of duty: A climber told by a negligent doctor that his knee was fit to mountain-climb killed on the mountain in circumstances unconnected with his knee; and the same climber told by a dishonest doctor that his knee was fit in order to have an affair with the climber’s wife. If the first doctor is to be found not liable and the second liable, that is not because of common sense, but because of the scope of the

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<sup>31</sup> See *Review of the Law of Negligence*, above n 30, [7.45] which recognises that the task of scope of liability analysis is not undertaken by the application of detailed rules of principle.



substantive rule on which liability is based, for negligence on the one hand and dishonesty on the other. Sixthly, without denigrating the value of common sense, it should not be used to provide generalised answers without recourse to the specifics of the legal problem in question. The specifics of the legal problem in question will usually depend upon theory – not abstract or metaphysical theory, but the underpinning legal or “political” theory held by the judge about the proper scope of the rule – legal, equitable, civil or criminal. Such reasoning should be exposed, not suppressed. Seventhly, a general structure for causation can be sketched as follows: (a) the identification of the prescribed causal connection between the wrongful act and the damage or injury; (b) the question as to what is a sufficient causal connection is a question of law; (c) the usual or standard causal connections most commonly prescribed are the causal connections described by Hart and Honoré; (d) the law may deviate from these usual or standard causal connections, by reference to explained policy.

Lord Hoffmann was critical of the strict separation between cause-in-fact or historical connection or involvement and policy or cause-in-law. The early factual enquiry is not devoid of structure and should not be an open interrogation of the world; rather it is an enquiry structured upon asking the right question from a correct application of the applicable rule. There is in his Lordship’s view an over-complication in the approach of “cause-in-fact” and “cause-in-law”.

The hard cases about causation and related topics such as the scope of liability in negligent misrepresentation cases,<sup>33</sup> the degree of the required causal connection necessary to be proved in respect of the acquisition of a disease of uncertain aetiology,<sup>34</sup> or in respect of damage subsequent to a failure to warn of risk,<sup>35</sup> or the extent of recoverability for increased risk of

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<sup>32</sup> After delivery of the first of his Lordship’s influential opinions on causation: *Empress Car Co* [1999] 2 AC 22.

<sup>33</sup> *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (“SAAMCO”).

<sup>34</sup> *Fairchild* [2003] 1 AC 32.

<sup>35</sup> *Chappel v Hart* (1998) 195 CLR 232; *Rosenberg v Percival* [2001] HCA 18; (2001) 205 CLR 434; *Chester v Afshar* [2004] UKHL 41; [2005] 1 AC 134.

harm,<sup>36</sup> or loss of a chance<sup>37</sup> are all answered, not by common sense or by positing a cause-in-fact/cause-in-law dichotomy, but by selecting for legal policy reasons different criteria by reference to which to judge liability, that is legal responsibility and compensation – being a departure from the usual or standard criteria. These are not intuitive responses based on internalised moral notions of common sense. They are legal rules formulated and explained.

## Governing principle

### *United Kingdom*

Having completed the introductory section on theory with a discussion of Lord Hoffmann's extra-curial writing, it is convenient to begin with the approach to causal questions in the United Kingdom. For most of the 20<sup>th</sup> century, the approach to causation was founded on epithet or metaphor, supported by a practical or common sense approach: direct,<sup>38</sup> natural and probable,<sup>39</sup> direct and natural,<sup>40</sup> proximate,<sup>41</sup> effective or real and effective.<sup>42</sup> It was not a question of "philosophical speculation" but "ordinary everyday life",<sup>43</sup> answered by applying common sense to the facts of the case.<sup>44</sup> Until the abolition of the defence of contributory negligence this causal analysis was clouded by the last opportunity rule.<sup>45</sup> After *The Wagon Mound*,<sup>46</sup> causation, expressed as the direct result, no longer stood as the determinant of the scope of liability.

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<sup>36</sup> *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537; *Gregg v Scott* [2005] UKHL 2; [2005] 2 AC 176.

<sup>37</sup> *Sellars v Adelaide Petroleum NL* [1994] HCA 4; (1994) 179 CLR 332 ("Sellars").

<sup>38</sup> *Re Polemis and Furness, Whithy & Co* [1921] 3 KB 560 ("Re Polemis").

<sup>39</sup> *Haynes v Harwood* [1933] 1 KB 146, 156; *Dorset Yacht Co v Home Office* [1970] UKHL 2; [1970] AC 1004, 1028–30 ("Dorset Yacht").

<sup>40</sup> *The Edison* [1932] P 52, 62–4 and 74; on appeal *Liesbosch, Dredger v Edison, SS (Owners)* [1933] UKHL 2; [1933] AC 449.

<sup>41</sup> *Yorkshire Dale Steamship Co v Minister of War Transport* [1942] AC 691 ("Yorkshire Dale Steamship").

<sup>42</sup> *Leyland Shipping Co v Norwich Union Fire Insurance Society* [1918] AC 350, 370 ("Leyland Shipping").

<sup>43</sup> *Monarch SS Co Ltd v AIB Karlshamns Oljefariker* [1948] UKHL 1; [1949] AC 196, 227 (Lord Wright) ("Monarch Steamship").

<sup>44</sup> *Stapley v Gypsum Mines Ltd* [1953] UKHL 4; [1953] AC 663, 681.

<sup>45</sup> See the discussion by Mason CJ in *March v Stramare* (1991) 171 CLR 506, 511–2.

In 1972, in *Alphacell Ltd v Woodward*,<sup>47</sup> Lord Wilberforce<sup>48</sup> reiterated that a common sense approach, without refinements such as “*causa causans*, effective cause or *novus actus*”, should be taken to causation. Lord Pearson<sup>49</sup> adopted the well-known passage from the speech of Lord Shaw of Dunfermline in *Leyland Shipping*,<sup>50</sup> the passages from the speeches of Viscount Simon LC and Lord Wright in *Yorkshire Dale Steamship*<sup>51</sup> and of Denning LJ in *Cork v Kirby Maclean Ltd*.<sup>52</sup> Lord Salmon<sup>53</sup> said that what caused a certain event to occur was “essentially a practical question of fact which can best be answered by ordinary common sense rather than by abstract metaphysical theory.”

In 1998, the perceived limitations of this approach were explored by the House of Lords in *Environment Agency v Empress Car Co (Abertillery) Ltd*.<sup>54</sup> The case concerned a pollution prosecution arising from the spillage of waste product from a tank that occurred after an unauthorised person had opened a tap which had no lock. The offence was “causing ... polluting matter ... to

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<sup>46</sup> *Wagon Mound (No 1)* [1961] AC 388.

<sup>47</sup> *Alphacell Ltd v Woodward* [1972] UKHL 4; [1972] AC 824 (“*Alphacell*”).

<sup>48</sup> *Alphacell* [1972] AC 824, 834.

<sup>49</sup> *Alphacell* [1972] AC 824, 844–5.

<sup>50</sup> *Leyland Shipping* [1918] AC 350, 369 (Lord Shaw):

“To treat proxima causa as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in the chain, but – if this metaphysical topic has to be referred to – it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.”

<sup>51</sup> *Yorkshire Dale Steamship* [1942] AC 691, 698 and 706, respectively:

(Visc Simon LC)

“The interpretation to be applied does not involve any metaphysical or scientific view of causation. Most results are brought about by a combination of causes, and a search for ‘the cause’ involves a selection of the governing explanation in each case.”

(Lord Wright)

“... This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common sense standards.”

<sup>52</sup> *Cork v Kirby Maclean Ltd* [1952] 2 All ER 402, 407.

<sup>53</sup> *Alphacell* [1972] AC 824, 847.

<sup>54</sup> *Empress Car Co* [1999] 2 AC 22 (Lord Browne-Wilkinson, Lord Lloyd of Berwick, Lord Nolan, Lord Hoffmann and Lord Clyde).

enter controlled waters”. Lord Hoffmann gave the leading opinion.<sup>55</sup> His analysis embodied the approach that he wrote about in the two speeches to which I have referred. He agreed that causation should not be over-complicated, nor, he said, should it be over-simplified. The first and crucial matter was to recognise that common sense gave different answers depending upon the question asked and the purpose of the inquiry, the identification of which purpose depending upon the rule by which responsibility was being attributed. This recognition leads to the reality that the open question: Who caused X? is misleading. The proper question is: Did the defendant cause X, in the context and framework of the relevant rule of responsibility? Lord Hoffmann discussed the place of deliberate human acts and extraordinary natural events, causal factors that played such a large part in the analysis of Hart and Honoré. These matters play a large part in the attribution of responsibility through cause in a common sense way, in particular by reference to later intervening factors. It is at this point that the underlying rule of responsibility becomes vital: for example, whether the duty imposed by the rule was directed to avoidance of risk of harm from such third parties or natural (including extraordinary) events. The purpose and scope of the rule needs to be understood before common sense becomes helpful. In identifying the rule for the relevant provision before the House, Lord Hoffmann recognised that liability in the statute at hand was strict, in the nature of a public nuisance, and was apt to encompass circumstances where a third party’s act intervened in certain circumstances. He recognised that in some cases<sup>56</sup> foreseeability had been used as the discrimen in the rule of responsibility. His Lordship disagreed with the use of foreseeability as a criterion involved in causation in this way. The true common sense distinction in this context was between acts and events that were a normal and familiar fact of life and those that were abnormal and extraordinary.

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<sup>55</sup> With which Lord Browne-Wilkinson, Lord Lloyd and Lord Nolan agreed.

<sup>56</sup> *Alphacell* [1972] AC 824; *Natural Rivers Authority v Wright Engineering Co Ltd* [1994] 4 All ER 281.

In 1999, the House of Lords returned to causation in *Reeves v Commissioner of Police*.<sup>57</sup> A prisoner in custody had committed suicide. His estate sued the police, who said that his death was caused by the intervention of his own hand. The House of Lords said that the death was caused by the breach of duty when that duty was imposed to guard against the very event that happened. The death was, of course, caused by the voluntary act of the deceased; but, for the purpose of the rule in question, it was also caused by the defendant because of the nature and purpose of their duty<sup>58</sup> (to exercise care to prevent this very thing happening).

In 2002, the House of Lords returned to causation in *Kuwait Airways Corp'n v Iraqi Airways Co (Nos 4 and 5)*.<sup>59</sup> Lord Nicholls,<sup>60</sup> whose views were significantly influenced by Professor Stapleton's work, described the "commonly accepted approach" of a twofold enquiry: first, whether the wrongful conduct causally contributed to the loss, widely undertaken by a "but for" test; and secondly, a value judgment as to the extent of the loss for which the defendant ought fairly or reasonably or justly be held liable: "whether the harm is within the scope of the defendant's liability, given the reasons why the law has recognised the cause of action in question."<sup>61</sup> This second stage of the analysis was assisted, his Lordship said, by concepts of remoteness, proximate cause, intervening acts and foreseeability. Lord Nicholls said that when the outcome of the second enquiry, that is often intuitive and informed by common sense, is not obvious the purpose of the relevant rule of liability will become crucial: What is the scope of duty? What is the loss protected? (One may, perhaps, venture to suggest that by then the crucial mistake may already have been made by acceptance of the "obviousness" of an intuitive common sense response.) Lord Hoffmann emphasised<sup>62</sup> that there was no universal causal requirement for liability in tort. The relevant causal connection depends upon the basis and purpose of liability. Liability cannot be

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<sup>57</sup> *Reeves v Commissioner of Police* [1999] UKHL 35; [2000] 1 AC 360.

<sup>58</sup> See *Reeves v Commissioner of Police* [2000] 1 AC 360, 370 (Lord Hoffmann) citing *Empress Car Co* [1999] 2 AC 22.

<sup>59</sup> *Kuwait Airways* [2002] 2 AC 883.

<sup>60</sup> *Kuwait Airways* [2002] 2 AC 883, 1090–2 [69]–[76].

<sup>61</sup> *Kuwait Airways* [2002] 2 AC 883, 1091 [20].

<sup>62</sup> *Kuwait Airways* [2002] 2 AC 883, 1105–6 [127]–[130].

separated from causation. His Lordship illustrated this by reference to where the putative causal act need only be a necessary condition when the subsequent act of a third party intervenes (the workman leaving the house unlocked);<sup>63</sup> or when the act of the plaintiff intervenes (the suicide of the person the defendant's duty was to protect);<sup>64</sup> or when the act need not even be a necessary condition, but only added substantially to the probability or risk of harm.<sup>65</sup>

It will be necessary to return in due course to other important House of Lords decisions in their proper place: valuation<sup>66</sup> and probabilistic causation.<sup>67</sup>

### ***Australia: March v Stramare and the rule of responsibility***

In Australia, it is necessary to begin with the decision of the High Court in *March v Stramare*.<sup>68</sup> The judgment of Mason CJ (with which Toohey and Gaudron JJ agreed) stands for the propositions that where negligence is in issue, causation is essentially a question of fact to be answered by reference to common sense and experience and one into which considerations of policy and value judgments necessarily enter; and that the "but for" test is not a definitive test of causation. Whilst this short encapsulation of the case may seem to align the reasoning with Hart and Honoré and place it in some conflict with Professors Wright and Stapleton and Lord Hoffmann, an examination of the reasons of Mason CJ reveals a significant degree of commonality of approach.

The facts are well-known: one night, a driver, Mr March, intoxicated and driving at an excessive speed, collided with a truck with flashing lights that

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<sup>63</sup> *Stansbie v Troman* [1948] 2 KB 48.

<sup>64</sup> *Reeves v Commissioner of Police* [2000] 1 AC 360.

<sup>65</sup> *McGhee v National Coal Board* [1973] UKHL 7; [1973] 1 WLR 1 ("*McGhee*"); *Bonnington Castings v Wardlaw* [1956] UKHL 1; [1956] AC 613 ("*Bonnington Castings*"); and *Fairchild* [2003] 1 AC 32.

<sup>66</sup> *SAAMCO* [1997] AC 191; *Nykredit Mortgage Bank v Edward Erdman Group Ltd* [1997] UKHL 53; [1997] 1 WLR 1627 ("*Nykredit*"); and *Platform Home Loans Ltd v Oyston Shipways Ltd* [1999] UKHL 10; [2000] 2 AC 190.

<sup>67</sup> *Fairchild* [2003] 1 AC 32 and *Barker v Corus (UK) Plc* [2006] UKHL 20; [2006] 2 AC 572 ("*Barker v Corus*").

<sup>68</sup> *March v Stramare* (1991) 171 CLR 506.

Stramare's employee had parked in the middle of the road. The question was whether the placement of the truck with its flashing lights in the middle of the road was a cause of Mr March's accident. It was held to be a cause.

Eight aspects of Mason CJ's valuable (if I may respectfully say) judgment should be noted. First, Mason CJ recognised that causation was a part of attribution of responsibility, not scientific enquiry.<sup>69</sup> Through the adoption of Viscount Haldane in *Thom or Simpson v Sinclair*<sup>70</sup> and Windeyer J in *National Insurance Co of New Zealand v Espagne*<sup>71</sup> the theory of Mill of the sum of the conditions was rejected.

Secondly, he recognised that some confusion is caused by the overlapping terminology and conceptions in causation and measure of recoverable damages.<sup>72</sup> Hence notions of "direct", "natural and probable", "direct and natural", "proximate cause", "real effective cause" and foreseeability can be seen to play mixed roles. He noted the view of modern commentators that these expressions concealed value judgments and unexpressed policy.

Thirdly, by reference to *Chapman v Hearse*,<sup>73</sup> he restated that reasonable foreseeability is not, in itself, a test of causation and, by reference to *Mahony v J Kruschich (Demolitions) Pty Ltd*<sup>74</sup> and *M'Kew v Holland & Hannon & Cubbitts*,<sup>75</sup> that it was not an exclusive criterion of responsibility. These passages recognised what might be called scope rules, but not in any neat and tidy way. As *Mahoney v Kruschich*<sup>76</sup> revealed, the determinant of lack of responsibility was based on the clarity of the conclusion (even if the "but for" test was satisfied and the consequence was foreseeable) that a line should be drawn and a *novus actus interveniens* recognised.

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<sup>69</sup> *March v Stramare* (1991) 171 CLR 506, 509.

<sup>70</sup> *Simpson v Sinclair* [1917] AC 127, 135.

<sup>71</sup> *National Insurance Co of New Zealand v Espagne* [1961] HCA 15; (1961) 105 CLR 569, 591.

<sup>72</sup> *March v Stramare* (1991) 171 CLR 506, 509–10.

<sup>73</sup> *Chapman v Hearse* [1961] HCA 46; (1961) 106 CLR 112, 122.

<sup>74</sup> *Mahony v J Kruschich (Demolitions) Pty Ltd* [1985] HCA 37; (1985) 156 CLR 522.

<sup>75</sup> *M'Kew v Holland & Hannon & Cubbitts* [1970] SC (HL) 20 ("M'Kew").

<sup>76</sup> *March v Stramare* (1991) 171 CLR 506, 528.

Fourthly, he also recognised that a source of confusion in causal concepts was the defence of contributory negligence. This was a potent factor in the development of an underlying policy rule of responsibility that tended to assign responsibility to one cause, through the notion of “effective” cause and the development of the “last opportunity” rule.<sup>77</sup> The passing of contributory negligence legislation permitted greater flexibility in assigning responsibility to more than one cause, and eliminated a source of confusion in dealing with the last opportunity rule by reference to language of causation. Mason CJ noted that the passing of the absolute defence of contributory negligence permitted in some respects the adoption of a legal approach to causation similar to that taken in philosophy and science,<sup>78</sup> though identity of approach was not possible because the law concerned the allocation of responsibility.

Fifthly, Mason CJ emphasised<sup>79</sup> that concurrent and successive causes can be proved by establishing the “material contribution” of the relevant wrongful conduct,<sup>80</sup> that is any contribution that is not *de minimis*. This remains a fundamentally important consideration in the operation of causal issues in many contexts, to which I will return in due course.

Sixthly, in adopting the well-known line of United Kingdom and Australian cases requiring causation to be determined by the application of common sense,<sup>81</sup> Mason CJ emphasised that causation was a question of fact. Mason CJ saw two difficulties in the approach of commentators who divide the issue of causation into two questions – the “but for” test and the further question of responsibility: (a) too great an emphasis on the “but for” test and (b) an implication that value judgment has no part to play in resolving causation, as a

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<sup>77</sup> *Alford v Magee* [1952] HCA 3; (1952) 85 CLR 437, 452; *Chapman v Hearse* (1961) 106 CLR 124; and *Teubner v Humble* [1963] HCA 11; (1963) 108 CLR 491, 502.

<sup>78</sup> It is to be noted that maritime law never had the same rule as the common law; contributory negligence was never a defence in maritime law, but the subtle pressure of philosophy and science did not often intrude there either.

<sup>79</sup> *March v Stramare* (1991) 171 CLR 506, 514.

<sup>80</sup> *Bonnington Castings* [1956] AC 613, 618, 620 and 627; *McGhee* [1973] 1 WLR 1, 4–5.

<sup>81</sup> *Leyland Shipping* [1918] AC 350; *Admiralty Commissioners v SS Volute* [1922] 1 AC 129; *Yorkshire Dale Steamship* [1942] AC 691; *Alphacell* [1972] AC 824; *McGhee* [1973] 1 WLR 1; *Fitzgerald v Penn* [1954] HCA 74; (1954) 91 CLR 268, 277–8.



question of fact.<sup>82</sup> It can be respectfully doubted whether Hart and Honoré can be criticised for removing factual value judgments from the question of causation. Nevertheless, Mason CJ's comments reflected an anxiety that the question of causation not be deconstructed into parts, some of which would not be factual in character.

Seventhly, Mason CJ recognised the important role that the “but for” test plays in the resolution of causal questions.<sup>83</sup> His Honour also recognised<sup>84</sup> its inadequacy when it rises no higher than providing for a necessary condition, unless that condition increased the risk of the event; and its inadequacy when one has concurrent or successive causes. Whilst an important question to ask, any answer was to be tempered by the making of value judgments and infusion of policy considerations. (One is tempted to reflect upon the circular nature of the journey at this point. Hart and Honoré are not, I think, saying anything different; nor, I venture to suggest is Professor Stapleton in substance, though not structure, a subject to which I will return when dealing with the *Civil Liability Acts*.)

Eighthly, Mason CJ discussed the difficulties involved in the *novus actus* cases.<sup>85</sup> They illustrated the inadequacy of the “but for” test.<sup>86</sup> The conclusion of a break in the chain of causation can be (as it was in *M’Kew*) the product of a value judgment considering the second event (in *M’Kew* the unreasonableness of the plaintiff’s conduct in how he descended a steep staircase) given that it would be unjust to hold the defendant legally responsible for the injury even though it could be traced back to the defendant’s wrongful conduct. Relevant to that value judgment were the character of the intervening act – deliberate, voluntary, or negligent; the scope of the duty of the defendant and whether it encompassed not exposing the plaintiff to such events and acts; the foreseeability or not of the second event;

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<sup>82</sup> *March v Stramare* (1991) 171 CLR 506, 514 Mason CJ refers to Hart and Honoré, above n 5, and John G Fleming, *Law of Torts*, (7<sup>th</sup> Ed, 1985, Law Book Co).

<sup>83</sup> *March v Stramare* (1991) 171 CLR 506, 516 citing *Fitzgerald v Penn* (1954) 91 CLR 268; *ICIANZ Ltd v Murphy* (1973) 47 ALJR 122; and *Duyvelshoff v Cathcart & Ritchie Ltd* (1973) 47 ALJR 410.

<sup>84</sup> *March v Stramare* (1991) 171 CLR 506, 516.

<sup>85</sup> *March v Stramare* (1991) 171 CLR 506, 517–8.

whether such event was likely to happen in the ordinary course of things as a natural or likely consequence of the defendant's negligence; whether the risk of the second event is increased by the defendant's breach. Thus, Mason CJ can be seen to recognise the importance of the underlying rule of responsibility.

The analysis of Deane J, was shorter but to substantially similar effect. Of primary significance to Deane J<sup>87</sup> was that the scope of duty of care extended to all users of the road including inattentive and intoxicated drivers.<sup>88</sup> The scope of duty (the relevant rule of responsibility) thus defined, causation followed. Deane J rejected<sup>89</sup> the "but for" test as an exclusive test of causation. It was contrary to authority and unreliable by its propensity to give both false negative and false positive conclusions.

McHugh J (with an analysis appearing to reflect in significant respects the work of Professor Stapleton) took a quite different view. He favoured the use of the "but for" test for causal involvement with a scope of risk analysis thereafter; the latter analysis enabling the relevant policy factors to be articulated and justified. McHugh J built on his commanding (if I may respectfully say) judgments in *Nader v Urban Transit Authority*<sup>90</sup> and *Alexander v Cambridge Credit Corp*<sup>91</sup> in the Court of Appeal. The relationship between causation and remoteness was to be understood by understanding the scope of risk created.<sup>92</sup>

I have dealt at some length with the various strands of Mason CJ's reasons in *March v Stramare* because, with the passage of time, the case tends to be over-simplified in recollection as concerned with only the application of

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<sup>86</sup> Especially *M'Kew* [1970] SC (HL) 20.

<sup>87</sup> *March v Stramare* (1991) 171 CLR 506, 520–1.

<sup>88</sup> cf *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; (2007) 234 CLR 330 ("Dederer").

<sup>89</sup> *March v Stramare* (1991) 171 CLR 506, 522–3.

<sup>90</sup> *Nader v Urban Transit Authority* (1985) 2 NSWLR 501, 530 ff.

<sup>91</sup> *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310, 349–58 ("*Alexander v Cambridge Credit*").

<sup>92</sup> *March v Stramare* (1991) 171 CLR 506, 534–6 citing *Roe v Ministry of Health* [1954] 2 QB 66, 85 and *Hughes v Lord Advocate* [1963] AC 837.

common sense. For instance, the Ipp Report<sup>93</sup> stated that the “current law in Australia (as laid down by the High Court) appears to be that whether the negligent conduct caused the harm in question is to be answered by the application of common sense”. This was said to provide “little guidance”. I would respectfully suggest this greatly undervalues the utility of the detailed and valuable body of reasons in *March v Stramare*. Mason CJ’s reasoning and discussion lead to the conclusion that the debate about causation may be one of structure (and so, perhaps, principle), but nevertheless the elements of analysis which Mason CJ would infuse into the common sense value judgment are essentially the same as those deployed in any scope of liability or risk analysis appended to the “but for” test, and any variant thereof. What a more clearly articulated structure may provide is a more stable and coherent framework for the approach to some of the value-laden questions (of causation and remoteness), such that it is harder for a decision-maker to disguise or not address critical reasoning in reaching what is ultimately often a contestable value-laden conclusion. I will come to the *Civil Liability Acts*<sup>94</sup> in due course, but at this point it is worth noting that the reason the approach to causation was the subject of Parliament’s attention was the desire to have articulated more clearly by judges the intellectual approach to their conclusions in the attribution of responsibility, including, in particular, the value judgments they were bringing to bear.<sup>95</sup>

The test in *March v Stramare* has been applied in later decisions in the High Court: see for example *Bennett v Minister of Community Welfare*,<sup>96</sup> *Wardley Australia Limited v Western Australia*,<sup>97</sup> *Medlin v SGIC*,<sup>98</sup> *Unity Insurance*

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<sup>93</sup> *Review of the Law of Negligence*, above at n 30, [7.25].

<sup>94</sup> *Civil Law (Wrongs) Act 2002* (ACT), ss 45 and 46; *Civil Liability Act 2002* (NSW), s 5D; *Civil Liability Act 2003* (Qld), ss 11 and 12; *Civil Liability Act 1936* (SA), s 34 (formerly *Wrongs Act 1936* (SA)); *Civil Liability Act 2002* (Tas), ss 13 and 14; *Wrongs Act 1958* (Vic) Pt X Div 3, s 51; *Civil Liability Act 2002* (WA), ss 5C and 5D.

<sup>95</sup> *Review of the Law of Negligence*, above n 30, [7.42].

<sup>96</sup> *Bennett* (1992) 176 CLR 408, 412–3 (Mason CJ, Deane and Toohey JJ), and 418–9 (Gaudron J).

<sup>97</sup> *Wardley Australia Limited v Western Australia* [1992] HCA 55; (1992) 175 CLR 514, 525 (Mason CJ, Dawson, Gaudron and McHugh JJ) (“*Wardley*”).

<sup>98</sup> *Medlin v State Government Insurance Commission* [1995] HCA 5; (1995) 182 CLR 1, 6–7 (Deane, Dawson, Toohey and Gaudron JJ) and at 20 (McHugh J) (“*Medlin*”).

*Brokers Pty Ltd v Rocco Pezzano Pty Ltd*,<sup>99</sup> *Chappel v Hart*,<sup>100</sup> *Marks v GIO Australia*,<sup>101</sup> *Kenny & Good Pty Ltd v MGICA*,<sup>102</sup> *Henville v Walker*<sup>103</sup> and *Roads and Traffic Authority v Royal*.<sup>104</sup>

There have been hints, however, that common sense as a fundamental operative element in any causal analysis is under threat. In *Allianz Australia v GSF Australia*,<sup>105</sup> Gummow, Hayne and Heydon JJ referred in their concluding remarks<sup>106</sup> to McHugh J's critical remarks in dissent in *March v Stramare* to the usefulness of common sense. Gummow and Hayne JJ repeated this reference in *Travel Compensation Fund v Tambree*.<sup>107</sup>

### **Canada – the “but for” test**

In Canada, the “but for” test is the primary test of causation – a plaintiff must prove on the balance of probabilities, that “but for” the negligence of the defendant, the plaintiff's injury or loss would not have occurred.<sup>108</sup> The “but for” test applies to multi-cause injuries.<sup>109</sup> In *Resurfice Corp v Hanke*<sup>110</sup> McLachlin CJ who delivered the opinion of the Court, re-affirming the role of the “but for” test, said at [23]:

“The ‘but-for’ test recognises that compensation for negligent conduct should only be made ‘where a substantial connection between the injury and the defendant’s conduct is present. It ensures that a defendant will not be held liable for

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<sup>99</sup> *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* [1998] HCA 38; (1998) 192 CLR 603, 612 [22].

<sup>100</sup> *Chappel v Hart* (1998) 195 CLR 232, 238 [6] (Gaudron J), 242–3 [23]–[24] (McHugh J), 255–6 [62] (Gummow J), 268–9 [93] (Kirby J) and 281–2 [111] and 290 [148] (Hayne J).

<sup>101</sup> *Marks v GIO Australia Holdings* [1998] HCA 69; (1998) 196 CLR 494, 512–3 [42] (McHugh, Hayne and Callinan JJ) and 530–1 [106] (Gummow J) (“*Marks*”).

<sup>102</sup> *Kenny & Good Pty Ltd v MGICA* [1999] HCA 25; (1999) 199 CLR 413, 426 [19] (Gaudron J), 456–7 [118] (Kirby and Callinan JJ) (“*Kenny & Good*”).

<sup>103</sup> *Henville v Walker* (2001) 206 CLR 459, 480 [61] (Gaudron J), 489 [95] (McHugh J).

<sup>104</sup> *Roads and Traffic Authority v Royal* [2008] HCA 19; (2008) 82 ALJR 870, 878 [32] (Gummow, Hayne and Heydon JJ) and 896 [135] (Kiefel J) (“*RTA v Royal*”).

<sup>105</sup> *Allianz Australia v GSF Australia* [2005] HCA 26; (2005) 221 CLR 568 (“*Allianz v GSF*”).

<sup>106</sup> *Allianz v GSF* (2005) 221 CLR 568, 596–7 [97]–[98].

<sup>107</sup> *Travel Compensation Fund v Tambree t/a Tambree and Associates* [2005] HCA 69; (2005) 224 CLR 627, 642 [45] (“*Travel Compensation*”).

<sup>108</sup> *Horsley v MacLaren* [1972] SCR 441; *Athey v Leonati* [1996] 3 SCR 458; confirmed in *Resurfice Corp v Hanke* [2007] 1 SCR 333, 342–3 [21].

<sup>109</sup> *Resurfice Corp v Hanke* [2007] 1 SCR 333, 342–3 [21].

<sup>110</sup> *Resurfice Corp v Hanke* [2007] 1 SCR 333; applied in *Fullowka v Pinkerton’s of Canada Ltd* [2010] SCC 5; [2010] 1 SCR 132.

the plaintiff's injuries where they 'may very well be due to factors unconnected to the defendant and not the fault of anyone': *Snell v Farrell* [[1990] 2 SCR 311] at p. 327 per Sopinka J."

However, in *Athey v Leonati*,<sup>111</sup> Major J who delivered the opinion of the Court noted at [14] that the "but for" test is the "general, but not conclusive, test for causation" acknowledging that in some circumstances the "but for" test is "unworkable". In those circumstances, causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury. Major J said that a contributing factor is "material" if it falls outside the *de minimis* range. *Athey v Leonati* introduced some confusion as to when a "material contribution test" was applicable as an alternative test of causation. In *Resurface* the Court expressed<sup>112</sup> the position by positing a framework for "material contribution" as follows:

"[24] However, in **special** circumstances, the law has recognized exceptions to the basic "but for" test, and applied a 'material contribution' test. Broadly speaking, the cases in which the 'material contribution' test is properly applied involve two requirements.

[25] First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the 'but for' test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those **exceptional** cases where these two requirements are satisfied, liability may be imposed, even though the 'but for' test is not satisfied, because it would offend basic notions of **fairness and justice** to deny liability by applying a 'but for' approach."  
(emphasis added)

The judgment<sup>113</sup> then goes on to give examples of when the material contribution test might be used: first, where two tortious sources caused the injury (the example of the two shots fired carelessly at a victim but it is

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<sup>111</sup> *Athey v Leonati* [1996] 3 SCR 458.

<sup>112</sup> *Resurface Corp v Hanke* [2007] 1 SCR 333, 343-4 [24]-[25].

<sup>113</sup> *Resurface Corp v Hanke* [2007] 1 SCR 333, 344-5 [27]-[28].

impossible to show which shot injured the victim); and secondly, where it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed the negligent act (the example of not being able to show whether the blood donor giving tainted blood would not have given blood had an appropriate warning been given). These are narrow applications of the expression not encompassing the kind of “material contribution” utilised in *Bonnington Castings v Wardlaw*.<sup>114</sup>

The Supreme Court of Canada has emphasised that the “but for” test is to be the test for causation in most cases. There has been some mention of common sense, but not an equivalent “common sense test” as in *March v Stramare*. Indeed Mason CJ’s judgment in *March v Stramare* has never been discussed or referred to by the Supreme Court of Canada and there appear to be only three references in Canadian Courts, one of those at the appellate level.<sup>115</sup>

In *Athey* Major J did refer to the role of common sense, referring to the Supreme Court case of *Snell v Farrell*<sup>116</sup> at 467:<sup>117</sup>

“In *Snell v. Farrell* ... this Court recently confirmed that the plaintiff must prove that the defendant’s tortious conduct caused or contributed to the plaintiff’s injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, ... and as was quoted by Sopinka J. ... it is ‘essentially a practical question of fact which can best be answered by ordinary common sense’. Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.”

## ***New Zealand***

The New Zealand Court of Appeal has emphasised that whether there is a sufficient connection between fault and damage to found liability is a question

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<sup>114</sup> [1956] AC 613.

<sup>115</sup> *Lawrence v Prince Rupert (City)* (2005) 361 WAC 103 (British Columbia Court of Appeal); *DP v Allen* (Ontario Superior Court of Justice, 14 July 2004); *Murano v Bank of Montreal* (1995) 31 CBR (3d) 1 (Ontario Court of Justice (General Division – Commercial List)).

<sup>116</sup> *Snell v Farrell* [1990] 2 SCR 311.

<sup>117</sup> *Athey v Leonati* [1996] 3 SCR 458, 467 [16].

of fact and degree and the answer is to be reached by the application of common sense.<sup>118</sup> What must be established is that in a common sense practical way the loss claimed was attributable to the breach of duty:<sup>119</sup> the common formulation used is that a cause must be “material or substantial” before affecting liability.<sup>120</sup> *March v Stramare* has been specifically endorsed by that Court,<sup>121</sup> and the shortcomings of the “but for” test as a conclusive test for factual causation recognised.<sup>122</sup>

### Caused or “materially contributed to”

Before proceeding any further one practical aspect of causation should be emphasised. It is an aspect of the weakness of the “but for” analysis as any comprehensive or exclusive test. Generally, unless the context dictates otherwise, the law sees it as sufficient for the impugned act or omission to have “materially contributed” to the loss,<sup>123</sup> being a contribution that is not *de minimis*. That such contribution can be made and recognised as causal, notwithstanding the failure of the “but for” test needs to be recalled at all times. In *Resurfice*, “material contribution” was expressed as a special or exceptional notion widely by reference to increased risk. That same notion is present in *Fairchild* and *Barker v Corus* and in some judgments in the High

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<sup>118</sup> *Fleming v Securities Commission* [1995] 2 NZLR 514, 523 (“*Fleming*”) (Cooke P, Gault and Ellis JJ agreeing; Richardson and Casey JJ finding it unnecessary to deal with the question of causation on the facts); for a general discussion of the New Zealand position see Andrew Tipping, “Causation at Law and in Equity: Do We Have Fusion” (1998–2000) 7 *Canterbury Law Review* 443.

<sup>119</sup> *Sew Hoy & Sons Ltd (In Receivership and in Liquidation) v Cooper* [1996] 1 NZLR 392, 399 (McKay J), 403 (Henry J) and 407 (Thomas J) (“*Sew Hoy & Sons*”).

<sup>120</sup> *Fleming* [1995] 2 NZLR 514, 523 (Cooke P, Gault and Ellis JJ agreeing). References were made to: *Monarch Steamship* [1949] AC 196; *March v Stramare* (1991) 171 CLR 506; and *M’Kew* [1970] SC (HL) 20.

<sup>121</sup> *Fleming* [1995] 2 NZLR 514 at 523 (Cooke P, Gault and Ellis JJ agreeing); followed in *Sew Hoy & Sons* [1996] 1 NZLR 392 (McKay J and Henry J). In *Sew Hoy & Sons* at 407–8 Thomas J cites *March v Stramare* for the principle that causation must be determined by applying common sense to the facts of each case but goes on to emphasise that common sense is not a test, but an approach to the factual question. The Supreme Court of New Zealand has not referred to, or discussed *March v Stramare* since its establishment in 2004.

<sup>122</sup> *Fleming* [1995] 2 NZLR 514, 523 (Cooke P, Gault and Ellis JJ agreeing); *Sew Hoy & Sons* [1996] 1 NZLR 392, 403 (Henry J); *Bank of New Zealand v Guardian Trust* [1999] 1 NZLR 664, 681 (Richardson P, Gault, Henry and Blanchard JJ).

<sup>123</sup> *Norton Australia Pty Ltd v Streets Ice Cream Pty Ltd* [1968] HCA [61]; (1968) 120 CLR 635 at 643 (“*Norton v Streets*”); *Bonnington Castings* [1956] AC 613, 618, 620 and 627; *March v Stramare* (1991) 171 CLR 506, 514; *Snell v Farrell* [1990] 2 SCR 311 and *Athey v Leonati* [1996] 3 SCR 458. I will come in due course to *McGhee* [1973] 1 WLR 1.

Court of Australia. A somewhat different concept is the material contribution or addition of a factor to the outcome, such as adding to the load of dust in a disease of accumulation<sup>124</sup> or contributing to the water which flooded a property.<sup>125</sup>

### Three broad approaches

The above writings and cases reflect three broad approaches. First, a clear adherence to an encapsulated notion of common sense. Secondly, an acceptance of the need for practical common sense, but with a greater emphasis upon, as a first step, ensuring that the correct question is asked, such question to be drawn from the correct rule of responsibility (including the rule of compensation). This has been reflected in, or accompanied by, more emphasis and precision being given to the content of the duty of care, the risk created by the breach and the purpose of the rules of responsibility and compensation. Thirdly, an avowedly structured approach of clear, and to the extent possible, strict division between: (i) the pure factual analysis of the relationship between the defendant's act or omission and the damage; and (ii) the evaluation by so-called scope rules of the imposition of liability. This structured approach is hinged on the enquiry as to the degree of the factual connection and the "but for" test as the central construct around which move other considerations attending the decisions to affix (or not) responsibility and to award compensation.

I am unpersuaded that the legal content is differently provided for by these approaches or that they will lead to different results. I see no philosophical challenge to the relevance of the notion of practical common sense. Nor do I see any disagreement that causation is not a separate essential universal concept, rather it is part of the ultimate normative decisions to attribute responsibility and to award compensation. What appears to be in issue is the

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<sup>124</sup> *Bonnington Castings* [1956] AC 613.

<sup>125</sup> For a helpful discussion of the different ways that the phrase "material contribution" is employed, in particular by reference to *Resurface Corp v Hanke* [2007] 1 SCR 333 in Canada, see D Cheifetz, "Causation in Tort Since *Resurface*: Overview" (2008) and "Causation in Canada in the Third



structure of analysis, not the substance of the legal rules. The “rules of scope” in the third approach are not new legal rules; they are a recognition of the “concerns” of the courts and they reflect the same kinds of relational and corrective considerations that have always attended causal decision-making. The importance of the structure of the third approach is said to lie in the promotion of greater clarity in judicial decision-making. Whether that occurs remains to be seen. The third approach may be an exercise in over complication; or, it may, by dividing factual involvement from “scope rules”, encourage a clearer discussion between the rules of responsibility and compensation, on the one hand, and factual involvement of the defendant’s act or omission, on the other.

### **The importance of the statutory framework**

To the extent that a question of causation will differ according to the purpose for which the question is asked, which will in turn depend upon the nature and scope of the legal rule of responsibility,<sup>126</sup> any governing statute is the key to that analysis. Its text and purpose will assist in identifying the correct rule of legal responsibility and the correct approach to compensation; further, its purpose and informing principles and norms will assist in understanding the relationship between factual involvement, responsibility and compensation.

### ***The Trade Practices Act***

The movement away from common law analogues and an increasingly subtle analysis based on the TPA and its informing statutory values is dramatically illustrated by the cases concerning s 82 of the TPA over the last 25 years. The TPA is one of the central pieces of legislation controlling commercial life in Australia. Its shortly stated object<sup>127</sup> reflects its “high public policy”:<sup>128</sup>

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Millennium: Nothing *Is* Now Enough” (2007–2008), available online:  
<[www.bbburn.com/articles/Resurface\\_status.pdf](http://www.bbburn.com/articles/Resurface_status.pdf)>.

<sup>126</sup> *Travel Compensation* (2005) 224 CLR 627, 642 [45] (Gummow and Hayne JJ) citing *Chappel v Hart* (1998) 195 CLR 232, 256 [63]–[64] (Gummow J), 285 [122] (Hayne J); and *Empress Car Co* [1999] 2 AC 22, 29 and 31 (Lord Hoffmann).

<sup>127</sup> *Trade Practices Act 1974* (Cth), s 2.

<sup>128</sup> *Marks* (1998) 196 CLR 494, 528 [99] (Gummow J).

“to enhance the welfare of Australians through the promotion of competition and fair trading and provisions for consumer protection”.

Part VI of the TPA<sup>129</sup> contains a wide range of enforcement mechanisms and remedies. Central amongst them are s 80 (injunctions), s 82 (damages) and s 87 (other flexibly moulded remedies). All operate upon, amongst other things, contraventions of Pts IV, IVA, IVB and V. These Parts concern restrictive trade practices (Pt IV), unconscionable conduct (Pt IVA), industry codes (Pt IVB) and consumer protection, including s 52 (Pt V). The norms and informing principles of these provisions are various and wide.

In 1985, in *Gates v City Mutual Life Assurance Society Ltd*<sup>130</sup> the High Court<sup>131</sup> placed the TPA into a common law framework. Gibbs CJ saw a tortious approach to damages as appropriate. Mason, Wilson and Dawson JJ thought the tortious measure of damages to be applicable in most, if not all, cases under Part V.<sup>132</sup> In 1992, in *Wardley Australia Limited v Western Australia*,<sup>133</sup> Mason CJ, Dawson, Gaudron and McHugh JJ<sup>134</sup> stated that s 82(1) should be understood as taking up the common law practical or common sense concept of causation in *March v Stramare*, though their Honours did add: “except in so far as that concept is modified or supplemented expressly or impliedly by the provisions of the Act”. That qualifying rider has become the crucial part of any causal analysis. Nevertheless, in 1995, in *Kizbeau Pty Ltd v W G & B Pty Ltd & McLean*<sup>135</sup> Brennan, Deane, Dawson, Gaudron and McHugh JJ<sup>136</sup> once again stated that actions based on s 52 are analogous to actions for torts and thus rules for assessing damages in tort, and not contract, provided more appropriate guides in most, if not all, cases.

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<sup>129</sup> *Trade Practices Act 1974* (Cth), ss 75B–87CAA. (The Act has from 2011 been amended. See *Competition and Consumer Act 2010* (Cth), Pt VI ss 75B–87CA.)

<sup>130</sup> *Gates v City Mutual Life Assurance Society Ltd* [1986] HCA 3; (1986) 160 CLR 1 (“*Gates v City Mutual*”).

<sup>131</sup> *Gates v City Mutual* (1986) 160 CLR 1, 6 (Gibbs CJ) and 11–5 (Mason, Wilson and Dawson JJ).

<sup>132</sup> *Gates v City Mutual* (1986) 160 CLR 1, 14–5.

<sup>133</sup> *Wardley* (1992) 175 CLR 514.

<sup>134</sup> *Wardley* (1992) 175 CLR 514, 525.

<sup>135</sup> *Kizbeau Pty Ltd v W G & B Pty Ltd & McLean* [1995] HCA 4; (1995) 184 CLR 281 (“*Kizbeau*”).

In 1998, in *Marks v GIO Australia Holdings Ltd*,<sup>137</sup> the Court began to move away from common law analogues upon which to analyse the application of the TPA and began to emphasise the statute, the facts and the relationship between them, bearing in mind the informing considerations and purposes of the TPA Act. Gaudron J<sup>138</sup> emphasised that the task is to identify the loss suffered by the conduct that was a contravention of the TPA, not to impose common law constructs of reliance or expectation damages or consequential loss. McHugh, Hayne and Callinan JJ<sup>139</sup> likewise posited the task by reference to the words of the statute, and that once cause is established the amount of recovery should not be limited by reference to common law analogues. Gummow J explained the fundamental remedial and protective purpose of the Act and its “high public policy” requiring the fullest relief which the fair reading of its language would allow. His Honour emphasised the diverse legal norms created by the TPA and rejected the analysis of compensation by reference necessarily to common law constructs.<sup>140</sup> In relation to causation Gummow J reiterated what he had said in *Chappel v Hart*<sup>141</sup> as to the importance of what Lord Hoffmann had said in *Empress Car Co*<sup>142</sup> that the ascertainment of the purpose and scope of the rule of responsibility (here s 52) is essential before any “common sense” answer can be given.<sup>143</sup>

Peering through the undoubted change of emphasis in *Marks* to predict accurate outcomes is not easy (as will be seen in *Murphy v Overton Investments Pty Limited*).<sup>144</sup> The facts of *Marks* and the different approaches of the Justices reveal that difficulty. Investors borrowed money from GIO induced by a representation that the interest rate would be at a given base

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<sup>136</sup> *Kizbeau* (1995) 184 CLR 281, 290.

<sup>137</sup> *Marks* (1998) 196 CLR 494.

<sup>138</sup> *Marks* (1998) 196 CLR 494, 503–4 [15]–[17].

<sup>139</sup> *Marks* (1998) 196 CLR 494, 510 [38].

<sup>140</sup> *Marks* (1998) 196 CLR 494, 528–9 [99]–[103].

<sup>141</sup> *Chappel v Hart* (1998) 195 CLR 232, 276–7.

<sup>142</sup> *Empress Car Co* [1999] AC 22, 30–2.

<sup>143</sup> See also in this respect Gummow J in *Rosenberg v Percival* (2001) 205 CLR 434, 460 [85]; and *Campomar Sociedad Limited v Nike International Limited* [2000] HCA 12; (2000) 202 CLR 45, 83–84 [98] and 85 [103].

<sup>144</sup> *Murphy v Overton Investments Pty Limited* [2004] HCA 3; (2004) 216 CLR 388 (“*Murphy v Overton*”).

rate plus 1.25 per cent margin. In fact, the loan agreement permitted GIO to charge a higher rate, which it did. The agreement also permitted the borrower to leave the facility and refinance without any penalty in such circumstances. The applicants did not prove that they would or could have obtained better funding if they had not relied on the representation and entered into the arrangement. They pressed an analogue with contract expectation damages. McHugh, Hayne and Callinan JJ expressed what might be called a traditional causation analysis, saying that a party who is misled suffers no prejudice or disadvantage unless it is shown that he or she could have acted or refrained from acting in some other way which would have been of greater benefit or less detriment than the course adopted.<sup>145</sup> The applicants had not proved that they were worse off, though the interest was higher than represented; the rate was better than that offered by GIO's competitors and the borrower was allowed to quit without penalty. Importantly, and differently, Gaudron and Gummow JJ<sup>146</sup> both assumed that the applicants were worse off when the interest rate increased. However, their Honours found that the loss was caused by the decision not to withdraw from the facility. Had this contractual right to exit the facility not existed both Gaudron and Gummow JJ would have concluded that there was loss caused by the contraventions by reason of the increase in rate, without more (though this conclusion was eschewed as being the product of expectation damages based on a contract analogy). Whilst the TPA and its informing purposes were expressed to be the basis of this, it was left largely unexplained why making good the representation represents loss by conduct in contravention of the Act. It may be that approaching the matter in this way best fulfils a policy of extracting compliance with the norms of the statutes. But this was not said.

In 1999, in *Henville v Walker*<sup>147</sup> there was an apparent difference of approach between Gleeson CJ and Gaudron J, on the one hand, and McHugh, Gummow and Hayne JJ, on the other, which at first sight appears important. The case must be read, however, in conjunction with the 2002 decision in *I &*

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<sup>145</sup> *Marks* (1998) 196 CLR 494, 512 [42].

<sup>146</sup> *Marks* (1998) 196 CLR 494, 505 [24] (Gaudron J) and 536 [188]–[119] (Gummow J).

<sup>147</sup> *Henville v Walker* (2001) 206 CLR 459.

*L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*.<sup>148</sup> In *Henville*, the applicant, an architect, contemplated a construction project of a small block of home units. Two commercial integers were critical to his decision to go ahead with the project: likely sale prices of the units when built and the estimated cost of construction. The applicant asked the respondent, an estate agent, about likely prices. He received a misleadingly high response. His own feasibility study, however, incompetently underestimated the costs. If either integer had been estimated accurately the project would not have appeared profitable and would not have proceeded. With both integers estimated inaccurately, the architect decided to go ahead. Gleeson CJ and Gaudron J restricted recovery to the difference between the advised sale price and the actual sale prices. This amount did not recompense the applicant for his whole loss on the project. The reasons of Gleeson CJ employed a causal analysis to isolate part of the losses referable to the misleading conduct, as distinct from that caused by the applicant's own negligence. At first blush, this appears to be a causal approach akin to that employed by Lord Hoffmann in the valuers' negligence cases to which I will come.<sup>149</sup> Gleeson CJ, however, did not approach the question by a limitation on scope or content of duty, nor did he apportion loss caused by the contravention. Rather, his analysis in *Henville* was a causal one (in which he saw some loss caused by the conduct and other loss not). In *I & L Securities*, Gleeson CJ made clear that once a causal relationship between the conduct and the loss had been shown there was no place for considerations such as contributory negligence or apportionment of damage in reducing the consequences of loss caused by the conduct in contravention of the TPA. The whole loss in *I & L Securities* (where a lender had lent to a borrower to develop land induced by a misleading valuation) was recoverable because it was one indivisible loss that had flowed from the inducement and so was caused by the conduct.

The consequences of detaching analysis under the TPA from the familiar constructs of contract and tort can be seen in *Murphy v Overton*

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<sup>148</sup> *I & L Securities v HTW Valuers* [2002] HCA 41; (2002) 210 CLR 109.

<sup>149</sup> *SAAMCO* [1997] AC 191; *Nykredit* [1997] 1 WLR 1627.

*Investments*.<sup>150</sup> This was a joint judgment of the whole Court.<sup>151</sup> As to principle of approach, at one level of analysis, the judgment is pellucid. It was said to be wrong to approach Part VI of the Act by beginning the enquiry attempting to draw analogy from the general law.<sup>152</sup> Analogies may be helpful, but they tended to distract attention from construing the Act.<sup>153</sup> “Loss and damage” was to be given no narrow meaning and not restricted to any one or more constructs.<sup>154</sup> The facts were that the appellants entered into a contractual arrangement concerning entry into the respondent’s nursing home. They relied on a brochure which inaccurately and misleadingly stated a weekly sum of maintenance charges of \$55.71, based on certain criteria. Under the contractual documentation, they could be, and later were, charged more for weekly outgoings, based on a wider set of criteria. It was found that if the truth had been known they would not have entered the arrangement. However, there was no evidence that the appellants paid more for entry into the arrangements than they were worth, nor was there evidence as to what they would have done had they not entered these arrangements and entered this nursing home. The trial judge and the Full Court found no loss proved. The High Court disagreed, stating that when the appellants came to be charged more than was represented, they suffered loss.<sup>155</sup> One is not

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<sup>150</sup> *Murphy v Overton* (2004) 216 CLR 388.

<sup>151</sup> Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

<sup>152</sup> *Murphy v Overton* (2004) 216 CLR 388, 407 [44].

<sup>153</sup> I would add at this point, construction of the *Trade Practices Act 1974* (Cth) is not necessarily difficult, it is application of it that is.

<sup>154</sup> *Murphy v Overton* (2004) 216 CLR 388, 407 [45].

<sup>155</sup> *Murphy v Overton* (2004) 216 CLR 388, 410 [55] and 413–4 [66]–[67]:

“[66] The appellants had been induced by the respondent’s conduct to undertake an obligation which may, but need not, have been more onerous than the respondent’s representation led them to believe. When the respondent started to charge all the outgoings it was entitled to charge, the appellants suffered a loss. The amount of that loss was not to be determined, as the majority of the Full Court held, only by comparing the financial position of the appellants according to whether they entered this lease or took some other accommodation. The appellants did not contend that they had suffered loss in that way. **The appellants suffered loss because the continuing financial obligations they undertook when they took the lease proved to be larger than they had been led to believe. The question then became: how much larger was that burden?**

[67] Answering that question is not easy. It would be necessary to take account of a number of considerations. First, the appellants knew that outgoings might increase. When they took the lease they knew, or at least must be taken to have known, that unexpected outgoings could occur in the future: unexpected both as to the subject-matter of the expense and the amount. It would be wrong to compensate them for their incurring outgoings of that kind, but how is proper account to be taken of that fact?” (emphasis added)

permitted to call these expectation damages. They represent, however, the difference between what has transpired and the belief as to what would transpire based on and induced by the representation.

We have come a long way from *Gates*, *Wardley* and *Kizbeau*. The loss in *Murphy* conformed with the loss that Gaudron and Gummow JJ assumed in *Marks* had there been no exit clause.

The requirement to have regard to the governing statute to identify the rule is unquestioned. What that means in any given circumstances is not as easy to discern with confidence. If it is as simple as the assertion of loss in *Murphy*, the rule can be simply stated as including loss as follows: In circumstances where a belief has been engendered by misleading or deceptive conduct, loss arises by being required to act in a way more disadvantageous than as one believed one would have to act in reliance on the conduct. This loss may flow irrespective of the results of any investigation of what the plaintiff would have done (other than not entering the impugned arrangement) had the misleading or deceptive conduct not occurred. It cannot be doubted that such disadvantage by reference to the belief and the reality could be an element of being worse off, but to constitute it as an available recoverable loss by reference to the relevant rule of responsibility taken from the TPA is a significant step. The explication of the underlying rule of responsibility and compensation is, as yet, incomplete.

### ***Civil Liability Acts***

In 2002, the Australian States and Territories passed uniform legislation in what was called “tort law reform”. This followed an enquiry by the Commonwealth under the leadership of Justice David Ipp<sup>156</sup> then a member of the New South Wales Court of Appeal. For convenience only, I will refer to the New South Wales legislation.<sup>157</sup> The drafting and promulgation of the Acts

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<sup>156</sup> *Review of the Law of Negligence*, above n 30. The other members of the committee were Professor Peter Cane, Associate Professor Donald Sheldon and Mr Ian Macintosh.

<sup>157</sup> *Civil Liability Act 2002* (NSW).

reflected the ideas and influence of Professor Stapleton and the structural approach of Lord Nicholls in *Kuwait Airways*,<sup>158</sup> and, to a point, the approach of McHugh J in *March v Stramare*.

Many of the provisions of the legislation apply to personal injury, but the definition of harm in s 5 in Part 1A includes “damage to property” and “economic loss” as separate and distinct types of harm. “Commercial torts” are therefore covered. Section 5A provides for coverage of Part IA as follows:

“This Part applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.

This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.”

Section 3B has a long list of exclusions. I do not stay to consider what “or otherwise” may cover and the possibility of breach of equitable duties conforming to negligence being included.<sup>159</sup> Sections 5D and 5E deal with causation:

### “DIVISION 3: CAUSATION

#### 5D General principles

(1) A determination that negligence caused particular harm comprises the following elements:

- (a) that the negligence was a necessary condition of the occurrence of the harm (*factual causation*), and
- (b) that it is appropriate for the scope of the negligent person’s liability to extend to the harm so caused (*scope of liability*).

(2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

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<sup>158</sup> *Kuwait Airways* [2002] 2 AC 883, 1090–2 [69]–[76].

<sup>159</sup> See Barbara McDonald, “Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia” (2005) 27 *Sydney Law Review* 443.



(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:

- (a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and
- (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

### 5E Onus of proof

In determining liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.”

I will leave s 5D(3) aside. The balance of s 5D reflects a structural approach broadly conforming to the analysis and writing of Professor Stapleton. The Ipp Report discussed<sup>160</sup> causation as a two pronged test: factual causation and liability for consequences. Explicit recognition was given to the influence of the work of Professor Stapleton.<sup>161</sup> The discussion in the Ipp Report, with one exception, did not avow any change to the common law. It cited the need for a suitable framework in which to resolve individual cases, which would encourage explicit articulation of reasons by judges for imposing or not imposing liability. It described s 5D and its statutory structure as a “suitable framework in which to resolve individual cases” and as “helpful legislative guidance”.<sup>162</sup> Whether it did indeed change the common law is not free from doubt.<sup>163</sup> That it propounded a structure conforming more to the approach of McHugh J in *March v Stramare* than that of Mason CJ would tend to indicate that it did. Further, though s 5D is found under the divisional heading

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<sup>160</sup> *Review of the Law of Negligence*, above n 30, [7.26]–[7.49].

<sup>161</sup> *Ibid*, [7.27] and see also *Ruddock v Taylor* [2003] NSWCA 262; (2003) 58 NSWLR 269, 285–6 [84]–[89] (Ipp JA).

<sup>162</sup> *Ibid*, [7.48] and [7.49].

<sup>163</sup> See McDonald, above n 159.

“Causation”, it appears to encompass all limits on scope of liability, including remoteness.<sup>164</sup>

The Ipp Report recognised, through a non-exhaustive discussion of the common law, the various kinds of considerations that might make up the value judgments or normative considerations under s 5D(1)(b) or s 5D(2) or s 5D(4): causal overdetermination with results attributable to more than one sufficient condition;<sup>165</sup> intervening causes; successive causes; the cumulative operation of two or more factors to cause indivisible harm and material contribution; other expressions of material contribution of joint and concurrent tortfeasors; the place of increase in risk; foreseeability; the state of the plaintiff to be taken as found; the place of sheer coincidence; the importance of the relevant rule of responsibility.<sup>166</sup> The Report stated that for the resolution of individual cases, there can only be a case by case approach, rather than by application of detailed rules or principles.

The one explicit change to the common law, or at least a strand of approach in the common law was s 5E. This concerned the filling of evidentiary gaps by shifting the onus of proof in causation.<sup>167</sup> I will return to this below. Other than the onus of proof, the discussion in the Report left the development of legal principle in respect of such matters as material contribution to harm and the relationship between materially increasing risk and causation to the courts.

In 2003, in *Ruddock v Taylor*,<sup>168</sup> Ipp JA, in a concurring judgment, took the opportunity to express his view that s 5D embodies the principles of the common law. This was premised on his Honour’s view that the two stage test explicit in Professor Stapleton’s work and in s 5D was a structure that

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<sup>164</sup> Indeed the Ipp Report was explicit in its combining of questions of causation and remoteness, see *Review of the Law of Negligence*, above n 30, [7.25].

<sup>165</sup> See the discussion in Hart and Honoré, *Causation in the Law* (2<sup>nd</sup> Ed), above n 5, 111–7, 122–5, 128–9 and 235–53; Wright, “Causation in Tort Law” and “Once More into the Bramble Bush”, above n 6; Stapleton, “Unpacking Causation”, above n 7; *The Havenshaw’s Grange* [1905] P 307; *Carolgie Steamship Co Ltd v Royal Norwegian Government* [1952] AC 293; *Baker v Willoughby* [1970] AC 467; *Jopling v Associated Dairies* [1982] AC 794.

<sup>166</sup> See generally Dominic Villa, *Annotated Civil Liability Act 2002* (2004, Lawbook Co), 46–62.

<sup>167</sup> *Review of the Law of Negligence*, above n 30, [7.27]–[7.36].

<sup>168</sup> *Ruddock v Taylor* (2003) 58 NSWLR 269.

conformed with the common law, implicitly, *March v Stramare*. In later cases in the New South Wales Court of Appeal, reference was made on a number of occasions to the “two stage test of causation” (as part of the common law) referring to what Ipp JA said in *Ruddock v Taylor*. See *Tambree v Travel Compensation Fund*;<sup>169</sup> *Harvey v PD*;<sup>170</sup> *Graham v Hall*;<sup>171</sup> *Elayoubi v Zipser*;<sup>172</sup> *Nguyen v Cosmopolitan Homes*;<sup>173</sup> *Coastwide Fabrication & Erection Pty Ltd v Honeywell*;<sup>174</sup> *Mobbs v Kain*<sup>175</sup> and *Stojan (No 9) Pty Ltd v Kenway*.<sup>176</sup> As Ipp JA pointed out in *Harvey*, some support could be taken for his view that the two stage test conformed to the common law from what was said by Hayne J in *Pledge v Roads and Traffic Authority*.<sup>177</sup>

A different view (though not an unequivocal one) has been expressed in the High Court. First, in *Tambree*,<sup>178</sup> Gummow and Hayne JJ likened the use of the two stage structure to the three stage *Caparo* approach to duty rejected in *Sullivan v Moody*.<sup>179</sup> Then, in *Adeels Palace Pty Ltd v Moubarak and Bou Najem*,<sup>180</sup> the Court,<sup>181</sup> in joint reasons, said that s 5D which must be applied

<sup>169</sup> *Tambree t/as R Tambree & Associates v Travel Compensation Fund* [2004] NSWCA 24; (2004) Aust Contract Reports 90-195, [146] per Sheller JA (with whom Mason P and Ipp JA agreed).

<sup>170</sup> *Harvey v PD* [2004] NSWCA 97; (2004) 59 NSWLR 639, 655–6 [106] (Santow JA) and 670–1 [185]–[191] (Ipp JA). Spigelman CJ at 643 [11] expressly reserved his position on the two-stage test for causation.

<sup>171</sup> *Graham v Hall* [2006] NSWCA 208; (2006) 67 NSWLR 135, 146–7 [78] (Ipp JA, with whom Giles and McColl JJA agreed).

<sup>172</sup> *Elayoubi v Zipser* [2008] NSWCA 335, [55] (Basten JA, with whom Allsop P and Beazley JA agreed).

<sup>173</sup> *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246, [67]–[70] (McDougall J, with whom McColl and Bell JJA agreed).

<sup>174</sup> *Coastwide Fabrication & Erection Pty Ltd v Honeysett* [2009] NSWCA 134, [59] (McDougall J, with whom Ipp and Young JJA agreed).

<sup>175</sup> *Mobbs v Kain* [2009] NSWCA 301, [107] (McColl JA, with whom Macfarlan JA agreed).

<sup>176</sup> *Stojan (No 9) Pty Ltd v Kenway* [2009] NSWCA 364, [142] (McColl JA, with whom Ipp and Basten JJA agreed).

<sup>177</sup> *Pledge v Roads and Traffic Authority* [2004] HCA 13; 78 ALJR 572, 574–5 [10]:

“The questions that are relevant to legal responsibility are first, whether, as a matter of history, the particular acts or omissions under consideration (here the acts or omissions which led to the presence of the foliage, and the parking bays, and the absence of warning signs) *did* have a role in happening of the accident. It is necessary then to examine the role that is identified by reference to the purposes of the inquiry – the attribution of legal responsibility. It is at this second level of inquiry that it may be necessary to ask whether, for some policy reason, the person responsible for that circumstance should nevertheless be held not liable [Stapleton, ‘Unpacking “Causation” in Cane and Gardner (eds), *Relating to Responsibility*, (2001) 145 at 166–73]”.

<sup>178</sup> *Travel Compensation* (2005) 224 CLR 607.

<sup>179</sup> *Sullivan v Moody* [2001] HCA 59; (2001) 207 CLR 562.

<sup>180</sup> *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem* [2009] HCA 48; (2009) 239 CLR 420 (“*Adeels Palace*”).

and that it expresses the relevant questions in a way that **may** differ from what was said by Mason CJ in *March v Stramare*. There was no further discussion of that question. The appeal turned on questions of fact applying the “but for” test. Nor did the Court discuss s 5D(2).

The requirement to follow s 5D is clear. What its statutory content is and any continuity with developing common law concepts awaits judicial elucidation. In *Woolworths Limited v Strong*<sup>182</sup> Campbell JA (with whom Handley AJA and Harrison J agreed) said that s 5D(1) excluded notions of “material contribution” and increase in risk. To the extent that his Honour was referring only to factors which gave a negative “but for” answer to the question in s 5D(1)(a), so much is clear. But the notion of cause at common law incorporates “materially contributed to” in a way which would satisfy the “but for” test. Some factors which are only contributing factors can give a positive “but for” answer. (Both the driver who goes through the red light and the driver with whom he collides who is not looking contribute to the accident. If each had not occurred the accident would not have occurred. The facts of *Henville v Walker* provide another example.) However, material contributions that have been taken to be causes in the past (notwithstanding failure to pass the “but for” test) are taken up by s 5D(2) which, though referring to “an exceptional case”,<sup>183</sup> is to be approached “in accordance with established principle”.<sup>184</sup>

Two further aspects of s 5D are worthy of note at this point. First, it may tend to increase the cost and complexity of litigation. The answering of the “but for” enquiry in s 5D(1)(a) is mandatory. The Parliament has posed an issue that must be resolved. In a case such as *Bonnington Castings*, that resolution may involve detailed expert evidence of an engineering, medical, epidemiological or other kind. In a case based on negligent misrepresentation that may involve detailed cross-examination and interrogation as to the degree of inducement the representation had and whether “but for” it the act in reliance

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<sup>181</sup> *Adeels Palace* (2009) 239 CLR 420, 440 [43] and [44] (French CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>182</sup> *Woolworths Limited v Strong* [2010] NSWCA 282.

<sup>183</sup> cf the approach of the Canadian Supreme Court in *Resurfice Corp v Hanke* [2007] 1 SCR 333.

<sup>184</sup> cf *March v Stramare* (1991) 171 CLR 506, 514 and *Bonnington Castings* [1956] AC 613.

would have been done. After that (possibly expensive) enquiry, two possibilities open up: either s 5D(1)(b) or s 5D(2). Both potentially involve similar normative enquiries, but from different perspectives: one exclusionary (s 5D(1)(a)) and one inclusionary (s 5D(2)). Without s 5D one would prove material contribution or relevant inducement. Secondly, if scientific evidence, including epidemiology is to be relevant to the enquiry under s 5D(1)(a), is the enquiry as to necessary condition to be an entirely factual one based on the modes of thought of the relevant scientific discipline involved, or can more general non-scientific judgments intrude?<sup>185</sup>

In light of the paragraphs of the Ipp Report to which I have referred, one would have thought that there remained ample room to develop principles that inform s 5D that will keep it conformable with the development of the common law. It is perhaps both pointless and mischievous to seek to conjure up facts that would pass or fail s 5D but not the common law test. Section 5D is not apt in its terms to give a result that offends common sense. That said, Mason CJ in *March v Stramare* clearly and expressly disavowed a two-staged test. It was McHugh J who adopted a two-staged test which was redolent of s 5D. Further, the terms of s 5D(2) and (4) are apt to encompass the expression and development of common law principles of limitation and expansion of the scope of liability assuming the passing or failing of the “but for” test. This is particularly so if one gives proper weight to the evident purpose of the provisions as revealed in the discussion in the Ipp Report.

### ***The Marine Insurance Act***

A brief examination of causation in marine insurance reminds one that, in some circumstances, a question about causation is encapsulated and rooted in common sense answered only by recourse to an evaluative human assessment which in all likelihood will be utterly contestable, founded in common sense and underlain by diffuse logic.

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<sup>185</sup> cf Spigelman CJ in *Seltsam Pty Limited v McGuinness; James Hardie & Coy Pty Limited v McGuinness* [2000] NSWCA 29; (2000) 49 NSWLR 262, 284–5 [136] (“*Seltsam v McGuinness*”).

The *Marine Insurance Act 1906* (UK) was the last of the great codifications of Sir Mackenzie Dalzell Chalmers.<sup>186</sup> It was adopted around the Commonwealth.<sup>187</sup> It remains a model upon which modern codes are drafted.<sup>188</sup> Section 55(1) of the UK Act<sup>189</sup> provides that subject to the provisions of the Act and the terms of the policy, the insurer is only liable for a loss “proximately caused by a peril insured against”. In the immediately following subsection, clarification is given as to what the insurer is not liable for by reference to language of loss “attributable to” as well as “proximately caused”. The Act elsewhere uses other language: “caused”: s 64 (s 70), “caused by or directly consequential on”: s 66 (s 72). It is unnecessary to go into these refinements.

The context of marine insurance is generally accident and liability insurance, usually in a commercial context. There will generally be a confusion of causes or influences of events that give rise to a claim. What is required as a matter of legislative command is “proximately caused”.<sup>190</sup> In some of the cases and commentary, the view was expressed that the notion of “proximate” cause bore within it the assumption that for answering a question about the response of an insurance policy there could be only one proximate cause.<sup>191</sup> That is not what the statute says. It uses an adjectival phrase “any loss **proximately caused**”. Modern cases do not make this demand.<sup>192</sup> Nor was it a rule of law before codification.<sup>193</sup>

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<sup>186</sup> See also the *Bills of Exchange Act 1882* (UK) and the *Sale of Goods Act 1873* (UK).

<sup>187</sup> For Australia see the *Marine Insurance Act 1909* (Cth).

<sup>188</sup> See the similarities in the *Maritime Code of the People’s Republic of China*, arts 216–256.

<sup>189</sup> The equivalent Australian provision is *Marine Insurance Act 1909* (Cth), s 61(1).

<sup>190</sup> For the place of proximate cause in insurance law generally, see Martin Davies, “Proximate Cause in Insurance Law” (1995) 7 *Insurance Law Journal* 284; Malcolm Clarke, “Insurance: The proximate Cause in English Law” (1981) 40 *Cambridge Law Journal* 284. See *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad* [2011] UKSC 5 for an extensive discussion of causation in maritime insurance.

<sup>191</sup> *Smith, Hogg & Co Ltd v Black Sea & Baltic General Insurance Co Ltd* [1940] AC 997, 1006; *Howard Fire Insurance Co v Norwich and New York Transportation Company* 79 US 194 (1870); Raoul P Colinvaux, *The Law of Insurance* (4<sup>th</sup> Ed, 1979), [4.32].

<sup>192</sup> *JJ Lloyd Instruments v Northern Star Insurance Co* (‘*The Miss Jay Jay*’) [1987] 1 Lloyd’s Rep 32.

<sup>193</sup> *Grill v General Iron Screw Collier Co Ltd* (1866) LR1 CP 600, 611; *Ocean Steamship Co Ltd v Liverpool and London War Risks Association Ltd* [1946] KB 561, 575; *Reischer v Borthwick* [1894] 2 QB 548, 551.

The *locus classicus* of the notion of “proximate cause” is, of course, *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd*.<sup>194</sup> The ship (*Ikaria*) was torpedoed well forward by a German submarine. With the assistance of tugs, though beginning to settle by the head, she limped into Le Havre harbour where she berthed at a quay. A gale sprang up, causing her to bump against the quay. The harbour authorities feared she might sink and block the quay and so ordered her to a mooring inside the outer breakwater. While moored there, she took the ground at each ebb tide, floating with the flood tide. This placed strain on her structure and, after two days, her bulkheads gave way and she sank, becoming a total loss. The policy covered perils of the sea, but had a war exclusion. Each of their Lordships<sup>195</sup> said the answer was to be given by the common sense response to the facts properly understood. Lord Shaw of Dunfermline’s famous discussion<sup>196</sup> made clear that fine distinctions were to be avoided, the proximate cause was not to be judged as the nearest in time, but as “proximate in efficiency”, that is not “destroyed” or “impaired” by other causes, but rather the question was as to the efficiency of the operating factor upon the result. If one cause has to be selected (as it was here for the reasons below) it is done by the qualities of “reality, predominance and efficiency”. This accorded with the “principles of a plain business transaction”. For there to be recovery in this case it was necessary to persuade the court that the loss was proximately caused by the perils of the sea and was not proximately caused by war because of the exclusion of the latter risk from the cover. Not surprisingly, that attempt failed.

It is not particularly profitable to multiply factual examples. One starts with the recognition that there is a business contract among participants in the maritime commercial community. The attribution of the notion of proximate, or real or effective cause to such person involves “the commonplace tests which the ordinary business person conversant with such matters would adopt”<sup>197</sup> or “what a business or seafaring man would take to be the cause without too

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<sup>194</sup> *Leyland Shipping* [1918] AC 350.

<sup>195</sup> Lord Finlay LC, Viscount Haldane, Lord Dunedin, Lord Atkinson and Lord Shaw of Dunfermline.

<sup>196</sup> *Leyland Shipping* [1918] AC 350, 368–70.

<sup>197</sup> *Yorkshire Dale Steamship* [1942] AC 691, 702 (Lord Macmillan).

microscopic analysis but on a broad view”.<sup>198</sup> Where one has more than one proximate cause<sup>199</sup> recovery depends upon the proper construction of the policy. If one proximate cause is a relevant peril and the other is not (but not an excluded peril) the policy will respond;<sup>200</sup> if one is an insured peril, but the other is an excluded peril (as was the case in *Leyland Shipping*), the policy will not respond.<sup>201</sup> (This is why the Court was looking for one cause. If a cause was war, the policy did not respond.)

The requirement of proximateness, efficiency and reality relevant for insurance, here marine insurance, stems from the notion that unless the parties agree otherwise it is to be taken that the insured peril had to have that degree of reality or efficiency in order for the policy to respond. Once that rule of responsibility is grasped, the answer to the causal question is one, made upon examination of the facts, which is “broad”, “common sense” and “in accordance with business realities”. The answer may be contestable, the logic to reach the answer may be diffuse, but what else is there to say? What intellectual process has been disguised? The marine underwriter has his or her answer, and gets on with business in the market.

### **The importance of the identification of the correct legal principle and any legal policy underlying it**

The rules of responsibility and compensation do not arise only under statute. The relevant legal context and rule at general law are also important.

### ***Equity***

This is a discussion of torts. Nevertheless, a discussion of causation in non-contractual wrongs in commercial law requires advertence to the operative principles in Equity. This is especially so given the frequency with which

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<sup>198</sup> *Yorkshire Dale Steamship* [1942] AC 691, 706 (Lord Wright).

<sup>199</sup> As in *Heskell v Continental Express* [1950] 1 All ER 1033.

<sup>200</sup> *The Miss Jay Jay* [1987] 1 Lloyd’s Rep 32.



equitable relationships, structures, duties and rights find their place in commercial law.<sup>202</sup>

It is not proposed to go over the same ground as the valuable papers in past conferences.<sup>203</sup> Nevertheless it will be necessary to touch on some of the matters covered by them.<sup>204</sup> Equity has a separateness that goes beyond history. Its principles and its origins in legal theory derive from notions of conscience, fidelity, trust, vulnerability, fraud, surprise and mistake.<sup>205</sup> In many respects, like torts, it is fault-based; but great care needs to be taken in the ascription of the elements of fault in any given case and in understanding the purpose of the rule creating the standard against which fault is assessed. In its modern form, Equity takes its place with the common law in a system of justice unified in administration. Its principles, sometimes, look very similar to common law principles: see, for example, the duties of a director to the company to exercise care.<sup>206</sup> Nevertheless, the nature of the equitable relationship and duty, and how it operates in a given set of circumstances is a factor critical to understanding the place (or not, as the case may be) of causation in the deployment of equitable remedies. That said, the rules of

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<sup>201</sup> *Wayne Tank and Pump Co Ltd v Employers Liability Insurance Corporation Ltd* [1973] QB 57; and see the discussion in *McCarthy v St Paul International Insurance* [2007] FCAFC 28; (2007) 157 FCR 402, 429–38 [88]–[116].

<sup>202</sup> Paul D Finn (Ed), *Equity and Commercial Relationships* (1987, Law Book Co); Peter Millett, “Equity’s Place in the Law of Commerce” (1998) 114 *Law Quarterly Review* 214; Simone Degeling and James Edelman (Eds), *Equity in Commercial Law* (2005, Law Book Co); A F Mason, “The Place of Equity and Equitable Remedies in the Common Law World” (1994) 110 *Law Quarterly Review* 238.

<sup>203</sup> See in particular J D Heydon, “Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?” and Joshua Getzler, “Am I My Beneficiary’s Keeper? Fusion and Loss-Based Fiduciary Remedies” in Simone Degeling and James Edelman (Eds), above n 202, 185 and 239.

<sup>204</sup> The subject of equitable compensation and the causal elements therein has been dealt with in a number of articles: Ian Davidson, “The Equitable Remedy of Compensation” (1981–1982) 13 *Melbourne University Law Review* 349; WMC Gummow, “Compensation for Breach of Fiduciary Duty” in Timothy Youdan (Ed), *Equity Fiduciaries and Trusts* (1989); J D Davies, “Equitable Compensation: Causation, Foreseeability and Remoteness” in Donovan WM Waters (Ed), *Equity, Fiduciaries and Trusts* (1993); Michael Tilbury, “Equitable Compensation” in Patrick Parkinson (Ed), *Principles of Equity* (1996); Steven B Elliott, “Remoteness Criteria in Equity” (2002) 65 *Modern Law Review* 588; Michael O’Meara, “Causation, Remoteness and Equitable Compensation” (2005) 26 *Australian Bar Review* 51.

<sup>205</sup> Ralph A Newman, *Equity and Law: A Comparative Study* (1961, Oceanea Publications, New York), especially Chapters I and II; Peter W Young, Clyde Croft and Megan L Smith, *On Equity* (2<sup>nd</sup> Ed, 2009, Law Book Co), Ch 1.

<sup>206</sup> *Permanent Building Society (In Liq) v Wheeler* (1994) 11 WAR 187; *Bristol and West Building Society v Mothew* [1998] Ch 1; J D Heydon, “Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?”, above n 203; *AWA Ltd v Daniels t/as Deloitte Haskins & Sells* (1992) 7 ACSR 759 (“*AWA v Daniels*”).

causation in Equity can be said to be, to a point, in a “state of flux”.<sup>207</sup> This is, in part, due to the joint administration of the two bodies of law and, in part, to the intrusion of Equity into commercial relationships.

The first and most obvious point to make is that liability for breach of trust is often strict. A failure to follow the terms of the trust is not alleviated (except by operation of statute)<sup>208</sup> by a lack of fault. Yet, of course, a trustee has a duty of prudence in the handling and investment of trust property.<sup>209</sup> The defaulting trustee’s duty is to effect restitution to the trust estate.<sup>210</sup> The rule was always a strict one “however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive”.<sup>211</sup> Street J (as he then was) in his much cited and luminous judgment in *Re Dawson*<sup>212</sup> said:<sup>213</sup>

“Considerations of causation, foreseeability and remoteness do not readily enter into the matter.

...

The principles embodied in this approach do not appear to involve any inquiry as to whether the loss was caused by or flowed from the breach. Rather the inquiry in each instance would appear to be whether the loss would have happened if there had been no such breach.

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The cases to which I have referred demonstrate that the obligation to make restitution, which courts of equity have from very early times imposed on defaulting trustees and other fiduciaries is of a more absolute nature than the common law obligation to pay damages for tort or breach of contract.”

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<sup>207</sup> Young, Croft and Smith, above n 205, 123 [2.480].

<sup>208</sup> See for example *Trustee Act 1925* (UK), s 61; *Trustee Act 1925* (NSW), s 85; *Trusts Act 1973* (Qld), s 76; *Trustee Act 1958* (Vic), s 67; *Trustee Act 1936* (SA), s 36; *Trustees Act 1962* (WA), s 75; *Trustee Act 1898* (Tas), s 50; *Trustee Act 1925* (ACT), s 85; *Trustee Act 1980* (NT), s 49A.

<sup>209</sup> *Cowan v Scargill* [1985] Ch 270, 276 and 289; *Fouche v Superannuation Fund Board* [1952] HCA 1; (1952) 88 CLR 609, 641; *Youyang Pty Ltd v Minter Ellison* [2003] HCA 15; (2003) 212 CLR 484 (“*Youyang*”).

<sup>210</sup> *Maguire & Tansey v Makaronis* [1997] HCA 23; (1997) 188 CLR 449 (“*Maguire v Makaronis*”); *Re Dawson* [1966] NSW 211; *Target Holdings Ltd v Redferns* [1995] UKHL 10; [1996] 1 AC 421, 434 (“*Target*”).

<sup>211</sup> *Clough v Bond* (1838) 3 My and Cr 490, 496–7; 40 ER 1016, 1018 (Lord Cottenham LC); *Caffrey v Darby* (1801) 6 Ves Jun 488; 31 ER 1159 (Lord Eldon MR).

<sup>212</sup> *Re Dawson* [1966] 2 NSW 211.

<sup>213</sup> *Re Dawson* [1966] 2 NSW 211, 215–6.

Whilst causation can thus be seen to be attenuated, a “but for” analysis was posited by his Honour. As some of the earlier discussion concerning the “but for” test reveals, the test can lead to false positive as well as false negative findings.<sup>214</sup> What Street J was distinguishing as irrelevant was a requirement for proximate or effective cause or the operation of the doctrine of *novus actus interveniens*. In *Maguire v Makaronis*, Brennan CJ, Gaudron, McHugh and Gummow JJ<sup>215</sup> also made clear that in the field of equitable compensation there is no place for the doctrine of *novus actus interveniens*. To the extent that such a “but for” analysis gave a wide scope for liability that was to the defaulting fiduciary’s account.

Many American cases have found trustees liable in the absence of any causal connection between the default and the loss, in particular (a) when there has been a failure to earmark trust funds; (b) if the trustee mingled trust funds with his own or those of other funds; and (c) if the trustee violated a duty to keep exclusive control of trust money.<sup>216</sup> These cases of absence of any causation are harsh, but prophylactic: an encouragement to due performance of trustee obligations. The rigidity of the rule was not universal.<sup>217</sup> Critical was the kind of breach involved: self-dealing would lead to liability even if the loss resulted from general economic conditions.<sup>218</sup> Also, if a trustee applied trust money in the acquisition of an unauthorised investment, he or she was liable to restore to the trust the amount of the loss on its realisation.<sup>219</sup>

Critical to any analysis of the place of causal connexion in the equitable remedy will be the nature and character of the rules of responsibility, compensation and restitution involved. Thus a rule that holds a fiduciary to a

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<sup>214</sup> As for the capacity of the “but for” test to be over-exclusionary see *Kuwait Airways* [2002] 2 AC 883, 1092 [73], John G Fleming, *Law of Torts* (9<sup>th</sup> Ed, 1998, Law Book Co), 222–30; and Basil S Markesinis and Simon F Deacon, *Tort Law* (4<sup>th</sup> Ed, 1999), 178–91; *March v Stramare* (1991) 171 CLR 506, 515–7 (Mason CJ); *Fairchild* [2003] 1 AC 32, 44 [10] (Lord Bingham).

<sup>215</sup> *Maguire v Makaronis* (1997) 188 CLR 449, 470.

<sup>216</sup> See Note (1936) 50 *Harvard Law Review* 317; William F Fratcher, *Scott on Trusts* (4<sup>th</sup> Ed, 1998, Little Brown & Co) Vol III §205.1, 243–8.

<sup>217</sup> *Scott on Trusts*, above n 216, Vol IIA §179.3, §179.4 and Vol III §205.1.

<sup>218</sup> *Scott on Trusts*, above n 216, Vol III, 246.

<sup>219</sup> *Knott v Cottee* (1852) 16 Beav 77; 51 ER 705; and *In re Duckwari Plc* [1999] Ch 253, 262; referred to by Lord Neuberger of Abbotsbury PJ delivering the reasons of the Court of Final

high duty to act in the interests of another and selflessly, will not readily permit such a person to require his beneficiary to prove that his proven default was a proximate cause of loss. Thus, the remedial rules will be structured to enforce, not undermine, such a strict duty.<sup>220</sup>

Also critical will be the nature and character of the remedy sought. A breach of fiduciary duty (eg self-dealing without disclosure and consent) will immediately generate a right to rescind the relevant transaction without the need to demonstrate any causal nexus<sup>221</sup> (that is whether the transaction would have been entered if the disclose had been made). Different considerations apply to compensation for breach of fiduciary duty. There, a “sufficient connection” between the breach of duty and the profit derived or loss sustained or asset held must be demonstrated.<sup>222</sup> The relevant causal connection is determined by the purpose of the rule, the purpose of the remedy and the nature and circumstances of the breach.

As to wrongful gain or profit, the question is whether the profit was obtained **by reason of** the fiduciary position or **by reason of** taking advantage of opportunity or knowledge derived therefrom.<sup>223</sup> As to property, tracing rules elongate in time and place the connection necessary to be established, such rules being formulated with presumptions (often contrary to the likely facts) against the defaulting fiduciary: such as in *In re Hallett's Estate*<sup>224</sup> and *In re Oatway*.<sup>225</sup> As to loss, in *Maguire*,<sup>226</sup> Brennan CJ, Gaudron, McHugh and Gummow JJ said that the principle underlying *Re Hallett's Estate* (that whenever an act can be done rightfully, the fiduciary is not allowed to say, against the person entitled to the property or right, that he has done it

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Appeal of Hong Kong in *Akai Holdings Ltd (in liquidation) v Thanakharn Kasikorn Thai Chamkat (Mahachon)* (8 November 2010), [150] (“*Thanakharn Kasikorn*”).

<sup>220</sup> *Warman International Ltd v Dwyer* [1995] HCA 18; (1995) 182 CLR 544, 557–8 (“*Warman*”); *Maguire v Makaronis* (1997) 188 CLR 449, 465.

<sup>221</sup> *Maguire v Makaronis* (1997) 188 CLR 449, 467.

<sup>222</sup> *Maguire v Makaronis* (1997) 188 CLR 449, 468; *Nocton v Lord Ashburton* [1914] AC 932, 956–7; *Thanakharn Kasikorn*, [150]–[152].

<sup>223</sup> *Maguire v Makaronis* (1997) 188 CLR 449, 468; *Warman* (1995) 182 CLR 544, 557; *Phipps v Boardman* [1967] 2 AC 46.

<sup>224</sup> *In re Hallett's Estate* (1879) 13 Ch D 696, 727.

<sup>225</sup> *In re Oatway* [1903] 2 Ch 356, 360–1; explained by Learned Hand J in *Primeau v Granfield* (1911) 184 F 480, 484–5 as a form of “protective election”.

wrongfully) attends any exposition of the apparently causal phrase used by Lord Haldane LC in *Nocton*, “by [the fiduciary] acting”. The restitutionary obligation is central. The nature of the remedy will vary to reflect the nature of the obligation and the nature and character of the breach. “Generalisations may mislead”.<sup>227</sup> As Kirby J put it in *Maguire*:<sup>228</sup>

“[Equitable] remedies will be fashioned according to the exigencies of the particular case so as to do what is ‘practically just’ as between the parties. The fiduciary must not be ‘robbed’; nor must the beneficiary be unjustly enriched.”

At least two important questions remain for resolution: first, the extent to which remedies for breach of equitable duties of a similar kind or character to common law (or statutory) duties, especially in a commercial context, will be regulated by causal analyses conforming to those at common law; and, related to that question, secondly, the continued force (or not) of the Privy Council decision in *Brickenden v London Loan & Saving Co*.<sup>229</sup>

In *Permanent Building Society v Wheeler*,<sup>230</sup> Ipp J doubted the equitable character of a trustee’s duty of care. This is not a topic without controversy.<sup>231</sup> In *Daniels v AWA*<sup>232</sup> a majority of the Court of Appeal of New South Wales characterised the obligation of care of directors as tortious (as well, of course, as statutory). This too is not a topic without controversy.<sup>233</sup>

In 1989, in *LAC Minerals Ltd v International Corona Resources Ltd*<sup>234</sup> La Forest J approved of the proposition<sup>235</sup> that to say simple carelessness of a (fiduciary) solicitor was a breach of a fiduciary obligation was a “perversion of words”. In 1991, a majority of the Supreme Court of Canada in *Canson*

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<sup>226</sup> *Maguire v Makaronis* (1997) 188 CLR 449, 469.

<sup>227</sup> *Youyang* (2003) 212 CLR 484, 499 [36].

<sup>228</sup> *Maguire v Makaronis* (1997) 188 CLR 449, 496 (approved by the Hong Kong Court of Final Appeal in *Thanakharn Kasikorn*, [150]–[152]).

<sup>229</sup> *Brickenden v London Loan & Saving Co* [1934] 3 DLR 465.

<sup>230</sup> *Permanent Building Society v Wheeler* (1994) 14 ACSR 109, 157–8.

<sup>231</sup> Heydon, above n 203.

<sup>232</sup> *AWA v Daniels* (1992) 7 ACSR 759.

<sup>233</sup> Heydon, above n 203.

<sup>234</sup> *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 85 DLR (4<sup>th</sup>) 14 at 2D.

<sup>235</sup> of Southin J in *Girardet v Crease & Co* (1987) 11 BCLR (2d) 361, 362.

*Enterprises Ltd v Broughton & Co*<sup>236</sup> held that damages for breach of fiduciary duty fell to be measured by analogy with common law rules of remoteness. The minority<sup>237</sup> considered that the equitable principles of compensation applied. In 1995, in *Henderson v Merrett Syndicates Ltd*<sup>238</sup> Lord Browne-Wilkinson characterised the liability of a negligent fiduciary as equivalent to his liability at common law. In 1996, however, in *Target Holdings Ltd v Redfern*,<sup>239</sup> Lord Browne-Wilkinson restated the principles (if I may say respectfully) somewhat more in accordance with accepted equitable principle.<sup>240</sup> His Lordship referred to *Canson* and quoted extensively with approval from the minority judgment of McLachlin J. Two passages should be noted, one from the judgment of McLachlin J<sup>241</sup> in *Canson* approved by Lord Browne-Wilkinson<sup>242</sup> and one from the opinion of his Lordship:

(McLachlin J)

“While foreseeability of loss does not enter into the calculation of compensation for breach of fiduciary duty, liability is not unlimited. Just as restitution in specie is limited to the property under the trustee’s control, so equitable compensation must be limited to loss flowing from the trustee’s acts in relation to the interest he undertook to protect. Thus, Davidson states [‘The Equitable Remedy of Compensation’ (1982) 3 *Melbourne U.L. Rev.* 349] ‘It is imperative to ascertain the loss resulting from breach of the relevant equitable duty’ (at p. 354 emphasis added).”

...

(Lord Browne-Wilkinson)

“Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach.”

<sup>236</sup> *Canson Enterprises Ltd v Broughton & Co* [1991] 3 SCR 534; (1991) 85 DLR (4<sup>th</sup>) 129 (“*Canson*”).

<sup>237</sup> expressed by McLachlin J (as her Ladyship then was), *Canson* (1991) 85 DLR (4<sup>th</sup>) 129, 160–3.

<sup>238</sup> *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 205.

<sup>239</sup> *Target* [1996] 1 AC 421, 428–41.

<sup>240</sup> citing at 434 *Caffrey v Darby* (1801) 6 Ves Jun 488; 31 ER 1159; *Clough v Bond* (1838) 3 My & Cr 490; 40 ER 1016; *Re Dawson* [1966] 2 NSW 211 and *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515.

<sup>241</sup> *Canson* (1991) 85 DLR (4<sup>th</sup>) 129, 160.

<sup>242</sup> *Target* [1996] 1 AC 421, 439.

In 1997, in the Court of Appeal in *Swindle v Harrison*,<sup>243</sup> a case concerned with a breach of fiduciary duty by a solicitor who had failed to disclose a secret profit from a loan taken by his client to complete the transaction, where no fraud was alleged, Evans LJ applied a common law causation test. In 1998, in *Bristol and West Building Society v Mothew*,<sup>244</sup> Millett LJ agreed with Ipp J, La Forest J and Lord Browne-Wilkinson in *Henderson* and said:

“Equitable compensation for breach of the duty of skill and care resembles common law damages in that it is awarded by way of compensation to the plaintiff for his loss. There is no reason in principle why the common law rules of causation, remoteness of damage and measure of damages should not be applied by analogy in such a case. It should not be confused with equitable compensation for breach of fiduciary duty, which may be awarded in lieu of rescission or specific restitution.”

In 1999, the New Zealand Court of Appeal approved the approach of Evans LJ in *Swindle* in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*.<sup>245</sup>

In *Maguire*,<sup>246</sup> *Pilmer v Duke Group Limited (In Liq)*<sup>247</sup> and *Youyang*,<sup>248</sup> the High Court sounded a clear warning bell over the too enthusiastic harmonisation of the causal approach in equity and common law. In *Youyang*,<sup>249</sup> the Court said:

“... [T]here must be a real question whether the unique foundation and goals of equity, which has the institution of the trust at its heart, warrant any assimilation even in this limited way with the measure of compensatory damages in tort and contract. It may be thought strange to decide that the precept that trustees are to be kept by courts of equity up to their duty has an application limited to the observance by trustees of some only of their duties to beneficiaries in dealing with trust funds.”

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<sup>243</sup> *Swindle v Harrison* [1997] 4 All ER 705.

<sup>244</sup> *Bristol and West Building Society v Mothew* [1998] Ch 1, 17.

<sup>245</sup> *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 681–2.

<sup>246</sup> *Maguire v Makaronis* (1997) 188 CLR 449.

<sup>247</sup> *Pilmer v Duke Group Ltd (In Liq)* [2001] HCA 31; (2001) 207 CLR 165, 196–7 [71]–[72] and 201 [85] (“*Pilmer*”). See also *McCann v Switzerland Insurance Australia Ltd* [2000] HCA 65; 203 CLR 579, 587–8 [15]–[17] and 621–3 [135]–[141].

<sup>248</sup> *Youyang* (2003) 212 CLR 484.

<sup>249</sup> *Youyang* (2003) 212 CLR 484, 500 [39].

The Court approved<sup>250</sup> the following from McLachlin J's judgment in *Canson*:<sup>251</sup>

"The basis of the fiduciary obligation and the rationale for equitable compensation are distinct from the tort of negligence and contract. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently the law seeks a balance between enforcing obligations by awarding compensation and preserving optimum freedom for those involved in the relationship in question, communal or otherwise. The essence of a fiduciary relationship, by contrast, is that one party pledges itself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged."

Why this caution is legitimate, is perhaps illustrated by a fiduciary's duty to exercise care. If the lack of care is in the management or administration of the trust property, a qualitative difference may be seen to exist between such a fault and tortious fault under a duty of care arising by reference to other considerations of proximity. After all, at common law, if the trustee were a bailee, he or she would face the reversal of an onus of proof should the property be lost or damaged. *Caffrey v Darby* was a case of negligent administration of trust property. Why should the stringency of an attenuated "but for" test not be appropriate? Nevertheless, it may be difficult to cavil with the conclusion of Lord Browne-Wilkinson in *Henderson* when considering questions such as professional negligence by someone who is a fiduciary and who has a cognate responsibility and liability in contract and tort.

The resolution of the doctrinal questions implicit in the equiparation of common law and equitable duties and principles is part of the ascertainment of the relevant rule of responsibility in circumstances where similarly expressed duties have different theoretical and ethical sources that are not merely a product of history.<sup>252</sup> Further, common sense plays its part in the

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<sup>250</sup> *Youyang* (2003) 212 CLR 484, 500–1 [40]; in *Pilmer* (2001) 207 CLR 165, 196 McHugh, Gummow, Hayne and Callinan JJ referred to this passage in *Canson* as well as the passage from McLachlin J's (as her Honour then was) judgment in *Norberg v Wynrib* [1992] 2 SCR 226, 272.

<sup>251</sup> *Canson* [1991] 3 SCR 534, 543.

<sup>252</sup> R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4<sup>th</sup> Ed, 2002, Butterworths), 831–41.



analysis, as is clear from a number of authorities.<sup>253</sup> Given the nature of equitable compensation, that is unexceptional, as long as it is not a substitute for identifying the relevant equitable rule and applying it with the stringency that such rule and the relevant breach and remedy require.

The comments of the High Court in *Youyang* are also to be understood against the background of the discussion of *Brickenden* in *Maguire*.<sup>254</sup> *Brickenden* is a case that has had its share of criticism.<sup>255</sup> It has, however, been widely followed.<sup>256</sup> *Brickenden* was the solicitor to a lender. He received a benefit from the loan made to one Biggs, being payment from Biggs out of the proceeds of the loan moneys owed to him by Biggs as well as commissions and fees in connection with the mortgages for those loans. *Brickenden* was held liable to the lender (his client) for the full loss it suffered on the loan to Biggs. In delivering the advice of the Board,<sup>257</sup> Lord Thankerton stated the following principle:

“When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent’s action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.”

In *Maguire*, Brennan CJ, Gaudron, McHugh and Gummow JJ did not find it necessary to consider the correctness of *Brickenden*, noting that it turned on whether the loss claimed could properly be said to have been sustained within

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<sup>253</sup> *Canson* (1991) 85 DLR (4<sup>th</sup>) 129, 163; *O’Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, 273 (“*O’Halloran*”); *Target* [1996] 1 AC 421, 439; *G M & A M Pearce & Co Pty Ltd v Australian Tallow Producers* [2005] VSCA 113, [65]–[66].

<sup>254</sup> *Maguire v Makaronis* (1997) 188 CLR 449, 470–4.

<sup>255</sup> J D Heydon, “Causal Relationship Between a Fiduciary’s Default and the Principal’s Laws” (1994) 110 *Law Quarterly Review* 328.

<sup>256</sup> *Commonwealth Bank v Smith* (1991) 42 FCR 390, 394 (FCAFC); *Gemstone Corporation v Grasso* (1994) 62 ASR 239, 243, 245 and 252 (FCSASC); *Palmisano v Hyman* (Deane J, FCA, 30 March 1977); *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 97 (NZCA); *Gathergood v Blundell & Brawn* [1991] 1 NZLR 405; *Estate Realities Ltd v Wignall* [1991] 3 NZLR 482, 493 (NZCA); *Sims v Craig Bell & Bond* [1991] 3 NZLR 535, 545–6 (NZCA); *Witten-Hannah v Davis* [1995] 2 NZLR 141, 148 and 157 (NZCA); *Haira v Burberry Mortgage Finance & Savings* [1995] 3 NZLR 396, 407–8 (NZCA); *Wan v McDonald* (1991) 33 FCR 491, 520–1 (Burchett J).

<sup>257</sup> Constituted by Lords Merrivale, Thankerton, Russell of Killowen, Wright and Alness.

the meaning of what Lord Haldane said in *Nocton v Lord Ashburton* “by” the solicitor having acted in breach of duty. Their Honours did, however, note that the question would be whether there was “an adequate or sufficient connection” between the compensation claimed and equitable breach. The assessment of that was assisted by recognising the policy of holding the fiduciary to the high standards of his office. Their Honours concluded,<sup>258</sup> in somewhat Delphic fashion (if I may say without intended disrespect):

“It may be that concern with respect to the apparent rigour of the reasoning in *Brickenden* reflects what has been seen as a tendency apparent in some recent decisions too readily to classify as fiduciary in nature relationships which might better be seen as purely contractual or as giving rise to tortious liability. Whilst that be so, it is not self-evident that the response should rest in a general denial of the applicability of the reasoning in *Brickenden* to delinquent fiduciaries, particularly solicitors and other professional advisers.”

Kirby J in *Maguire*<sup>259</sup> and Spigelman CJ, Sheller JA and Stein JA in *Beach Petroleum NL V Kennedy*<sup>260</sup> subjected *Brickenden* to close scrutiny. As their Honours pointed out, the breadth of Lord Thankerton’s statement of principle must be understood by reference to the facts of, and arguments in, the case. The non-disclosed facts were “material”, indeed potently causal. The reasons of the Canadian Supreme Court display the contest between competing causal influences: *Brickenden*’s non-disclosure and the dereliction of duty by the lender’s directors. *Brickenden* was responsible for the non-disclosure of material facts. The materiality could be seen from a finding by the trial judge recounted by the Privy Council that “there was no equity in the properties ... above the prior [disclosed] mortgages” and that the sum lent which paid out *Brickenden* could not have been recouped from a sale at that time. In these circumstances, a rule which denied to the defaulting fiduciary, who had failed to disclose **material** information concerning a conflict of duty and interest and thus who had failed in his solemn duty of undivided loyalty, the ability to prove a competing or better cause being the dereliction of the decision maker of the client, is explicable, indeed utterly sensible. On a “but for” test, the dereliction

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<sup>258</sup> *Maguire v Makaronis* (1997) 188 CLR 449, 474.

<sup>259</sup> *Maguire v Makaronis* (1997) 188 CLR 449, 488–95.

<sup>260</sup> *Beach Petroleum NL V Kennedy* [1999] NSWCA 408; (1999) 48 NSWLR 1, 91–4 [434]–[451] (“*Beach Petroleum*”).

of duty of the directors could be put to one side as a concurrent wrongful cause.<sup>261</sup>

In *Beach Petroleum*<sup>262</sup> the Court said that *Brickenden* was not authority for the general proposition that, in no case involving breach of fiduciary duty, may the Court consider what would have happened if the duty had been performed. Kirby J said much the same in *Maguire*.<sup>263</sup>

The above discussion illuminates the proposition that “causation in Equity is not susceptible to the formulation of a single test. It is necessary to identify the purpose of the particular rule to determine the approach to issues of causation”.<sup>264</sup> This reflects once again the important proposition emphasised by Lord Hoffmann that causation is not a self-contained essential idea, but a part of the logical, moral and practical process of attribution of responsibility and of awarding compensation.

### ***The duty to warn***

In certain circumstances, the general law will impose a duty to warn. The approach to this in Australia and the United Kingdom is illustrative of the significant changes in approach to causation that have taken place by reference to rules of responsibility and scope of duty.

In *Rogers v Whitaker*<sup>265</sup> the High Court stated that except in the case of an emergency or where disclosure would be damaging to the patient, a medical practitioner has a duty to warn a patient of a material risk inherent in proposed treatment. A risk was material if a reasonable person in the patient’s position if warned would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the patient would be likely to attach significance to it. This duty was part of the content of the single

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<sup>261</sup> cf *Elayoubi v Zipster* [2008] NSWCA 335, [51].

<sup>262</sup> *Beach Petroleum* (1999) 48 NSWLR 1, 93 [444].

<sup>263</sup> *Maguire v Makaronis* (1997) 188 CLR 449, 492–3.

<sup>264</sup> *O’Halloran* (1998) 45 NSWLR 262, 274–5 with reference to *Empress Car Co* [1999] 2 AC 22 (Lord Hoffmann); cf *Barnes v Hay* (1988) 12 NSWLR 337 (Mahoney JA).

<sup>265</sup> *Rogers v Whitaker* [1992] HCA 58; (1992) 175 CLR 479.

comprehensive duty of doctor to patient. Causation did not arise in the High Court in *Rogers v Whitaker*. The trial judge had found that Mrs Whitaker would not have undergone the surgery had she been advised of the relevant risk, a finding that was confirmed in the Court of Appeal. The point was not pressed in the High Court.

This aspect of the duty returned to the Court in *Chappel v Hart*,<sup>266</sup> this time with the debate centring on causation. Though the subject is divorced from commercial law, an analysis of the approach of the Court to vindication of this duty helps one understand how the content of the legal rule affects the causal response and will assist in understanding any causal link where there is a duty to speak in a commercial context, in particular, one based on vulnerability.

Mrs Hart underwent an operation carried out **with** due skill and care by Dr Chappel who, though he had warned Ms Hart that there was a risk of a perforated oesophagus, had not warned her of the risk of infection. The infection damaged her laryngeal nerve and led to the paralysis of the right vocal cord. If she had been warned of the risk of infection she would not have undergone the surgery when she did, but would have engaged the most experienced surgeon available (who was not Dr Chappel). There was some evidence to suggest that the chance of perforation was related to the skill of the doctor, but occurrence of infection was extremely rare.

To a significant degree the reasoning of Gaudron J is consistent with the equiparation of breach and causation through a shifting onus of proof once breach and the creation of risk of a kind that eventuated in the harm suffered is proved. This approach (although in substance supported by Kirby J) has not found general support in the High Court. More significant for present purposes were the views of Gummow J on causation (with which Kirby J also agreed). After citing<sup>267</sup> *March v Stramare*, Gummow J referred to the then recent

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<sup>266</sup> *Chappel v Hart* (1998) 195 CLR 232.

<sup>267</sup> *Chappel v Hart* (1998) 195 CLR 232, 255–6 [62] (almost as a matter of formality).

opinion of Lord Hoffmann in *Empress Car Co*<sup>268</sup> in which the necessity to articulate the correct legal rule before applying common sense had been emphasised. Gummow J stressed<sup>269</sup> that the nature and purpose of the duty concerned the right to know of the risks to make an informed judgment. His Honour noted the acceptance in argument by Dr Chappel that on another occasion it was unlikely that Mrs Hart would suffer the infection, given its random and rare occurrence. Thus, the “but for” test was satisfied, but only by reason of sheer coincidence. However, given the nature and purpose of the duty that was sufficient for Gummow J.<sup>270</sup>

McHugh J and Hayne J were in the minority. McHugh J<sup>271</sup> said that with the rejection of the “but for” test in *March v Stramare* it was not enough that but for the breach **this** injury would not have occurred. Both McHugh J and Hayne J concluded that the lack of warning had not materially increased the risk of injury – it exposed Mrs Hart to the same risk of injury as she would face in due course. To hold Dr Chappel liable was to attribute responsibility for a random coincidence.

The reasons of Gummow J and his utilisation of the “but for” test in support of the nature and purpose of the duty reveal the potentially powerful influence in causation analysis of the rule of responsibility to which Lord Hoffmann has given emphasis. It can marginalise *March v Stramare* if its content is seen to justify a departure from notions of common sense proximate or efficient cause. It also makes more explicable the movement away from the tortious analogue in TPA claims in the way exhibited in *Marks and Murphy*.

In *Chester v Afshar*<sup>272</sup> the House of Lords confronted the same issue as in *Chappel v Hart*. The facts were similar. Whilst in *Chappel* it was likely that Mrs Hart would have undergone the surgery in the future, in *Chester* it was shown that if warned the plaintiff would not have undergone the surgery then, but it

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<sup>268</sup> *Empress Car Co* [1999] 2 AC 22.

<sup>269</sup> *Chappel v Hart* (1998) 195 CLR 232, 256–7 [65].

<sup>270</sup> *Chappel v Hart* (1998) 195 CLR 232, 258 [70].

<sup>271</sup> *Chappel v Hart* (1998) 195 CLR 232, 243 [25].

<sup>272</sup> *Chester v Afshar* [2005] 1 AC 134.

was not shown that she would not have undergone it later. Lord Bingham of Cornhill and Lord Hoffmann rejected the existence of the causal connection. Lord Steyn, Lord Hope of Craighead and Lord Walker of Gestingthorpe found the relevant causal connection. To a significant degree, this disagreement exhibited the same fault lines as existed between the reasons of Gummow J and McHugh J and Hayne J in *Chappel v Hart*.

For the minority, Lords Bingham and Hoffmann, the “but for” test should not be taken to be met by sheer coincidence. The breach did not increase the risk; coincidence caused the loss. Where the breach is a failure to warn of a risk, the plaintiff must show that he or she would have taken the opportunity to avoid or reduce that risk. The majority, though all influenced by the reasons in *Chappel v Hart*, accepted that they were modifying causal analysis in aid of vindicating the relevant rule of responsibility. What was critical for Lords Steyn, Hope and Walker was the content of the duty of care and the rights of autonomy of the patient supported by it.<sup>273</sup> To deny compensation even in the coincidental circumstances was to undermine the value of the duty itself. *Chester v Afshar* and *Fairchild* (discussed below) reveal the practical effect on judicial method of the recognition that causation is not a separate universal concept and of the importance of the rule of responsibility. The reasoning of their Lordships in the majority may be contestable; but it is a transparently clear normative judgment, based on a given (albeit tenuous) factual relationship between breach and harm.

There will be no causal link, however, if the patient would have gone ahead with the treatment at the same time as in fact he or she did. That was found to be the position in *Rosenberg v Percival*.<sup>274</sup> This causal question was to be determined by reference to this patient, not by reference to some reasonable patient.<sup>275</sup> Nor will there be a causal link if the event or misfortune suffered by the plaintiff had no relationship to the risk against which he or she should

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<sup>273</sup> *Chester v Afshar* [2005] 1 AC 134, 146 [24] (Lord Steyn), 153 [55] and 154 [59] (Lord Hope), 163 [91] (Lord Walker).

<sup>274</sup> *Rosenberg v Percival* (2001) 205 CLR 434.

<sup>275</sup> *Rogers v Whitaker* (1992) 175 CLR 479, 490; *Chappel v Hart* (1998) 195 CLR 232, 246 [32] and 272 [93]; and *Rosenberg v Percival* (2001) 205 CLR 434, 443 [24].

have been warned, such as if the patient had an adverse reaction to anaesthesia.<sup>276</sup>

Though these are personal injury cases, they reveal the consequences of applying underlying policy of the rule of responsibility to any causal analysis. This is just as relevant in a commercial case if the duty to warn or speak arises in a context of reliance or vulnerability.

### ***Negligent misrepresentation***

The legal developments in the House of Lords and High Court in the last 15–20 years in this field reflect a central consideration in the law of torts: the utilisation of the scope of duty of care to control the attribution of responsibility. The relevant rule of responsibility in the scope of duty governs the place of causation.

The principal difference between the United Kingdom and Australia has been the approach to the ascertainment of the duty of care and its content. In Australia, the High Court, in a number of cases,<sup>277</sup> has categorically rejected, not only its own previously enunciated general ascertainment of proximity, but also the two stage approach in *Anns v Merton London Borough Council*<sup>278</sup>

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<sup>276</sup> *Chappel v Hart* (1998) 195 CLR 232, 257 [66]; *Chester v Afshar* [2005] 1 AC 134.

<sup>277</sup> *Hill v Van Erp* [1997] HCA 9; (1997) 188 CLR 159, 210 (McHugh J), 237–9 (Gummow J); *Perre v Apand Pty Ltd* [1999] HCA 36; (1999) 198 CLR 180, 193–4 [7]–[10] (Gleeson CJ), 197–8 [25]–[27] (Gaudron J), 208–12 [70]–[82] (McHugh J), 251 [191] (Gummow J), 268–70 [245]–[247], 273 [255], 275 [259], 277–8 [267], 283–6 [279]–[287], 288–9 [292]–[296] (Kirby J), 300–3 [330]–[335] (Hayne J), 318–9 [389], 321–2 [393], 323–4 [398]–[400], 326 [406] (Callinan J) (“*Perre v Apand*”); *Crimmins v Stevedoring Committee* [1999] HCA 59; (1999) 200 CLR 1, 13 [3] (Gleeson CJ), 32–3 [73], 33–4 [77] (McHugh J), 56 [149] (Gummow J), 80 [222] (Kirby J), 96–7 [270]–[274] (Hayne J) (“*Crimmins*”); *Brodie v Singleton Shire Council* [2001] HCA 29; (2001) 206 CLR 512, 630–1 [316] (Hayne J); *Sullivan v Moody* (2001) 207 CLR 562, 578–9 [48] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Tame v New South Wales* [2002] HCA 35; (2002) 211 CLR 317, 355–6 [104]–[107] (McHugh J), 405 [257], 409 [266]–[268] (Hayne J) (“*Tame*”); *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; (2002) 211 CLR 540, 583 [99] (McHugh J), 624–5 [234]–[236] (Kirby J) (“*Graham Barclay Oysters*”); *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552, 564 [30] (McHugh J); *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16; (2004) 216 CLR 515, 528–9 [18] (Gleeson CJ, Gummow, Hayne and Heydon JJ) (“*Woolcock*”); *Vairy v Wyong Shire Council* [2005] HCA 62; (2005) 223 CLR 422, 433 [28] (McHugh J), 444–5 [66]–[68] (Gummow J) (“*Vairy*”); *Imbree v McNeilly* [2008] HCA 40; (2008) 248 ALR 647, 658 [41]–[42] (Gummow, Hayne, Kiefel JJ), 681 [141], 690 [181] (Kirby J); *Stuart v Kirkland-Veenstra* [2009] HCA 15, [132] (Crennan and Kiefel JJ).

<sup>278</sup> *Anns v Merton London Borough Council* [1978] AC 728.

based on reasonable foreseeability, the expanded three stage approach in *Caparo Industries v Dickman*<sup>279</sup> and any reformulation of these such as in Canada in *Cooper v Hobart*.<sup>280</sup> This rejection of any formula or test the application of which will yield an answer to the question of whether a duty exists and its content has been accompanied by the identification of an approach to assist in undertaking the same task. This approach is to undertake a close analysis of the facts of the relationship between plaintiff and putative tortfeasor by reference to “salient features” affecting the appropriateness of imputing a legal duty to take reasonable care and its content.<sup>281</sup>

The consequences for causation in this approach to duty can be seen in the different approaches to valuers’ and auditors’ negligence cases. The United Kingdom cases reveal a greater simplicity brought about by the shaping of a clear duty of care enunciated at a level of abstraction. The Australian cases demand close involvement with the facts of the case at hand and eschew delineation of principle at a level of abstraction.

### *Negligent valuers*

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<sup>279</sup> *Caparo Industries plc v Dickman & Ors* [1990] UKHL 2; [1990] 2 AC 605 (“*Caparo Industries v Dickman*”).

<sup>280</sup> *Cooper v Hobart* (2001) 206 DLR (4<sup>th</sup>) 193.

<sup>281</sup> *Caltex Oil (Australia) Pty Ltd v The Dredge “Willemstad”* [1976] HCA 65; (1976) 136 CLR 529, 576–7 (Stephen J); *Perre v Apand* (1999) 198 CLR 180, 192 [5], 194–5 [11]–[15] (Gleeson CJ), 218–31 [100]–[133] (McHugh J), 252–61, [196]–[221] (Gummow J), 300–7 [330]–[348] (Hayne J), 326–7 [406]–[413] (Callinan J); *Crimmins* (1999) 200 CLR 1, 13 [3] (Gleeson CJ agreeing with McHugh J), 23–4 [42]–[43] (Gaudron J), 39–51 [93]–[133] (McHugh J), 96–7 [270]–[272] (Hayne J), 113–7 [343]–[360] (Callinan J); *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; (2000) 205 CLR 254, 262–7 [13]–[30] (Gleeson CJ), 288 [98], 291–4 [108]–[118] (Hayne J); *Sullivan v Moody* (2001) 207 CLR 562, 577–83 [43]–[63] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Tame* (2002) 211 CLR 317, 329–35 [6]–[28] (Gleeson CJ), 341 [54] (Gaudron J), 361–2 [123]–[125] (McHugh J), 397–9 [237]–[241] (Gummow and Kirby JJ), 425–31 [323]–[336] (Callinan J); *Graham Barclay Oysters* (2002) 211 CLR 540, 555–64 [9]–[40] (Gleeson CJ), 570 [58] (Gaudron J, agreeing with Gummow and Hayne JJ), 577–83 [84]–[99] (McHugh J), 596–610 [145]–[186] (Gummow and Hayne JJ), 617 [213], 629–31 [245]–[251] (Kirby J), 663–4 [320]–[321] (Callinan J); *Woolcock* (2004) 216 CLR 515, 529–33 [19]–[33] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 547–60 [74]–[116] (McHugh J); *Thompson v Woolworths (Qld) Pty Ltd* [2005] HCA 19; (2005) 221 CLR 234, 243 [24] (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ); *Vairy* (2005) 223 CLR 422, 442–8 [58]–[78] (Gummow J); *Dederer* (2007) 234 CLR 330, 345 [44] (Gummow J); *Stuart v Kirkland-Veenstra* [2009] HCA 15; (2009) 237 CLR 215, 248–54 [87]–[114] (Gummow, Hayne and Heydon JJ), 259–62 [130]–[138] (Crennan and Kiefel JJ).



In *SAAMCO*,<sup>282</sup> there were three appeals. Lord Hoffmann wrote the leading opinion.<sup>283</sup> The case was decided as a matter of principle at a level of some abstraction: as the identification of the content of the scope of the duty of care owed by a valuer, in the absence of a contractual warranty as to the accuracy of the valuation. The essential first question was: For what kind of loss is the plaintiff entitled to compensation? This was to be answered by identifying the scope of the duty of care. The scope of the duty was reasonable care for the accuracy of the information. So, liability was restricted to the consequences of the information being inaccurate. Even in circumstances where the lender would not have lent at all had there been non-negligent provision of information, the causal question is governed by the nature of loss compensated for by the scope of duty. What was recoverable was no more than the extent to which the valuation was wrong and the security diminished thereby. The principle was reiterated in *Nykredit* (in dealing with the question of interest and costs in one of the three appeals within *SAAMCO*).<sup>284</sup>

These cases were applied in *Platform Home Loans Ltd v Oyston Shipways Ltd*.<sup>285</sup> *SAAMCO* was, however, controversial.<sup>286</sup> It has been followed in New Zealand,<sup>287</sup> but not in Australia. In *Kenny & Good Pty Ltd v MGICA (1992) Ltd*,<sup>288</sup> the High Court dealt with the duty of care of valuers. The facts were not complex. In April 1990 (about six months before a dramatic fall in property values) a real estate valuer was engaged by a bank (Macquarie) to provide a valuation of a partially completed development as it stood and as completed. The request extended to include other parties including a trustee company lender (PC) and the mortgage insurer (MGICA). The valuations were \$5.35 (as was) and \$5.5 million (on completion). The valuation report stated that the property was “suitable security for investment of trust funds to the extent of 65 per cent of our valuation for a term of 3–5 years”. The true value at the date of

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<sup>282</sup> *SAAMCO* [1997] AC 191; and see also *Nykredit* [1997] 1 WLR 1627.

<sup>283</sup> With whom Lord Goff of Chiefeley, Lord Jauncey of Tullilchettle, Lord Slynn of Hadley and Lord Nicholls of Birkenhead agreed.

<sup>284</sup> *Nykredit* [1997] 1 WLR 1627, 1638; see also Lord Nicholls of Birkenhead at 1631–2.

<sup>285</sup> *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 AC 190; see in particular at 208–10 (Lord Hobhouse of Woodborough) and 212–4 (Lord Millett).

<sup>286</sup> For example it was criticised by Professor Stapleton in Stapleton, “Negligent Valuers and Falls in the Property Market”, above n 7.

<sup>287</sup> *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 682–3.

the valuations was \$3.9 to \$4 million on an as-completed basis. PC advanced 65 per cent of \$5.5 million (\$3.575) to the developer. The loan was secured by a first mortgage and insured by MGICA. The developer defaulted. A little over a year later (July 1991) PC entered into possession and in January 1992 the property was sold for \$2.65 million, which was accepted to be its value when sold. As in *SAAMCO*, the lender and the insurer would not have lent or insured had the valuation not been negligent. The lender's loss (\$1,977,513.67) was paid by the insurer. The trial judge in the Federal Court (Lindgren J) and the Full Court declined to follow *SAAMCO*. The valuers appealed.

No member of the High Court was prepared to state the duty at the level of abstraction in *SAAMCO*. Gaudron J fundamentally rejected the notion that the duty only protects some security margin; in the case at hand it was the decision to enter and the ability to recoup if the loan were entered. McHugh J did not follow *SAAMCO* in point of analysis, but reached a similar result. His view (which was agreed with in this respect by Gummow J) was that both scope of duty and foreseeability are relevant; but that the principles to apply were contract principles in assessing damages.<sup>289</sup> This was because the duty

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<sup>288</sup> *Kenny & Good* (1999) 199 CLR 413.

<sup>289</sup> McHugh J said in *Kenny & Good* (1999) 199 CLR 413, 431 [35]:

“... that is the proper approach whether the plaintiff was a contracting party or merely a person for whose benefit the valuation was made. Speaking generally, the valuer is liable only for such losses as a reasonable person would regard as flowing naturally from the negligent valuation or which are of a kind that should have been within the valuer's contemplation. In the absence of a contrary undertaking or special circumstances, the aggrieved party cannot recover any part of the difference between the true value of the property and the price recovered at the time of the sale. The aggrieved party's damages are confined to the difference between the price paid for the property and the price that would have been paid on the basis of a true valuation together with such expenses and other losses that were sufficiently likely to result from the breach of duty to make it proper to hold that they flowed naturally from the breach of duty or that they were within the reasonable contemplation of the parties to the valuation contract or arrangement. In the case of money lent on a valuation, the damages are confined to the difference between what was lent and what would have been lent on the true value of the property together with such expenses and other losses that were sufficiently likely to result from the breach of duty to make it proper to hold that they flowed naturally from the breach of duty or that they were within the reasonable contemplation of the parties to the contract or arrangement. In either case, losses do not include the consequences of subsequent market declines.”

was equivalent to contract.<sup>290</sup> As to decline in value, his Honour expressed the view that any foreseeable fall in value was or should be built into the assessment of true value and, in so far as any decline occurred beyond this it was not reasonably foreseeable and should be regarded as outside the contemplation of the parties.<sup>291</sup> It did not matter for McHugh J that the lender would not have entered the arrangement, because the issue was not one of causation, but remoteness. In the case at hand, however, McHugh J found the valuer liable for the whole market decline because of the warranty of safety of lending that was given. Gummow J noted that *SAAMCO* and *Nykredit* establish that the valuer's duty of care had a settled and limited scope that was formulated at some level of abstraction and which foreclosed questions of causation, remoteness and measure of damages. His Honour made the important point that the difference in approach in point of principle was that in Australia the existence and scope of the duty requires scrutiny of the precise relationship between the parties. This process of ascertainment, and identification of content, of the duty precedes and governs the consequential enquiries of causation, remoteness and measure of damages.

### *Negligent Auditors*

Claims for recovery by third parties who invest or deal with companies and claim reliance on the auditor's report have met with limited success. However, it has been limiting the scope of the duty of care, rather than causal analysis that has restricted liability. This approach is most evident in the United Kingdom where, in *Caparo Industries plc v Dickman*,<sup>292</sup> the House of Lords concluded that a duty of care arises generally only when the plaintiff is in the contemplation of the defendant as a member of a class who is likely to rely on the advice for the same purposes as that for which it has been prepared by the defendant. The plaintiff company, Caparo, had claimed damages from the auditors of a company which it had taken over. Caparo alleged that the

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<sup>290</sup> *Hedley Byrne & Co Ltd v Heller & Partners* [1963] UKHL 4; [1964] AC 465, 529–30; *Spring v Guardian Assurance Plc* [1994] UKHL 7; [1995] 2 AC 296, 324; *Hill v Van Erp* (1997) 188 CLR 159, 223.

<sup>291</sup> I have some difficulty with this as a matter of valuation theory.

<sup>292</sup> *Caparo Industries v Dickman* [1990] 2 AC 605.

auditors had negligently carried out their audit and negligently prepared their statutory report causing Caparo to suffer a loss when it was later revealed that the acquired company's profits had been overstated and the share price subsequently fell. The House of Lords held that the auditors owed no duty of care to Caparo. The High Court has not followed *Caparo* in respect of the principle for establishing the existence of a duty of care,<sup>293</sup> but nevertheless has limited claims by third parties against auditors by reference to scope of duty in *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords*.<sup>294</sup>

There is little doubt, however, that auditors owe a duty of care to the client company. Claims by client companies give rise to interesting questions of causation. It is useful to start with *Alexander v Cambridge Credit Co Ltd*.<sup>295</sup> The auditors of *Cambridge Credit* had failed to note that the accounts did not show provisions that should have been made. Had the appropriate note been made, it was highly probable that a receiver would have been appointed. The company was put into receivership three years after the negligent audit and a claim was made for breach of contract for the increase in the deficiency of assets required to meet liabilities over those three years. The trial judge (Rogers J) found for the company.<sup>296</sup> An appeal to the New South Wales Court of Appeal was allowed (Mahoney and McHugh JJA, Glass JA dissenting)<sup>297</sup> on the basis that there was no causal connection between the breach of contract and the damage. It was held that the "continued existence" of the company which allowed trading losses was not enough alone, to be held to be causative of the loss.<sup>298</sup>

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<sup>293</sup> *Perre v Apand* (1999) 198 CLR 180, 193–4 [9]–[10] (Gleeson CJ), 210–2 [77]–[82], 212–213 [83], 216 [93] (McHugh J), 300–2 [330]–[333] (Hayne J); *Sullivan v Moody* (2001) 207 CLR 562, 579 [49] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

<sup>294</sup> *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)* [1997] HCA 8; (1997) 188 CLR 241; see in particular the judgment of McHugh J at 276–81 for an extensive survey the position taken as to the duty of care owed by auditors to third parties in various common law jurisdictions at the time. It was only New Zealand that had adopted a less restrictive approach to duty of care in *Scott Group Ltd v McFarlane* [1977] NZCA 8; [1978] 1 NZLR 553 (Court of Appeal), but as McHugh J notes at 278–9 the analysis in *Scott* was based on *Anns v Merton London Borough Council* which conflated proximity and foreseeability.

<sup>295</sup> *Alexander v Cambridge Credit* (1987) 9 NSWLR 310.

<sup>296</sup> *Cambridge Credit Corporation Ltd & Anor v Hutcheson & Ors* (1985) 9 ACLR 545. The long procedural history of the matter in the Commercial Division in the Supreme Court of New South Wales is outlined in *Alexander v Cambridge Credit* (1987) 9 NSWLR 310, 317–21.

<sup>297</sup> Mahoney and McHugh JJA, Glass JA dissenting.

<sup>298</sup> *Alexander v Cambridge Credit* (1987) 9 NSWLR 310, 334–5 (Mahoney JA):

The judgments in *Alexander v Cambridge Credit* were discussed and followed by the English Court of Appeal in *Galoo Ltd (In Liquidation) v Bright Grahame Murray (A Firm)*.<sup>299</sup> This was a claim in both contract and tort by two companies (Galoo and Gamine) who allegedly incurred trading losses as a result of relying on the negligent auditing of the defendant.<sup>300</sup> The claim was framed as “but for” the negligence, a fraud which had occurred would have been discovered and the companies would have been put into liquidation and thus ceased to trade. If they had ceased to trade, they would have avoided the further trading losses which they in fact incurred. The claim failed for lack of causation. Giving the principal judgment, Glidewell LJ expressly applied a common sense approach to the question – with reference to *Monarch Steamship*<sup>301</sup> and *March v Stramare*<sup>302</sup> – distinguishing between provision of opportunity to make losses and causing them.<sup>303</sup>

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“To allow the company to continue in existence is, in a sense, to expose it to all of the dangers of being in existence. But allowing the company to remain in existence does not, without more, cause losses from anything which is, in that sense, a danger incident to existing. There are some dangers loss from which will raise causal considerations and some will not. But the company's case has been conducted on the basis that there is not to be — and there has in fact not been — a detailed examination of what particular things caused the fall in net value of the company between 1971 and 1974 and the nature for this purpose of them.

In the end, the company's case has been that the loss it claims was caused by the breach because, and because alone, the breach allowed the company to continue in existence. Some of the incidents flowing from its existence during 1971–1974 may be the results of the breach; some, for example, those flowing from earthquakes or the like, will not be. But the basis of the plaintiffs' claim has been such that no inquiry is to be or has been pursued, for this purpose, into what in fact happened, why and the relationship of what happened to the breach. I do not think that that is enough to establish a causal relationship.”

And at 359 (McHugh JA):

“In the proved circumstances of this case, I do not think that the issue of the certificates by the auditors constituted a cause of Cambridge's loss of \$145,000,000. The existence of a company, as counsel for Cambridge conceded, cannot be a cause of its trading losses or profits. Yet that is what the case for Cambridge comes to. Except in the sense that the issue of the certificates induced the trustee not to take action against Cambridge and thereby permitted Cambridge to exist as a trader, the issuing of the certificates was not one of the conditions which were jointly necessary to produce the loss of \$145,000,000. To assert in these circumstances that the issue of the certificates was a cause of the loss in my opinion is to depart from the commonsense notion of causation which the common law champions.”

<sup>299</sup> *Galoo Ltd (In Liquidation) v Bright Grahame Murray (A Firm)* [1994] 1 WLR 1360.

<sup>300</sup> A claim by a third plaintiff as a third party investor who relied on the auditor's report failed for want of duty of care, with reference to the House of Lords decision in *Caparo Industries v Dickman* [1990] 2 AC 605.

<sup>301</sup> *Monarch Steamship* [1949] AC 196.

As was noted by the New Zealand Court of Appeal in *Sew Hoy & Sons Ltd (In Receivership and in Liquidation) v Coopers & Lybrand*,<sup>304</sup> these cases should not be taken as authority that negligent auditors reports can never be causative of trading loss to the company. In that case, dealing with the question of whether a company which continued trading after its auditors negligently certified its accounts can recover from the auditors the trading losses which it then incurred, the Court held that an application to strike out the claim was not appropriate. It was a question of causation in the particular case and the company could have the opportunity to attempt to establish a causal link as there could be additional factual circumstances where that causal link could be established, such as a mistaken belief as to the value of stock, or a mistaken belief that the company was trading in a profitable manner which meant that the company continued to trade **in the same way**, incurring further losses. What this approach highlights is that in such claims when the question of causation arises there is need to consider the relationship between breach, the risk created by the breach and the loss. A bare claim that the company should have ceased to trade and thus incurred trading losses may not succeed. It may be different if the auditor negligently failed to alert the board of hugely risky practices undertaken by the company that could cause much greater losses in the future, or a incompetent methodology of trading which created risks in the future. The AWA litigation – *AWA Ltd v Daniels Trading as Deloitte Haskins & Sells*<sup>305</sup> before Rogers J at trial and then *Daniels and Others (formerly practising as Deloitte Haskins & Sells) v Anderson*<sup>306</sup> on appeal – serves as a useful example. AWA claimed damages for the losses incurred by a seemingly successful foreign exchange manager who, undetected, lost \$49.8 million<sup>307</sup> in forward foreign exchange contracts. It was alleged that the loss was caused by the auditors' repeated failure to report gross deficiencies in the company's records and internal

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<sup>302</sup> *March v Stramare* (1991) 171 CLR 506.

<sup>303</sup> *Galoo Ltd (In Liquidation) v Bright Grahame Murray (A Firm)* [1994] 1 WLR 1360.

<sup>304</sup> *Sew Hoy & Sons* [1996] 1 NZLR 392.

<sup>305</sup> *AWA v Daniels* (1992) 7 ACSR 759.

<sup>306</sup> *Daniels and Others (formerly practising as Deloitte Haskins & Sells) v Anderson* (1995) 37 NSWLR 438 (“*Daniels v Anderson*”).

<sup>307</sup> In the last quarter of the 1980s – a significant sum.

controls. These matters went to the very risk that was created by the breach. Rogers J found the negligence of the auditors causative of the loss and the finding was upheld on appeal.

### **Deceit**

In the tort of deceit the rule of responsibility is one that provides a remedy for intentionally dishonest conduct. For this remedy, there is no limitation based on foreseeability.<sup>308</sup> As Lord Steyn pointed out in *Smith New Court*<sup>309</sup> the removal of foreseeability as a limitation on recovery of damages in deceit means that the limits of responsibility are set out by causation, mitigation and remoteness, which are overlapping, though distinct concepts.

This leads to the question as to how causation in fraud should be expressed. The usual phrase is “directly flowing”.<sup>310</sup> This is “really caused by”<sup>311</sup> including consequential losses, the plaintiff not being limited to comparing values at the date of acting on the deceit. These considerations, together with moral quality attached to the rule of responsibility mean that there is no basis for constructing a limitation, whether through the content of the duty of care or in scope rules for causation, that would limit recovery of a plaintiff as in *SAAMCO*. A broad notion of what is consequential under the “but for” test (tempered by common sense) is called for.<sup>312</sup>

One aspect of Lord Steyn’s reasons in *Smith New Court* illuminates an important underpinning aspect of the emphasis being given in the modern

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<sup>308</sup> *Clark v Urquhart* [1930] AC 28, 68; *Potts v Miller* [1940] HCA 43; (1940) 64 CLR 282, 298–9; *Toteff v Antonas* [1952] HCA 16; (1952) 87 CLR 647, 650; *Doyle v Olby (Ironmongers)* [1969] 2 QB 158; *South Australia v Johnson* (1982) 42 ALR 161; *Gould v Vaggelas* [1985] HCA 85; (1985) 157 CLR 215; *Gates v City Mutual* (1986) 160 CLR 1; *Smith New Court Securities v Citibank NA* [1996] UKHL 3; [1997] AC 254 (“*Smith New Court*”); *Palmer-Bruyn and Parker Pty Ltd v Parsons* [2001] HCA 69; (2001) 208 CLR 388; *Henville v Walker* (2001) 206 CLR 459, 473 [30]–[31].

<sup>309</sup> *Smith New Court* [1997] AC 254, 284–5.

<sup>310</sup> *Clark v Urquhart* [1930] AC 28, 68; *Doyle v Olby (Ironmongers)* [1969] 2 QB 158, 167–8.

<sup>311</sup> *Smith New Court* [1997] AC 254, 265 (Lord Browne-Wilkinson), 282 (Lord Steyn).

<sup>312</sup> *Smith New Court* [1997] AC 254, 284–5 (Lord Steyn).

cases to the rule of responsibility in causation: the interweaving of law and morality.<sup>313</sup>

### **The legal and forensic rules relevant to proof**

All claims must be proved if they are to succeed. The usual rule of proof is the balance of probabilities. That is the essential forensic rule which gives content to the relevant causal link between the impugned act or omission with the resultant damage or loss. Forensic or procedural rules of proof often provide the practical mechanism for proof of difficult causal questions. These issues arise in both commercial and non-commercial contexts. The law exhibits pragmatism in its day-to-day administration. One of the reasons for that is the need to fashion expedient rules of recovery which facilitate just and fair outcomes by reference to the nature and character of the underlying rules of responsibility and compensation. As Wigmore said<sup>314</sup> the legal or ultimate burden of proof is determined by the substantive law “upon broad reasons of experience and fairness”. Justice and fairness are qualities that must inspire confidence and loyalty in the administration of justice from defendants as well as plaintiffs. To speak of pragmatic and expedient rules to facilitate just outcomes must not be seen as a code for always solving a plaintiff’s particular evidential difficulties.

This discussion of the topic of evidence and onus of proof (as with many other topics in the law) can helpfully commence with some words of Lord Mansfield:<sup>315</sup>

“It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted”.

Similar examples of a practical approach to how much evidence is required to draw an inference in a context of the party having the means of knowledge

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<sup>313</sup> *Smith New Court* [1997] AC 254, 280.

<sup>314</sup> John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3<sup>rd</sup> Ed, 1940, Little Brown & Co), Vol 9, §2486, 278.

<sup>315</sup> *Blatch v Archer* (1774) 1 Cowp 63, 65; 98 ER 969, 970; this passage was quoted in *Farrell v Snell* [1990] 2 SCR 311, 328; and *Fairchild* [2003] 1 AC 32, 46 [13] (Lord Bingham).



can be cited in many cases since the Ancien Regime.<sup>316</sup> An important element of this approach is that:<sup>317</sup>

“in considering the amount of evidence necessary to shift the burden of proof the Court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively”.

In some circumstances, it is not so much who has the better knowledge to prove a fact, but who has put the plaintiff in the position in which it finds itself. For example, in intellectual property cases for instance, where it has been shown that the infringer has wrongly taken advantage of the property of another for commercial gain, difficult questions sometimes arise as to establishing how much of a profit made by an infringer is attributable to the wrongful infringement or use and how much is attributable to the capital, skill or other legitimate attributes or endeavours of the infringer. If profits are made by the use of something which only came into existence by the infringement, all profits must be accounted for.<sup>318</sup> The owner of the intellectual property is not required to establish how much use was made of its property,<sup>319</sup> once infringement is established. The onus is on the infringer to identify how much profit is reasonably attributable to its innocent efforts.<sup>320</sup> Reasonable or rational apportionment is made without any attempt at mathematical precision.<sup>321</sup>

In cases concerning the damage to goods in their transport, causation issues are sometimes disentangled using rules of evidence that assist the party with the ultimate onus, who has consigned goods to the carrier. In *Davis v*

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<sup>316</sup> *Hollis v Young* [1909] 1 KB 629; *Dunlop Holdings Ltd Application* [1979] RPC 523, 544; *Hampton Court Ltd v Crooks* [1957] HCA 28; (1957) 97 CLR 367, 371–2 (“*Hampton Court v Crooks*”); *Parker v Paton* (1941) 41 SR (NSW) 237 at 243; J D Heydon, *Cross on Evidence* (8<sup>th</sup> Aust Ed, 2010, Butterworths), [7160] 304, fn 123 and the cases and references there cited.

<sup>317</sup> James Fitzjames Stephen, *A Digest of the Law of Evidence* (5<sup>th</sup> Ed, 1887, Macmillan), 111, cited in *Cullen v Welsbach Light Company of Australasia Ltd* [1907] HCA 3; (1907) 4 CLR 990, 1013–4; see also *Hampton Court v Crooks* (1957) 97 CLR 367, 371–2.

<sup>318</sup> *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* [1968] HCA 50; (1968) 122 CLR 25, 43 (“*Colbeam Palmer*”).

<sup>319</sup> *Colbeam Palmer* (1968) 122 CLR 25, 45; *Hamilton-Brown Shoe Co v Wolf Bros & Co* 240 US 251 (1915).

<sup>320</sup> *Colbeam Palmer* (1968) 122 CLR 25, 45; *Sheldon v Metro-Goldwyn Pictures Corp* 309 US 290 (1940); *Mishawaka Rubber & Woolen Manufacturing Co v SS Kresge Co* 316 US 203 (1942).

<sup>321</sup> *Colbeam Palmer* (1968) 122 CLR 25, 46.

*Garrett*<sup>322</sup> a barge with a cargo of lime deviated from its voyage and whilst out of its course encountered bad weather and rough sea wetting the lime, causing it to heat and catch fire. To save those on board the barge was run on shore where both barge and cargo of lime were lost. There was a possibility that the weather and sea would have likewise affected the barge had the proper course of the voyage been maintained. Tindall CJ expressed the matter in a way that the wrongdoer could not “apportion or qualify his own wrong”.<sup>323</sup> The evidential onus clearly had shifted to the wrongdoer in that an inference could be drawn; but it can be seen to be an onus of exculpation, not merely of raising a doubt or even eliminating an inference. The wrongdoer had, by its wrong, caused the difficulty of proof. Some of the cases in which this principle is most clearly expressed are contractual deviation cases,<sup>324</sup> some are bailment cases where goods have been stored in an unauthorised place.<sup>325</sup>

It is unnecessary to canvass exhaustively the shifting onuses in proving a claim for cargo damage under a bill of lading,<sup>326</sup> but one view of the proper approach was described by Viscount Sumner in *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd*<sup>327</sup> and Mocatta J in *Government of India v Chandris*<sup>328</sup> that if a plaintiff has shown a prima facie case by delivery of cargo

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<sup>322</sup> *Davis v Garrett* (1830) 6 Bing 715; 130 ER 1456.

<sup>323</sup> *Davis v Garrett* (1830) 6 Bing 715, 724; 130 ER 1456, 1459:

“But we think the real answer to the objection is, that no wrong-doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could shew, not only that the same loss might have happened but that it must have happened if the act complained of had not been done; but there is no evidence to that extent in the present case.”

<sup>324</sup> *Davis v Garrett* (1830) 6 Bing 715; 130 ER 1456; *A/S Rendal v Arcos Ltd* (1937) 58 LI LR 287, 297 (Lord Wright, with whom Lord Atkin, Lord Thankerton and Lord MacMillan agreed); *James Morrison & Co Ltd v Shaw, Savill, and Albion Company Ltd* [1916] 2 KB 783, 795 and 800; *Tate & Lyle Ltd v Hain Steamship Co Ltd* (1936) 55 LI LR 159, 177 (Lord Wright, with whom Lord Thankerton, Lord Macmillan and Lord Maughan agreed).

<sup>325</sup> *Lilley v Doubleday* (1881) 1 QBD 510; *Gibaud v Great Eastern Railway Company* [1921] 2 KB 426.

<sup>326</sup> For detailed discussion of the topic see Steven Rares, “The Onus of Proof in a Cargo Claim – Articles III and IV of the Hague-Visby Rules and the UNCITRAL Draft Convention” (2008) 31(2) *Australian Bar Review* 159 (delivered as a lecture in MIG/MLAANZ lecture series at the Federal Court of Australia, 23 July 2008; [2008] FedJSchol 22).

<sup>327</sup> *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd* [1929] AC 223, 241.

<sup>328</sup> *Government of India v Chandris* [1965] 2 QB 204, 216.

in good order and condition and damage at out-turn, but the carrier has shown that only part of the damage has been caused by its breach, it (the carrier) must show how much is (and is not) a result of that cause otherwise it will be liable for all the damage.<sup>329</sup>

These kinds of issues arise in particular in some difficult personal injury cases such as medical negligence and dust disease cases, but the questions are also relevant to any tort, commercial or non-commercial, including, for instance, product liability. The task of the plaintiff is to prove on the balance of probabilities that the wrongful act or omission caused or contributed to the injury. This involves direct evidence or a legal inference that must amount to more than conflicting inferences of equal degree or probability such that choice between them is conjecture; the evidence must permit the conclusion that, from all the circumstances, the relevant fact can be inferred or affirmatively drawn.<sup>330</sup> Of course, common experience and any expert evidence is relevant. Indeed common experience may provide the answer when expert evidence cannot,<sup>331</sup> though if expert evidence regards an affirmative answer as lacking justification either as a probable inference or as an accepted hypothesis common experience cannot provide an answer.<sup>332</sup>

It is in this area that one comes to the issue of the consequences (in terms of proof) of the defendant's wrongful act or omission materially increasing the risk of a certain type of harm and that harm in fact being suffered. In *Betts v*

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<sup>329</sup> See also *The 'Panaghia Tinnou'* [1986] 2 Lloyd's Rep 586, 592; and *Islamic Investment Co Isa v Transorient Shipping Ltd (The 'Nour')* [1999] 1 Lloyd's Rep 1, 14–5; but cf *Great China Metal Industries Co Ltd v Malaysian International Shipping Corp Berhad* [1998] HCA 65; (1998) 196 CLR 161.

<sup>330</sup> *Holloway v McFeeters* [1956] HCA 25; (1956) 95 CLR 470, 480–1; *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298; *Luxton v Vines* [1952] HCA 19; (1952) 85 CLR 352, 358–9.

<sup>331</sup> *Adelaide Stevedoring Co Ltd v Forst* [1940] HCA 45; (1940) 64 CLR 538, 563–4; and *EMI (Australia) Ltd v Bes* [1970] 2 NSWLR 238, 242; and see the valuable discussion of legal approach to scientific questions by O'Meally J (as his Honour then was) in *McDonald v State Rail Authority (NSW)* (1998) 16 NSWCCR 695, 714–7.

<sup>332</sup> *Adelaide Stevedoring Co Ltd v Forst* (1940) 64 CLR 538, 569; *Australian Iron & Steel Ltd v Connell* [1959] HCA 54; (1959) 102 CLR 522, 535–6 (Menzies J) and *Tubemakers of Australia Ltd v Fernandez* (1976) 50 ALJR 720, 724.

*Whittingslowe*<sup>333</sup> Dixon J, in discussing the decision of the English Court of Appeal in *Vyner v Waldenberg Pty Ltd*,<sup>334</sup> said:

“It is not necessary to inquire whether their Lordships meant more than that the breach of duty coupled with an accident of the kind that might thereby be caused is enough to justify an inference, in the absence of any sufficient reason to the contrary, that in fact the accident did occur owing to the act or omission amounting to the breach of statutory duty.”

This was not an unqualified statement of principle by Dixon J. He went on to say:

“**In the circumstances of this case** that proposition is enough. For, in my opinion, the facts warrant no other inference inconsistent with liability on the part of the defendant.” (emphasis added)

Dixon J was using the conjunction of breach of duty and eventuation of the harm that might thereby be caused as part of the process of drawing an inference. That is how the case has been understood in High Court<sup>335</sup> and other Australian cases.<sup>336</sup> This orthodox approach is not consistent with some dicta in the High Court.<sup>337</sup> Some of those dicta<sup>338</sup> purport only to deal with the evidentiary onus, but they may be seen to go further. If (as was frankly recognised by Lord Wilberforce in *McGhee*)<sup>339</sup> the breach of duty and increase in risk thereby was not enough alone to draw the inference, then to require evidence from the defendant to avoid a causal connection is to reverse the effective legal onus on this issue. It is certainly not contentious if the increase in risk and injury are otherwise unexplained allowing an inference to be drawn.<sup>340</sup> Once, however, alternative causes are shown to be sufficiently open to deny an inference of causation to be drawn, for liability to

<sup>333</sup> *Betts v Whittingslowe* [1945] HCA 31; (1945) 71 CLR 637, 649.

<sup>334</sup> *Vyner v Waldenberg Pty Ltd* [1946] KB 50, which was specifically overruled in *Bonnington Castings* [1956] AC 613.

<sup>335</sup> *RTA v Royal* (2008) 82 ALJR 870, 878 [31] (Gummow, Hayne and Heydon JJ) and 897 [143] (Kiefel J).

<sup>336</sup> *Gett v Tabet* [2009] NSWCA 76; (2009) 254 ALR 504, [254]–[256] and *Flounders v Millar* [2007] NSWCA 238; (2007) 49 MVR 53, [4]–[38] and cases there cited.

<sup>337</sup> *Bennett* (1992) 176 CLR 408, 420–1 (Gaudron J); *Chappel v Hart* (1998) 195 CLR 232, 238–9 (Gaudron J), 257–9 (Gummow J, but in the context of the particular duty in that case and recognising Gummow J’s views in *RTA v Royal* at [31]) and 273 (Kirby J); and *Naxakis v Western General Hospital* [1999] HCA 22; (1999) 197 CLR 269, 279 (“*Naxakis*”).

<sup>338</sup> *Chappel v Hart* (1998) 195 CLR 232, 373 (Kirby J).

<sup>339</sup> *McGhee* [1973] 1 WLR 1.

be found either the legal onus has to shift to fill the gap or a different substantive causation rule has to be applied.

Courts have, in some cases, however, abandoned the need for a plaintiff to show that a **particular** defendant caused the plaintiff's harm. In *Summers v Tice*<sup>341</sup> both negligent shooters who had shot simultaneously in the plaintiff's direction were held responsible for the striking of the plaintiff by one bullet.

Bailment is a relationship that, upon its proof and the non-return or return in a damaged condition, of the goods the onus of disproving negligence lies on the bailee.<sup>342</sup>

In *Bonnington Castings v Wardlaw*<sup>343</sup> the silica dust that caused the pursuer's pneumoconiosis came from two sources in his employer's factory: "innocent" dust from the pneumatic hammer at which he worked in respect of which no known practical method of extracting or preventing dust was available; and "guilty" dust from swing grinders that were fitted with an extraction device which was negligently not kept free from obstruction. The medical evidence permitted the conclusion that pneumoconiosis was caused by the gradual accumulation of silica dust inhaled (guilty and innocent dust together). The guilty dust being material in its contribution to the disease, causation was proved.<sup>344</sup> The House overruled *Vyner v Waldenberg Bros Ltd*<sup>345</sup> to the extent that it can be taken to have said that the onus of proof lay on an employer to show that breach of a safety regulation was not the cause of an accident.<sup>346</sup>

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<sup>340</sup> As may be the better understanding of at least Gaudron J and Gummow J in *Chappel v Hart* (1998) 195 CLR 232.

<sup>341</sup> *Summers v Tice* 199 P2d 1 (1948); 5 ALR (2<sup>nd</sup>) 91 referred to in *Cook v Lewis* [1951] SCR 830.

<sup>342</sup> Norman Palmer, *Bailment* (1979, Law Book Co), 40–3; Joseph Story, *Bailments* (1843, Little Brown), 80–1 [79], 280–1 [278]; Norman Palmer and Ewan McEndrick, *Interests in Goods* (2<sup>nd</sup> Ed, 1998, LLP), 478–80.

<sup>343</sup> *Bonnington Castings* [1956] AC 613.

<sup>344</sup> *Bonnington Castings* [1956] AC 613, 618 (Viscount Simonds agreeing with Lord Reid), 621–3 (Lord Reid), 623–4 (Lord Tucker), 625–6 (Lord Keith of Avonholm).

<sup>345</sup> *Vyner v Waldenberg Bros Ltd* [1946] KB 50.

<sup>346</sup> *Bonnington Castings* [1956] AC 613, 618, 619–20, 624–5, 626–7.

In *McGhee v National Coal Board*,<sup>347</sup> the pursuer who worked in a brickworks contracted dermatitis. He was usually employed in emptying pipe kilns, but shortly before he felt excessive irritation of the skin he had been sent to empty brick kilns where work was hotter and dustier. Shortly thereafter, he went off work suffering dermatitis. The breach of duty relied upon (and admitted) was not providing washing facilities after finishing work in the brick kilns. The medical evidence was to the effect that the dermatitis was caused by repeated minute abrasions of the outer skin followed by some damage to underlying cells, of a kind not scientifically understood. Profuse sweating over time softened the skin and made it easily injured. Dust would adhere to the skin in the kiln and exertion would cause abrasion. Washing was the only practical way of removing the danger. His bicycling home caked with sweat and dust would only exacerbate the position. Enough, however, was known about the disease to enable a conclusion that it was not like pneumoconiosis in that it was not caused by all the dust and sweat and exertion. However, it was clear that not providing showers materially increased the risk of contracting dermatitis. The House of Lords found for the pursuer. Two interpretations have been placed on the case. The first is reflected in Lord Bridge's analysis (adopted by all members of the House of Lords)<sup>348</sup> in *Wilsher v Essex Area Health Authority*<sup>349</sup> that *McGhee* did not stand for any principle that the onus of proof was reversed. It was said to be (with the exception of Lord Wilberforce's opinion) an example of a robust and pragmatic approach to causal inferential fact finding of material contribution.<sup>350</sup> The second is reflected in the analysis of Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hoffmann and Lord Rodger of Earlsferry in *Fairchild v Glenhaven Funeral Services*<sup>351</sup> that in circumstances such as *McGhee* either a material increase in risk is an adequate "causal" link or no relevant distinction was to be drawn between materially increasing the risk and materially contributing to (that is causing) the injury.<sup>352</sup> (I will return in

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<sup>347</sup> *McGhee* [1973] 1 WLR 1.

<sup>348</sup> Lord Fraser of Tullybelton, Lord Lowry, Lord Griffith and Lord Ackner.

<sup>349</sup> *Wilsher v Essex Area Health Authority* [1988] AC 1074 ("*Wilsher*").

<sup>350</sup> This interpretation of *McGhee* as a case of inference was the view of Lord Hutton in *Fairchild*.

<sup>351</sup> *Fairchild* [2003] 1 AC 32; See also the discussion of the Canadian authorities in *Farrell v Snell* [1990] 2 SCR 311.

<sup>352</sup> See below for the debate in *Barker v Corus* [2006] 2 AC 572 as to what was decided in *Fairchild*.

the next section to the treatment by the House of Lords in *Fairchild* and *Barker v Corus of McGhee* as a separate substantive rule of causation.)

There are a number of dicta in the High Court about *McGhee*.<sup>353</sup> The issue of the relationship between breach and causation and between causing an increase in risk, material contribution and onus of proof was expressly left open in *Bennett v Minister of Community Welfare*,<sup>354</sup> was expressly disavowed by the plaintiff/respondent in *Amaca Pty Ltd v Ellis*,<sup>355</sup> nor was the point taken in *Tabet v Gett*.<sup>356</sup> Until the High Court deals with the matter

<sup>353</sup> See *Bennett* (1992) 176 CLR 408, 420–1 (Gaudron J); *March v Stramare* (1991) 171 CLR 506, 516–7 (Mason CJ); *Chappel v Hart* (1998) 195 CLR 232, 272–4 [93]; *RTA v Royal* (2008) 82 ALJR 870, 888–9 [94] (Kirby J) and 897–8 [143] (Kiefel J); *Amaca Pty Ltd v Ellis*; *State of South Australia v Ellis*; *Millennium Inorganic Chemicals Ltd v Ellis* [2010] HCA 5; (2010) 240 CLR 111, 123 [12] (“*Amaca v Ellis*”); *Tabet v Gett* (2010) 240 CLR 537, 558 [40] (Gummow ACJ) and 588 [149] (Kiefel J); and see also the discussion by Spigelman CJ of *McGhee* and related cases in *Seltsam v McGuinness* (2000) 49 NSWLR 262, 278–80 [102]–[120].

<sup>354</sup> *Bennett* (1992) 176 CLR 408, 416:

“It is unnecessary for us to consider what would have been the position in the event that the advice obtained by the appellant in 1976 constituted independent legal advice conforming to normal standards and procedures. Whether such advice would have constituted the supervening cause or a concurrent cause along with the Director’s omission to obtain advice is an interesting and, on the fact as we see them, an academic question. In order to answer that question, it might be necessary to consider the view that there is no real distinction between breach of duty and causation (See *McGee v National Coal Board* [1973] 1 WLR 1 at p 8; [1972] 3 All ER 1008 at p 1014, per Lord Simon of Glaisdale; *Quigley v The Commonwealth* (1981) 55 ALJR 579 at p 581; 35 ALR 537 at p 539, per Stephen J), as well as the question whether a failure to take steps which would bring about a material reduction of the risk amounts to a material contribution to the injury. These questions have been considered in Canada in the context of a possible shift in the onus of proof (*Nowsco Well Service Ltd v Canadian Propane Gas & Oil Ltd* (1981), 122 DLR (3d) 228; *Letnik v Metropolitan Toronto Municipality*, [1988] 2 SCR 399; (1988) 49 DLR (4<sup>th</sup>) 707; *Haag v Marshall* (1989), 61 DLR (4<sup>th</sup>) 371; *Snell v Farrell* [1990] 2 SCR 311; (1990) 72 DLR (4<sup>th</sup>) 289; *Lankenau Estate v Dutton* (1991), 79 DLR (4<sup>th</sup>) 705) but it seems that the problem still awaits final resolution. There is no occasion to consider it here.”

<sup>355</sup> *Amaca v Ellis* (2010) 240 CLR 111, where at 123 [12] the Court said:

“The plaintiff expressly disavowed any argument in these appeals that demonstrating only that the exposure to asbestos increased the risk of contracting lung cancer was sufficient to establish causation. It was the plaintiff’s case in this Court, as it had been in the courts below, that she could succeed only if she showed that Mr Cotton’s exposure to asbestos had caused or contributed to (in the sense of being a necessary condition for) his developing lung cancer. This being the way in which the case was presented, it will be neither necessary nor appropriate to consider issues of the kind considered by the House of Lords in *McGhee v National Coal Board* [[1972] UKHL 7; [1973] 1 WLR 1], *Fairchild v Glenhaven Funeral Services Ltd* [[2002] UKHL 22; [2003] 1 AC 32], and *Barker v Corus UK Ltd* [[2006] UKHL 20; [2006] 2 AC 572]. See also *Sienkiewicz v Greif (UK) Ltd* [[2009] EWCA Civ 1159] or by the Supreme Court of Canada in *Resurfice Corp v Hanke* [[2007] 1 SCR 333].”

<sup>356</sup> *Tabet v Gett* (2010) 240 CLR 537.

otherwise, the unanimous joint judgment of the High Court in *St George Club Ltd v Hines*<sup>357</sup> represents the law in Australia:<sup>358</sup>

“In an action at law a plaintiff does not prove his case merely by stating that it was possible that his injury was caused by the defendant’s default.”

As Spigelman CJ said in *Seltsam v McGuinness*<sup>359</sup> it can be difficult to distinguish between permissible inference and conjecture. The process of concluding one way or the other is often contestable. The difference, however, is real.<sup>360</sup>

### Probability, risk and scope rules

The use of statistical probabilities in legal proof has been much discussed.<sup>361</sup> In *Seltsam v McGuinness*,<sup>362</sup> Spigleman CJ made the following points: First, evidence of possibility including expert evidence and epidemiological research or other statistical evidence is admissible and is to be weighed with other evidence in any causation question. Secondly, the necessary conclusion is an inference that this causal fact (with this act and this plaintiff) was more probable than not. Thirdly, the inability of medical science to give an answer

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<sup>357</sup> *St George Club Ltd v Hines* (1961) 35 ALJR 106, 107.

<sup>358</sup> See also *Tubemakers of Australia Ltd v Fernandez* (1976) 50 ALJR 720, 724 (Mason J) and in the Court of Appeal [1975] 2 NSWLR 190, 197 (Glass JA); *Seltsam v McGuinness* (2000) 49 NSWLR 262, 275 [80]–[84].

<sup>359</sup> *Seltsam v McGuinness* (2000) 49 NSWLR 262, 275 [84].

<sup>360</sup> *Jones v Great Western Railway Co* (1930) 144 LT 194, 202 (Lord Macmillan); *Carr v Baker* (1936) 36 SR (NSW) 301, 306 (Jordan CJ); *Caswell v Pavell Duffryn Associated Collieries Ltd* [1940] AC 152, 169–70 (Lord Wright); *Seltsam v McGuinness* (2000) 49 NSWLR 262, 275–6.

<sup>361</sup> Glanville Williams, “The Mathematics of Proof” [1979] *Criminal Law Review* 297; Jonathan L Cohen, “The Logic of Proof” [1980] *Criminal Law Review* 91; Richard Eggleston, “The Probability Debate” [1980] *Criminal Law Review* 678; John G Fleming, “Probabilistic Causation in Tort Law” (1989) 68 *Canadian Bar Review* 661; Joseph K McLaughlin and Ronald Brookmeyer, “Epidemiology and Biostatistics” in Robert J McCunney (Ed), *A Practical Approach to Occupational and Environmental Medicine* (2<sup>nd</sup> Ed, 1994, Little Brown & Co); and see the large number of articles cited by Spigelman CJ in *Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262, 272 [64]–[66]; Richard Eggleston, *Evidence, Proof and Probability* (2<sup>nd</sup> Ed, 1983); D H Hodgson, “The Scales of Justice: Probability and Proof in Legal Fact Finding (1995) 69 *Australian Law Journal* 731; D H Hodgson, “Probability: the Logic of the Law” (1993) 13 *Oxford Journal of Legal Studies* 457; D H Hodgson, “Probability: The Logic of the Law – a Response” (1995) 15 *Oxford Journal of Legal Studies* 51; Note (1997) 71 *Australian Law Journal* 33; Mike Redmayne, “Standards of Proof in Civil Litigation” (1999) 62 *Modern Law Review* 167; David Hamer, “The Civil Standard of Proof Uncertainty: Probability, Belief and Justice” (1994) *Sydney Law Review* 506.

<sup>362</sup> *Seltsam v McGuinness* (2000) 49 NSWLR 262.



does not foreclose conclusion.<sup>363</sup> Fourthly, increased risk does not satisfy the requirements of causing or materially contributing to.<sup>364</sup> Fifthly, in discussing the American authorities on epidemiological evidence and related risk<sup>365</sup> he noted that it was said that an increase in “relative risk” of a factor of 2, if proved by evidence demonstrated that the agent is responsible for an equal number of diseases as all other background factors. Thus a relative risk of 2 implies a 50 per cent likelihood that the exposed individual’s disease was caused by the agent. A relative risk of more than 2 implied that it was more probable than not. Spigelman CJ then said:<sup>366</sup>

“The predominant position in Australian case law is that a balance of probabilities test requires a court to reach a level of actual persuasion. This process does not involve a mechanical application of probabilities.

...

In Australian law, the test of actual persuasion does not require epidemiological studies to reach the level of a Relative Risk of 2.0, even where that is the only evidence available to a court. Nevertheless, the closer the ratio approaches 2.0, the greater the significance that can be attached to the studies for the purposes of drawing an inference of causation in an individual case. The ‘strands in the cable’ must be capable of bearing the weight of the ultimate inference.”

Relative risk was discussed by the High Court recently in *Amaca v Ellis*<sup>367</sup> in dealing with lung cancer in a smoker said to have been caused by exposure to asbestos. The Court rejected the Western Australian Court of Appeal’s conclusion that the multiplicative or synergistic effect of smoking and asbestos made the latter a materially contributing cause. Crucially, it was not proven that smoking and asbestos **must** work together; the evidence only suggested that they might. Without this, the plaintiff was left with a relative risk factor for asbestos under 2 and for smoking greatly over 2. No witness assigned a probability greater than 23 per cent to the chance that the cancer was caused

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<sup>363</sup> *EMI (Australia) v Bes* [1970] 2 NSWLR 238, 242.

<sup>364</sup> *Bendix Minter Pty Ltd v Barnes* (1997) 42 NSWLR 307, 315–6.

<sup>365</sup> *Seltsam v McGuinness* (2000) 49 NSWLR 262, 278–85 [102]–[137].

<sup>366</sup> *Seltsam v McGuinness* (2000) 49 NSWLR 262, 284–5 [136]–[137].

<sup>367</sup> *Amaca v Ellis* (2010) 240 CLR 111.

by exposure to asbestos. The case was unlike *Bonnington Castings* where the “guilty” dust was proved to have contributed to the accumulation of dust that resulted in the disease. The issue in *Amaca v Ellis* was “whether **one** substance that can cause injury **did** cause injury”. Material contribution arose only if a connection was established (not a risk or heightened risk created).<sup>368</sup>

I turn to the significant developments in English law on causation in respect of certain types of injury. The unanimous decision of the House of Lords in *Fairchild*<sup>369</sup> was to the effect<sup>370</sup> that:

“Where an employee had been exposed by different defendants, during different periods of employment, to inhalation of asbestos dust in breach of each defendant’s duty to protect him from the risk of contracting mesothelioma and where that risk had eventuated but, in current medical knowledge, the onset of the disease could not be attributed to any particular or cumulative wrongful exposure, a modified proof of causation was justified; that in such a case proof that each defendant’s wrongdoing had materially increased the risk of contracting the disease was sufficient to satisfy the causal requirements for his liability; and that, accordingly, applying that approach and in the circumstances of each case, the claimants could prove, on a balance of probabilities, the necessary causal connection to establish a defendant’s liability.”

This apparent clarity must be understood in the context of the strong disagreement in *Barker v Corus*<sup>371</sup> about what *Fairchild* did decide. It can be said, however, that each of their Lordships concluded that in the circumstances before them, where all the defendants negligently increased the risk of the disease that eventuated, but it was impossible to say which caused the disease in this man, it would be an affront to justice to require more than that increase in risk as the relevant causal or factual criterion of involvement upon which to found responsibility for compensation. Very much at the root of this policy decision was an aspect of underpinning legal theory referred to extra-curially by McLachlin J<sup>372</sup> that tort law, as an aspect of the rule of law, is concerned with righting wrongful conduct. If, what are (by legitimate human perception), self-evident wrongs cannot be recognised by

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<sup>368</sup> *Amaca v Ellis* (2010) 240 CLR 111, [68].

<sup>369</sup> *Fairchild* [2003] 1 AC 32.

<sup>370</sup> Taken from the headnote in *Fairchild* [2003] 1 AC 32.

<sup>371</sup> *Barker v Corus* [2006] 2 AC 572, between, in particular, Lord Hoffmann and Lord Rodger.

the law's rules and thus go unremedied, people who legitimately feel themselves victims will be left with a sense of injustice. A legitimate sense of injustice should not be the product of the rule of law. The place of justice and fairness was both explicit and central in the reasoning of Lord Bingham,<sup>373</sup> Lord Nicholls,<sup>374</sup> Lord Hoffmann<sup>375</sup> and Lord Rodger.<sup>376</sup>

*McGhee* was closely analysed by all their Lordships. All but Lord Hutton expressed the view (contrary to *Wilsher*) that *McGhee* was not merely an example of robust drawing of inferences.

The explicit change to causal principle that materially increasing the risk of injury was sufficient factual tortious involvement for causation to be established and for the attribution of compensatory responsibility was narrowly confined by all their Lordships.<sup>377</sup> Central to such confinement were the following: all the contributing risk was tortiously caused by the defendants, the causal element was singular (only exposure to asbestos), medical science could not ever explain which of the present defendants "caused" (in the traditional sense) the disease, but one of them did.

In 2006, the House of Lords returned to the issue of causation in the exceptional *Fairchild* context in *Barker v Corus (UK) Plc*<sup>378</sup> when the House of Lords was called upon to consider how one would apportion between tortfeasors if their relevant causal involvement was only increasing the risk of harm and, importantly, how one should deal with "innocent" exposure which was present in *Barker*,<sup>379</sup> but which had not been present in *Fairchild*. By this time, the House of Lords had rejected, by a narrow majority, the attempt to extend circumstances in which causation or compensation could be based on

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<sup>372</sup> Beverley M McLachlin, "Negligence Law – Proving the Connection" in Nicholas J Mullany and Allen M Linden (Eds), *Torts Tomorrow: A Tribute to John Fleming* (1998).

<sup>373</sup> *Fairchild* [2003] 1 AC 32, 66 [33].

<sup>374</sup> *Fairchild* [2003] 1 AC 32, 69 [40].

<sup>375</sup> *Fairchild* [2003] 1 AC 32, 73 [56].

<sup>376</sup> *Fairchild* [2003] 1 AC 32, 112 [155].

<sup>377</sup> *Fairchild* [2003] 1 AC 32, 40 [2] and 55 [21] (Lord Bingham), 70 [43] (Lord Nicholls), 74 [61] (Lord Hoffmann), 91 [108] (Lord Hutton), 118 [170] (Lord Roger).

<sup>378</sup> *Barker v Corus* [2006] 2 AC 572 (Lord Hoffmann, Lord Scott of Foscote, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe and Baroness Hale of Richmond).

<sup>379</sup> "Innocent" in the sense that the plaintiff caused some of his own exposure.

increasing the risk of harm by its rejection, in *Gregg v Scott*,<sup>380</sup> of loss of a chance as the basis for recovery in medical negligence cases.

All the members of the House came to the view, assisted by their analysis of *McGhee*, that the exceptional approach in *Fairchild* should extend to circumstances where not all the exposure was tortiously caused by the defendants.<sup>381</sup> Thus it was not fatal to the plaintiff's case that he had exposed himself to asbestos. The members of the House, however, placed a restriction on the width of the exception: there must only be one causative agent.<sup>382</sup> Lord Hoffmann recanted his view previously expressed in *Fairchild* that this limitation was unprincipled. With respect, it may be doubted that his former view lacked force. Just as the departure from usual causal analysis is a normative judgment based on justice and fairness, so the limits of that departure are likewise policy based. Any principle was the choice of policy, not logic.

As to contribution, all of the members of the House, save for Lord Rodger, were of the view that the contribution amongst defendants should be on the basis of respective length and intensity of exposure. The liability of each to the plaintiff was founded upon tortiously increasing risk by exposure; it was just that their mutual responsibility should be based on the extent of that risk caused by each.<sup>383</sup> Lord Rodger was in dissent on the question of contribution. His major disagreement was with the interpretation of *Fairchild* and *McGhee* as cases limited to material increase in risk and not as cases where such can be taken as sufficient to cause or contribute to the disease.

Whilst the House of Lords was astute to limit the exception in *Fairchild* and *Barker v Corus*, it is founded on the broad basis of avoiding injustice. This underpinning moral norm will continue to press where scientific research identifies a likely causal relationship, but cannot explain individual human

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<sup>380</sup> *Gregg v Scott* [2005] 2 AC 176.

<sup>381</sup> Caveat with Lord Rodger: *Barker v Corus* [2006] 2 AC 572, 610 [100]–[102].

<sup>382</sup> *Barker v Corus* [2006] 2 AC 572, 587 [24] (Lord Hoffmann), 599 [64] (Lord Scott), 611 [104] (Lord Walker), 615 [121] (Baroness Hale).

responses. For commercial law, its importance is in the pricing and management of insurance risks and the forecasting of, and provision for, product liability claims, such as pharmaceuticals and chemicals.

### **Identification of harm – economic loss and loss of a chance**

The identification of harm said to be caused is a critical integer in any analysis of responsibility and liability. Before an analysis of causation is embarked upon one needs to understand what it is that is said to have been caused. In contract, this will be principally determined by the terms of the obligation breached in the contractual milieu of the parties and the events that have happened. A covenant to deliver a particular horse that is breached may cause a number of kinds of loss to the promisee, all or only some of which may be within contemplation of the parties: the loss of the value in the particular animal above its price; the liability to an on-buyer to whom the promisee has promised the horse; damages for not being able to sell goods to be transported by the horse; the loss of the chance to win prize money at races: Has the breach of contract deprived the innocent party of a valuable benefit or only the chance of obtaining a valuable benefit? If the former, the plaintiff must prove on the balance of probabilities that the breach deprived it of the benefit. If the latter, the plaintiff need prove on the balance of probabilities the loss of a chance of obtaining the benefit, leaving the assessment of the value of that opportunity to an assessment of possibilities and probabilities.<sup>384</sup>

The notion of a lost chance or opportunity is well known in contract.<sup>385</sup> An assessment as to what the innocent party has lost by the breach will depend on the terms of the promise made in its contractual milieu and the events that have happened. Loss of a chance will be recoverable where either the

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<sup>383</sup> *Barker v Corus* [2006] 2 AC 572, 589–90 [35]–[36] (Lord Hoffman), 599 [62] (Lord Scott), 612 [109] (Lord Walker), 616 [126] (Baroness Hale).

<sup>384</sup> *Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54; (1991) 174 CLR 64 (“*Amann Aviation*”); *Sellars* (1994) 179 CLR 332; *Howe v Teefy* (1927) 27 SR (NSW) 301.

<sup>385</sup> *Chaplin v Hicks* [1911] 2 KB 786.

contract as a whole<sup>386</sup> or the particular provision<sup>387</sup> was such as to promise an opportunity or chance to obtain a benefit and in other cases where the loss of a business or commercial opportunity is a consequence of the breach and the loss of the opportunity or chance falls within rules of remoteness.<sup>388</sup>

Damages for loss of a chance is not limited to contract damages. In *Sellars v Adelaide Petroleum*<sup>389</sup> the High Court permitted damages for loss of a business opportunity in tort and under the TPA. The addition of the adjective “business” or “commercial” to the phrase “loss of opportunity” or “loss of chance” is crucial. In Australia,<sup>390</sup> the United Kingdom<sup>391</sup> and Canada,<sup>392</sup> (but not elsewhere)<sup>393</sup> it has been critical in the restriction of such recovery and in the rejection of loss of a chance as a basis for recovery in medical negligence or tort cases generally. It may be accepted that the distinction is not rigidly logical.<sup>394</sup> In *Sellars*, the High Court only dealt with commercial opportunities.<sup>395</sup> There is intrinsically something that can be valued in money’s worth in a commercial opportunity. As Lord Hoffmann put it in *Gregg v Scott*,<sup>396</sup> “most cases in which there has been recovery for loss of a chance have involved financial loss, where the chance can plausibly be characterised as an item of property, like a lottery ticket.” This distinction was emphasised by the Court of Appeal in *Gett v Tabet*<sup>397</sup> and by the High Court<sup>398</sup> on appeal in the same case. The distinction was helpfully discussed by Professor

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<sup>386</sup> *Chaplin v Hicks* [1911] 2 KB 786.

<sup>387</sup> *Amann Aviation* (1991) 174 CLR 64.

<sup>388</sup> See generally J W Carter, Elisabeth Peden, Greg J Tolhurst, *Contract Law in Australia*, (5<sup>th</sup> Ed, 2007, LexisNexis), 856–8.

<sup>389</sup> *Sellars* (1994) 179 CLR 332.

<sup>390</sup> *Tabet v Gett* (2010) 240 CLR 537.

<sup>391</sup> *Gregg v Scott* [2005] 2 AC 176; *Hotson v East Berkshire Area Health Service* [1987] AC 750.

<sup>392</sup> *Laferriere v Lawson* [1991] 1 SCR 541.

<sup>393</sup> *Matsuyama v Birnbaum* 890 NE 2d 819 (Supreme Judicial Court, Massachusetts) and see (2009) 122 *Harvard Law Review* 1247; Lara Khoury, “Causation and Risk in the Highest Courts of Canada, England and France” (2008) 124 *Law Quarterly Review* 103.

<sup>394</sup> See the judgment in *Rufo v Hosking* [2004] NSWCA 391; (2004) 61 NSWLR 678. The view of the Court in *Gett v Tabet* (2009) 254 ALR 504, that *Rufo* should not be followed was based on a view that it was not open to an intermediate court of appeal in Australia to make this change in the law. As to this, Gummow ACJ in *Tabet v Gett* (2010) 240 CLR 537, 553 [25] agreed that the question was only one for the High Court.

<sup>395</sup> See the analysis in *Gett v Tabet* (2009) 254 ALR 504, [339]–[345].

<sup>396</sup> *Gregg v Scott* [2005] 2 AC 176, 197 [83].

<sup>397</sup> *Gett v Tabet* (2009) 254 ALR 504, [332]–[363].

<sup>398</sup> See *Tabet v Gett* (2010) 240 CLR 537, 560 [49]–[50] and 562 [58] (Gummow ACJ) and 581–2 [124] (Kiefel J, with whom Hayne, Bell and Crennan JJ agreed).

Stapleton<sup>399</sup> in her description of a “present damage to economic value” formulation of loss. The use of this asset or valuation model has its limits, but it is essential if loss of a chance is not to be a head of damage which re-orders the law of torts. It can be accepted that the lost commercial opportunity to negotiate on a particular hypothesis in *Sellars* would be difficult to consider as a property concept; yet it would be easily recognised by a business person as a circumstance worth paying for. The worth of the advantageous position is to be assessed partly by reference to the ultimate benefit that might be obtained and partly by reference to how much would be paid to keep that negotiating advantage. The difficulty with the translation of loss of a chance into tort generally is that it confuses and potentially weakens rights of recovery. Gaudron J discussed this in *Chappel v Hart*.<sup>400</sup> It was the physical injury that Mrs Hart complained of, not her lost opportunity. To construct a loss of opportunity case is just to say that damages are caused solely by the increase in risk. There may be, as elsewhere discussed, a case for relaxing causal connections in certain kinds of cases; it is quite another thing to award damages generally in the law of torts for increased risk alone.

Finally, it is necessary to be clear as to what has to be proven in order to recover for loss of a chance where it is recoverable. The principles appear to be as follows. The courts distinguish between the occurrence or non-occurrence of historical events on the one hand and past hypothetical events on the other.<sup>401</sup> Whether an event did or did not happen is determined on the balance of probabilities.<sup>402</sup> Whether an event will or will not happen is determined by prediction, conjecture and weighing up probabilities.<sup>403</sup> As to past hypothetical events – what would or might have happened if the world had been different in some way – the approach is different depending upon

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<sup>399</sup> Stapleton, “Cause-in-fact and Scope of Liability for Consequences”, above n 7; and see Brian Coote, “Chance and the Burden of Proof in Contract and Tort” (1988) 62 *Australian Law Journal* 761.

<sup>400</sup> *Chappel v Hart* (1998) 195 CLR 232, 237–9 [5]–[8].

<sup>401</sup> *Malec v JC Hutton Pty Ltd* [1990] HCA 20; (1990) 169 CLR 638, 642–3 (Deane, Gaudron and McHugh JJ) and 639–40 (Brennan and Dawson JJ) (“*Malec*”).

<sup>402</sup> *Malec* (1990) 169 CLR 638, 642–3.

<sup>403</sup> *Malec* (1990) 169 CLR 638, 642–3; *Davies v Taylor* [1974] AC 207.

the nature of the enquiry.<sup>404</sup> Causation, even involving such hypothetical events is to be proved on the balance of probabilities.<sup>405</sup> The qualification upon the last proposition is that if the loss to be proved is a loss of a commercial opportunity or chance the plaintiff must prove some loss, that is that the lost opportunity or chance would have been taken had the default not occurred.<sup>406</sup> Thus, what the plaintiff would or would not have done in taking up the opportunity or chance in the hypothetical circumstances of an absence of breach is to be assessed on the balance of probabilities.<sup>407</sup> However, how others would have acted in that opportunity is part of the valuation of the chance or opportunity, not part of the proof of existence.<sup>408</sup> Past hypothetical events when part of the assessment of damages, including the assessment of the value of the lost chance or opportunity, are assessed conjecturing the probabilities and possibilities.<sup>409</sup>

## Concluding Remarks

Causation is part of the legal analysis which attributes legal responsibility and awards compensation in a just and coherent way conformable with the legal rule at hand. This object is both a legal and a human one. Rules of human responsibility and compensation, to be supported by, and have the loyalty of, society need to reflect its underlying norms of fairness and justice to both claimant and respondent and have a degree of simple coherence. Hence, the

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<sup>404</sup> John G Fleming, “Probabilistic Causation in Tort Law: a Postscript” (1991) 70 *Canadian Bar Review* 136.

<sup>405</sup> *Mallett v McMonagle* [1970] 2 AC 166, 176; *Sykes v Midland Bank Everton and Trustee Co* [1971] 1 QB 113; *Sellars* (1994) 179 CLR 332, 355; *Gett v Tabet* (2009) 254 ALR 537, 575–82 [332]–[363].

<sup>406</sup> *Sellars* (1994) 179 CLR 332, 355; *Daniels v Anderson* (1995) 37 NSWLR 438, 530; *Heenan v Di Sisto* [2008] NSWCA 25; (2008) 13 BPR 25,213, [32]; *Allied Maples Group v Simmons & Simmons* [1995] 1 WLR 1602 (“*Allied Maple*”).

<sup>407</sup> *Sellars* (1994) 179 CLR 332, 353; *Heenan v Di Sisto* (2008) 13 BPR 25,213, [32]; *Hall v Foong* (1995) 65 SASR 281, 292 and 381; *Hanfex Pty Ltd v NS Hope & Associates* [1990] 2 Qd R 218, 228; *Sykes v Midland Bank* [1971] 1 QB 113, 127; *Lillicrap v Nalder* [1993] 1 WLR 94, 99.

<sup>408</sup> *Allied Maple* [1995] 1 WLR 1602, 1613; *Heenan v Di Sisto* (2008) 13 BPR 25,213, [32]; *Daniels v Andersen* (1995) 37 NSWLR 438, 530; *Spring v Guardian Assurance Plc* [1995] 2 AC 296, 327.

<sup>409</sup> *Malec* (1990) 169 CLR 638; *Sellars* (1994) 179 CLR 332; *Daniels v Anderson* (1995) 37 NSWLR 438. Earlier Australian cases which say that no loss has been proved without showing that the benefit would have accrued can be taken to have been overtaken and distinguished by *Sellars*: see the discussion in this respect of *Gates v City Mutual* (1986) 160 CLR 1 and *Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA) Pty Ltd* [1984] HCA 59; (1984) 157 CLR 149, especially at 351–3; the Full Federal Court decisions of *WCW Pty Ltd v Bolster* (6 January 1993) and *Gove v Montague Mining Pty Ltd* [2000] FCA 1214 are likewise of doubtful authority.



law's concern with the occurrence causing or contributing to the loss.<sup>410</sup> Hence also, the law's desire to apply causation (and other rules of scope) liberally and not rigidly so as to avoid injustice.<sup>411</sup> To put the matter slightly differently, and though said in respect of assessment of damages, as Cooke J (as he then was) said in *Takaro Properties Ltd v Rawling*,<sup>412</sup> assessment of damages is "a pragmatic subject ... [which] does not lend itself to hard-and-fast rules".

The growing willingness of the courts<sup>413</sup> to adapt the rules for, and to regulate, responsibility and liability of parties according to a perceived just outcome conformable with an appropriately nuanced rule of responsibility reflects the declining influence of formalistic, scientific or analytical jurisprudence of a century, or even half a century, ago. Law is not merely the living command of the past represented by the analytically determined product of the *ratio decidendi* of authoritative and binding cases. Immanent within it are notions of fairness and justice. The detailed analyses of their Lordships in *Fairchild* reveal an approach that assumed the validity of moral judgments known intuitively, and established by analysis, discussion and reflection.<sup>414</sup> There is no Benthamite derision of justice and morality. Rather, justice, as a moral concept, has a relationship with utility in the binding of society through loyalty to the rule of law in the character of the analysis of John Stuart Mill – the "sentiment of justice".<sup>415</sup> This reflects a scepticism about a static analytical ideal and a greater confidence in the contemporaneous (judicial) perceptions of what is socially or intuitively just. However, the analyses that led to these conclusions were rigorous and comprehensive; though involving a policy choice, the technique that was deployed is an illustration of the exercise of judicial power, based on the analysis of precedent, of underlying principle and

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<sup>410</sup> *Norton v Streets* (1968) 120 CLR 635, 643; *Alexander v Cambridge Credit* (1987) 9 NSWLR 310, 350 (McHugh J).

<sup>411</sup> *Monarch Steamship* [1949] AC 196, 232; *Wenham v Ella* [1972] HCA [43]; (1972) 127 CLR 454, 466 (Walsh J); *Alexander v Cambridge Credit* (1987) 9 NSWLR 310, 351 (McHugh J).

<sup>412</sup> *Takaro Properties Ltd v Rawling* [1986] 1 NZLR 22, 69.

<sup>413</sup> Exhibited by *Marks* (1998) 196 CLR 494; *Murphy v Overton* (2004) 216 CLR 388; *Chappel v Hart* (1998) 195 CLR 232; *Chester v Afshar* [2005] 1 AC 134; *SAAMCO* [1997] AC 191; *Fairchild* [2003] 1 AC 32; and *Barker v Corus* [2006] 2 AC 572.

<sup>414</sup> cf Jerome Hall, *Living Law of Democratic Society* (1949), 80–1; see W G Friedmann, *Legal Theory* (5<sup>th</sup> Ed, 1967, Columbia University), 154–5.

<sup>415</sup> Friedmann, above n 414, 320.

drawing upon basal notions of justice and fairness that inform both legal theory and the development of the law in respect of the attribution of responsibility. Whether this approach remains limited to the creation of exceptional rules when seen to be absolutely necessary by an ultimate appeal court (as in *Fairchild* and *Barker v Corus*) or whether it comes to inform habitually broader and more evaluatively “just” conclusions by judges lower in the judicial hierarchy remains to be seen. That the issue arises on a day-to-day basis can be seen by the facts of *McGhee*. The structural framework calling for assessment as to what is “appropriate” (*Civil Liability Act*, s 5D(1)(b) and *cf* s 5D(2) and (4)) may require broad normative considerations at a working trial level.

The debates as to causation and the changes made to approaching causal questions have tended to emphasise a change to the structure of analysis. I am not sure, however, that as long as one recognises (as Mason CJ did in *March v Stramare*) the importance of asking the correct question based on the relevant rule of responsibility, an approach based on common sense, on a case by case basis, using approaches to well known problems revealed by past authorities is not all that one can sensibly expect. One can of course structure the approach as in *Civil Liability Act*, s 5D. That, however, simply bundles all considerations beyond factual involvement into one enquiry (s 5D(1)(b) or s 5D(2)), rather than two enquiries (causation and remoteness). Why, as a matter of logic will this result in otherwise busy (or lazy) trial judges becoming more transparently fulsome in their reasons? Why do we necessarily want them to be, given the usual right of appeal by way of rehearing? Rightly, much is expected of a judge’s reasoning, but there must be opportunity for those reasons simply to take account of, and express, the fact that the decision may be finely balanced and the answer intrinsically contestable after careful assessment of the circumstances at hand. The cases I have outlined in relation to marine insurance exhibit that. Is it to be said any alternative to *March v Stramare* would yield a result not conforming with common sense? One would hope not, unless the rule of responsibility called for it. That is because common sense will always play a central role in any evaluative analysis of a human or physical relationship where the aim is a just

conclusion as to personal responsibility. Further, care should be taken not to make legal structures more complex than they need to be. Central to Hart and Honoré's concept of causation is that law must be understood by ordinary people. If I may respectfully say so, this underpinning is both correct and fundamentally important as a matter of legal theory.<sup>416</sup> It is an essential characteristic of the rule of law. As Maitland said in 1892:<sup>417</sup>

“Englishmen do not love lawyers, and the law they love they do not think of as lawyers' law.”

The importance of simplicity of legal structure (where possible) is something not to be lost sight of in debates about structure and approach to the causation enquiry. When people lose a court case, the reasons for their loss and the potentially catastrophic consequences therefrom need to be readily explicable. I venture to suggest that sophisticated and deeply experienced judges such as Haldane, Birkenhead, Shaw, Sumner, Simon, Wright, Reid, Wilberforce, Pearson, Dixon, Fullagar, Kitto, Windeyer, Mason, Deane, Toohey and Gaudron had this basal requirement for simplicity in mind in their emphasis on common sense in *Thom (or Simpson) v Sinclair*,<sup>418</sup> *Leyland Shipping*,<sup>419</sup> *Admiralty Commissioners v SS Volute*,<sup>420</sup> *Yorkshire Dale Steamship*,<sup>421</sup> *The Dredge Liesbosch*,<sup>422</sup> *Monarch Steamship*,<sup>423</sup> *Stapley v Gypsum*,<sup>424</sup> *Alphacell*,<sup>425</sup> *National Insurance v Espagne*,<sup>426</sup> *Fitzgerald v Penn*,<sup>427</sup> and *March v Stramare*.<sup>428</sup> Only one of these cases was a jury case. Simplicity of approach was required for a jury; but it is also wise to maintain it for judges and the law they administer.

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<sup>416</sup> Raoul C Van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (1987, Cambridge University Press), 160.

<sup>417</sup> H A L Fisher (Ed), *The Collected Papers of Federic William Maitland, Vol. 1* (1911), printed as *Historical Writings in Law and Jurisprudence*, Vol 28 (1981, William S Hein & Co Inc).

<sup>418</sup> [1917] AC 127.

<sup>419</sup> *Leyland Shipping* [1918] AC 350.

<sup>420</sup> *Admiralty Commissioners v SS Volute* [1922] 1 AC 129.

<sup>421</sup> *Yorkshire Dale Steamship* [1942] AC 691.

<sup>422</sup> *Liesbosch, Dredger v Edison, SS (Owners)* [1933] AC 449.

<sup>423</sup> [1949] AC 196.

<sup>424</sup> *Stapley v Gypsum Mines Ltd* [1953] AC 663.

<sup>425</sup> *Alphacell* [1972] AC 824.

<sup>426</sup> *National Insurance Co of New Zealand v Espagne* (1961) 105 CLR 569.

<sup>427</sup> *Fitzgerald v Penn* (1954) 91 CLR 268.

<sup>428</sup> *March v Stramare* (1991) 171 CLR 506.

Ultimately, basal questions of legal responsibility will only be answered by a process that includes a sufficient causal connection that admits of a just and fair conclusion in the light of the relevant rules of responsibility and compensation. Common sense, understood as the sound practical intuitive response of the community or milieu in which the question is being asked, properly contextualised and supportable by reasoned (even if contestable) explanation is central to that process. To the extent that such a proposition has a foundation that would be refuted by some philosophers but accepted by others, so be it. The practice of law and the articulation of reasons for responsibility require a degree of linguistic and analytical simplicity. The task, as Lord Hoffmann has said, is not to allow simplicity of expression to obfuscate analysis and thereby confuse or distort the explication of reasons.

## THE 2010 SIR FRANK KITTO LECTURE

### Good Faith and Australian Contract Law – A Practical Issue and a Question of Theory and Principle

James Allsop\*

Good faith in the Australian law of contract has been the subject of discussion and some controversy for twenty years. Much has been written on it. The lecture will seek to examine both the intensely practical as well as the theoretical considerations attending the notion. The lecture will seek to show not only the elements of the notion already well known to and part of Australian law, but also the forces operating that might be seen to require a more explicit recognition of the requirement in Australian contract law.

- 1 As I was preparing for this lecture in the last few months, at times I contemplated whether I had made a mistake with the topic. So much has been written about good faith in contracts that I thought a contribution from me would be of little value. (I may have been correct; you may judge that.) Nor was the topic one upon which Sir Frank Kitto dwelt. Apart from the march of time as my leave began to expire, I came to the view that I should persevere because of both the practical and theoretical importance of the topic. I hope Sir Frank would not consider the use of his name in conjunction with the following discussion other than entirely appropriate.

- 2 I have not sought to examine intimately the growing body of cases in Australia at the intermediate appellate level and first instance on the topic of good faith in contracts. The series of New South Wales Court of Appeal decisions from 1991 to 2001 (*Coal Cliff Collieries*,<sup>1</sup> *Renard Constructions*,<sup>2</sup> *Hughes Bros v Trustees of the Roman Catholic Church*,<sup>3</sup> *Alcatel v Scarcella*,<sup>4</sup> and *Hungry Jack's*<sup>5</sup>) and the influential views of Justice Paul Finn<sup>6</sup> and Sir Anthony Mason<sup>7</sup> saw good faith recognised as a sufficiently certain concept to found a legally enforceable obligation to negotiate in good faith and as the foundation of a duty that may be implied into a contract. Since then other intermediate courts have reacted with a mixture of caution<sup>8</sup> and doubt<sup>9</sup>. The current state of the authorities was analysed with great clarity by Steytler J (as he then was) in the Full Court of the Western Australian Supreme Court in *Central Exchange v Anaconda*.<sup>10</sup> The High Court has not spoken, the issue being left open in *Royal Botanic Gardens*.<sup>11</sup> In the meantime, the New South Wales Court of Appeal has reinforced the place of good faith by holding in *United Rail Group*<sup>12</sup> that an obligation to negotiate in good faith can be a sufficiently certain concept for contractual obligation, and by giving content to an express clause providing for the “utmost good faith” in a commercial contract in *Macquarie International Health Clinic*<sup>13</sup>.
- 3 Nor have I sought to survey the large body of academic scholarship in this field.<sup>14</sup>
- 4 What I have sought to do is to consider the practical and theoretical considerations attending a contractual obligation or principle of good faith and the significance of the concept of good faith in the Australian law of contract.
- 5 The practical importance of the question has at least two related elements, being the requirements of the community, principally the commercial community, for a satisfactory balance of certainty, fairness and common sense in the rules which govern the consensual relationships of its

members; and for the cost-effective, expeditious and just resolution of disputes by reference to such rules.

- 6 The theoretical importance lies in the foundational assumptions that underpin, or should underpin, our legal system and what the debate about the operation of good faith in our contract law tells us of our legal system, its state and development.
- 7 Of course, these two dimensions, the practical and the theoretical, inform each other. Commercial law is, or to a significant degree should be, the reflection of society's facilitation, not hindrance,<sup>15</sup> of commercial endeavour. That said, the norms that underpin a just and fair society and its legal system should underpin commerce. It is honest commercial endeavour that is to be facilitated not hindered, and it is the reasonable expectations of honest commercial men and women that are to be vindicated and protected. The law does not provide many rules for thieves and cheats, other than, rules against thieving and cheating. As Lord Shaw of Dunfermline said in 1924 in *Cantiare San Rocco SA v Clyde Shipbuilding and Engineering Co*,<sup>16</sup> a rule that leaves the loss to lie where it falls "works well enough among tricksters, gamblers and thieves". His Lordship recognised, with a touch of disdain, that this was the approach of the law of England as to the consequences of frustration of contracts. But, for Scotland, his Lordship saw a somewhat fairer rule, one that conformed more with honesty, reasonable expectations and fairness, under the law of restitution.
- 8 Before I turn to good faith, let me commence with some comments on what are sometimes seen as the competing considerations of certainty and generally expressed norms of conduct. I do so at the outset, because two things should be borne in mind at all times. First, no system of law and no system of commercial law can exist without generally expressed norms of conduct. Secondly, sometimes, a sensible rule can only be expressed coherently, and with any degree of certainty, using a generally expressed norm.

- 9 This paper concerns the question whether good faith is one of those norms in the law of contract in Australia.
- 10 One view of law and commercial law sees a system of value-free rules which can always be called upon and applied in a self-referential system providing the tolerably certain answer to the given problem. In such a system, practical certainty is said to be achieved by clarity of the value-free rule and its application to relevant facts, without the need for theoretical generalisation or morals. This is a pervasive, if not dominant, view in Australian courts. That is hardly surprising, since it reflects what occurs in many instances of adjudication.<sup>17</sup>
- 11 Certainty is a pervading human need. It takes its place from the earliest years of our existence, as a necessary environmental factor in our human relationships, with our parents, our siblings and our friends. In commerce, the need for certainty is founded upon a desire for clarity, efficiency and despatch in commercial dealings. Clarity and certainty enable risk to be priced more finely and more reliably aiding the operation of markets. Reduction of risk attending a transaction reduces transactional cost and tends to a lowering of price. This can increase total economic activity.
- 12 But certainty is not necessarily value-free. There have been few equals to Lord Mansfield in his understanding, and lucid expression, of commercial law. In 1761, in *Hamilton v Mendes*,<sup>18</sup> he famously said:
- “The daily negotiations and property of merchants ought not to depend upon subtleties and niceties; but upon rules, easily learned and easily retained, because they are the dictates of common sense, drawn from the truth of the case.”
- 13 This was not a call for rules shorn of values, but for simple rules reflective of the common sense and norms of the merchants. That was not, however, a call for moral or legal perfection. In 1774, in *Vallejo v Wheeler*,<sup>19</sup> the same judge said:



“In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon”.

- 14 Lord Mansfield was well aware of the need for certainty, simplicity and clarity in markets that were fast-moving, international and subject to price variation and thus speculation.
- 15 Few modern judges have equalled Lord Diplock in his appreciation of the place of the law and the judge in regulating and fostering commerce in markets. His explanations in *The 'Maratha Envoy'*<sup>20</sup> of the place of standard form contracts in international markets such as the market for chartered ships and of the place of the court in interpreting contracts in such markets were commanding and illuminating, and worthy of reading, and rereading.<sup>21</sup> As his Lordship explained, standard forms and standard clauses permit comparison of different offers and the easy consideration of the commercial advantages and disadvantages of a proposed transaction, rather than of its legal attributes. The court's role is consistency and certainty in decisions, especially those attributing meaning to frequently used standard form contracts in markets.
- 16 One of the most telling points as to certainty in commercial law was made by Robert Goff LJ (as Lord Goff of Chieveley then was) in the Court of Appeal in the *The Scaptrade*<sup>22</sup> that it is important for the courts not to place obstacles in the way of parties knowing their position, if necessary with the aid of legal advice, without going to court. By this, his Lordship was recognising that the vast bulk of commercial justice is administered in conference with clients, not in court with judges.
- 17 Yet certainty, whilst very important, is not an overwhelming or dominating consideration in human existence. The certainty of a beating by a brutal father is as unwanted as the certainty of clear strict rules that overly favour

banker over customer, shipowner over charterer, franchisor over franchisee, or domestic over foreign merchant.

- 18 Whilst certainty is related to risk and its reduction, risk is not limited to lack of certainty. The high probability of being fleeced in a market with clear rules (because of the prevalence of aggressive sharp practice) is a risk factor likely to outweigh the benefit of clarity of rules.
- 19 People, including commercial people, expect a degree of common sense, fairness and justice in the law and in the rules that govern commercial behaviour. The place of morals and norms of justice in any legal system is an important jurisprudential and theoretical question.<sup>23</sup> It is also an intensely practical day-to-day question. People, including business people, understand notions of honesty, fairness and justice in their dealings. They often have a different view as to what this produces at the point of any given dispute, but the notions inhere in human conduct and expectations. A balance must always to be struck between specific rule-based certainty and the application of generalised norms informed by honesty, reasonable expectations and fairness.
- 20 Honesty is an essential requirement of any commercial market. Honesty is a moral concept, the core elements of which are truth and moral rectitude. It is unnecessary, however, to explore the reaches of moral philosophy to accept, as a working hypothesis for development of practical legal rules, that honesty is a relative, and not absolute, concept for this purpose. Just as markets may be seen to have, or not to have, workable degrees of competition, so they may have workable degrees of honesty. One only has to recall the dictum of Cardozo CJ in *Meinhard v Salmon*<sup>24</sup> comparing acceptable conduct in the workaday world of the market with the fiduciary's "punctilio of an honour" to appreciate the relativity of the concept. Nevertheless, it is an essential norm for the reduction of risk and the maximisation of efficient economic activity. One rarely hears a party or a judge say "but what is honesty?". ("What is truth?", on the other hand, has been asked from time to time.<sup>25</sup>)

- 21 Honesty is a concept wide enough to include, but not be exhaustively defined by, a subjective or personal sense of right and wrong. Honesty can, though not necessarily must, incorporate the imputed or imposed standards of others: the “normally acceptable standards of honest conduct”,<sup>26</sup> judged by reference to what the person actually knew. This is a broad normative standard to be judged by reference to community or market expectations and standards of conduct.
- 22 The balance between specific value-free rules and honest conduct is, or should be, self evident: the former are constrained by the latter. Although certainty may, thus, on one view, be compromised, this occurs for a fundamentally important consideration – the honest working of society and commerce. In a sense, certainty (by reference to reasonable expectations) is strengthened by the moral content. For instance, when should the strict and clear contractual obligation of a banker to obey the mandate of its customer be qualified by reference to the character or quality of the conduct of the customer? The New Zealand Court of Appeal recently answered the question by reference to whether the customer’s conduct reflected “normally acceptable standards of honest conduct.”<sup>27</sup> More precise definition of “acceptable” in this context in furtherance of rule-based certainty is only likely to elevate factual applications of the legal norm into narrower and more intricate rules.
- 23 The confusion between factual application of the legal rule, on the one hand, and the overly-precise identification of multiple legal rules, on the other, often occurs. It can produce a plethora of “rules” and incoherence and confusion in the law, which itself is productive of uncertainty. (Many modern statutes exhibit this vice.) Thus, at important points of rule-making, there is no choice but to leave the rule expressed generally, if the only alternative is to express a multitude of exemplifications of factual applications as rules. In other words, in some contexts and with some rules, the sensible vindication of Lord Mansfield’s statement in *Hamilton v Mendes* that rules for commerce should be easily learned and easily

retained, means that certainty, to the extent it is possible, is fostered, not undermined, by the use of the generally expressed norm. It is sometimes the only way of expressing the sensible commercial rule.

- 24 The recognition of the importance of honesty takes us some way down the path of discussing good faith. Good faith includes honesty. The original American Uniform Commercial Code (“UCC”) defined good faith as “honesty in fact in the conduct or transactions concerned”.<sup>28</sup> This was later revised to “honesty in fact and the observance of reasonable commercial standards of fair dealing”.<sup>29</sup> I will return to these notions in due course. It is enough to understand the central place of honesty in good faith.
- 25 Further, no legal construct governing commercial behaviour can entirely eschew norms beyond honesty that are generally expressed and informed by standards of the relevant group. The balance between specific value-free rules and generally expressed norms is a judgmental one based on legal tradition, legal technique, the perceived importance and value of the inter-related operation of these factors and a knowledge of the expectations and standards of the community or market governed by the legal construct.
- 26 The balance for any legal construct between specific value-free rules and generally expressed norms depends significantly on the values of the community served by the construct. It might be thought that the smaller or more coherent, culturally and socially, is the community governed by the construct, the fewer disputes there are likely to be about how a generally expressed norm should operate. It should be recalled, however, that how a generally expressed norm will operate in any given contract will depend upon the terms in which it is expressed, the other express terms of the contract and, importantly, the context in which the contract is made. The parties in their mutual milieu make their own law.

- 27 Another practical consideration which silently, but in a real way, influences the development of law and legal principle is the available means of dispute resolution. The rules of a legal system must be able to be the subject of adjudication efficiently and justly. An important consideration for assessing efficiency and justice is the cost of dispute resolution. It is neither efficient nor just to inflict expensive dispute resolution on parties; and if the formulation of a rule is likely to produce that result, such weighs heavily against it as a rule to be adopted.
- 28 There are many examples in commercial law of mechanical or value-free rules giving way to a norm or principle that is more evaluative in foundation whether because that is the chosen compromise or because the generally expressed norm best expresses a simple rule. Two recent examples and one older example in commercial law illustrate the point. In *The 'Golden Victory'*<sup>30</sup> the House of Lords considered the methodology for calculation of damages for breach of contract – in the case at hand a time charter of a ship (*Golden Victory*). By majority, the simple rule of assessing loss at the date of termination for breach by reference to the market rate gave way to taking into account later events to give a fairer or more just amount in compensation.
- 29 In *The 'Achilleas'*<sup>31</sup> in the House of Lords, Lord Hoffmann in dealing with contractual damages saw a need to move away from mechanistic application of otherwise clear rules based on *Hadley v Baxendale*<sup>32</sup> and *Koufos v Czarников*<sup>33</sup> and to approach the calculation of damages in contract by reference to more general notions of reasonable conformance with the substance of the underlying bargain. Lord Hoffmann, rather than applying the test of foreseeability, posited, as the primary question in deciding whether loss was recoverable in contractual damages, the ascertainment of the risks, and thus the losses, which the parties' intentions (objectively ascertained) revealed had been bargained for as part of the contract. Thus, the assessment was whether a reasonable person at the time of making the contract would have contemplated the assumption of responsibility for that kind of loss.

- 30 In marine insurance, the notion of discharge of the insurer from liability is central to the operation of the promissory warranty<sup>34</sup> and to the operation of the principles of deviation<sup>35</sup> and delay<sup>36</sup>. The discharge of the insurer will see the assured lose, for all time, the benefit of the contract of insurance. If there is delay in a voyage covered by a voyage policy the rule is expressed generally: “the insurer is discharged from liability as from the time when the delay became unreasonable”.<sup>37</sup> The rule, easily learned and easily retained, is expressed in general terms.
- 31 The above cases are examples of the preferred use of rules that have a degree of evaluation and uncertainty to them which are adopted for reasons of commercial fairness or appropriateness, or because that is the only way simply to express the rule.
- 32 Let me return to good faith.
- 33 Good faith is an expression that includes honesty, but goes beyond it. What place should it have in our law of contract?
- 34 I will seek to answer this question by reference to the following considerations:
- (a) the content of the phrase;
  - (b) the extent to which it exists already in our law;
  - (c) the forces within, and external to, Australia pressing on our contract law conformable with its inclusion;
  - (d) considerations of legal technique in the modification of the law of contract;
  - (e) considerations of legal theory.

## The content of the phrase good faith

- 35 Before examining the related elements that can be put forward as attributes of the phrase, it is important to recognise that a process of characterisation of the relevant transaction and legal relationship is necessary at the outset. If the legal relationship is one involving a trust or fiduciary relationship, the notion of good faith takes on particular attributes that are well-known and not the subject of this discussion. The criteria by reference to which the fiduciary relationship is recognised do not lead to a simple test without conceptual difficulty.<sup>38</sup> However, a helpful (if incomplete) step in ascertaining whether a fiduciary relationship exists is the characterisation of the relationship as commercial or not.<sup>39</sup> The characteristic aspect of the duty of the fiduciary is, within the terms of the relationship, to subordinate its interests in favour of its beneficiary. This subordination will be derived from the degree of power and control and consequent vulnerability of the respective parties in the relationship.
- 36 The usage of the phrase good faith in this equitable context should not give rise to the notion that in a commercial non-fiduciary context it carries with it the obligation upon a contracting party to subordinate its interests to those of the arms' length contractual counterparty. That is not the case. The possibility of confusion with the incidents of faithfulness of the equitable fiduciary have led some (wisely I think) to prefer other terminology: fidelity to the bargain<sup>40</sup> and fair dealing<sup>41</sup>. These are terms to which I will return.
- 37 In a common law context it is difficult not to begin by reference to the position in the United States.
- 38 In the 19<sup>th</sup> and early 20<sup>th</sup> centuries in some States, notably New York, and in the United States Supreme Court, a common law doctrine of good faith was recognised.<sup>42</sup> In 1868, in *Railroad Company v Howard*, Justice Clifford speaking for the Supreme Court said:

“Corporations as much as individuals are bound to good faith and fair dealing, and the rule is well settled that they cannot, by their acts, representations and silence, involve others in onerous engagements and then turn around and disavow their acts and defeat the just expectations which their own conduct has superinduced”.<sup>43</sup>

39 As I will later discuss, the expression of the matter thus reflects a reach of the concept intrinsically tied to, and constrained by, the contract entered and to the honest and fair performance of what has been agreed, rather than the superimposition of moral values having their source and legitimacy outside the contract, and operating beyond the agreement of the parties. These 19<sup>th</sup> century cases persuaded Judge Posner to say in 1991 that the contractual duty of good faith in its modern form was “*not some newfangled bit of welfare-state paternalism or ... the sediment of an altruistic strain in contract law [its essentials] being well-established in nineteenth century cases*”.<sup>44</sup>

40 The modern conception of good faith in American law, however, can be traced to the legal realist, Professor Karl Llewellyn who was the Chief Reporter for the UCC and an influential figure in the drafting of the *Restatement (2d) of Contracts*. The textual underpinnings for good faith in the United States are the UCC and the American Law Institute’s *Restatement (2d) of Contracts*.

41 The UCC § 1-203 provides:

“Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement”.

42 Many of the UCC provisions mention good faith.

43 I have already referred to the definition of good faith in the original § 1-201(19) and the later § 1-201(20). There are other variants of the duty in parts of the UCC, such as § 2-103(1)(b) in respect of sale of goods: “*honesty in fact and the observance of reasonable standards of fair*



*dealing in the trade*"; and in § 3-103(a)(4) in respect of negotiable instruments, good faith is defined as "*honesty in fact and the observance of reasonable commercial standards of fair dealing*".

44 In the *Restatement (2d) of Contracts*, § 205 reads, "Every contract imposes on each party a duty of good faith and fair dealing in its performance and enforcement".

45 These provisions have led to a large body of decisions in many American jurisdictions, not always easy to reconcile with each other.

46 Leading scholars have viewed the operation of the principle from different perspectives. In 1968, Professor Robert Summers published an influential article in which he expressed the content of the obligation as an "excluder analysis" – good faith ruled out or excluded certain kinds of bad faith.<sup>45</sup> Good faith had no stable content, other than to exclude bad faith. The commentary to the *Restatement* took this up in the discussion of § 205.<sup>46</sup>

47 In 1980, Professor Steven Burton published a major article introducing a "forgone opportunity analysis".<sup>47</sup> This was a standard intended to be limited to the bargained-for expectation of the parties.

48 Meanwhile, Professor Allan Farnsworth, from 1963 expressed the view that good faith was an expression of the existing underlying principles of contract law and its role was particularly in the implication of terms.<sup>48</sup>

49 I will return to the American position in due course. For the moment, I will return to the expressions "fidelity to the bargain" and "fair dealing" and seek to analyse them by reference to more familiar jurisprudence and general principle.

50 Together with honesty, these two expressions best convey the non-fiduciary contractual obligation arising from the two main sources of principle in the law of contract: the exercise of the will of the parties and

the legal, social and moral context in which that will is recognised, interpreted and enforced.

- 51 Few have difficulty with good faith in the form of honesty being a general and imputed contractual obligation. Few also have difficulty with good faith requiring the bargain not to be consciously undermined or sabotaged. This can be seen as a staple obligation of contract law, expressed in terms that are sufficient without the moral overtones of good faith. The notion of a fidelity or faithfulness to the bargain better encapsulates this operative principle. It was at the core of what Justice Clifford said in *Railway Company v Howard*. It was at the heart of what was said in 1864, in *Stirling v Maitland* by Cockburn CJ:<sup>49</sup>

“if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative.”

- 52 This was an expression of a negative by implication. Some years later, Lord Blackburn in *Mackay v Dick* expressed a similar idea by reference to the process of construction of the contract and by reference to positive action:<sup>50</sup>

“[if] ... parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing though there may be no express words to that effect.”

- 53 These ideas were eloquently (and, if I may say so, more powerfully) expressed in Australia in 1896 in the Supreme Court of Queensland by Chief Justice Griffith in *Butt v M'Donald*.<sup>51</sup> He stated a general rule of somewhat broader reach than either that stated by Cockburn CJ or by Lord Blackburn:

“It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other to have the benefit of the contract.”

54 It might be thought that by this expression of the matter – “the benefit of the contract” – that is, what each has bargained for, received, given up and paid for was protected, in all contracts, by a general rule of implication. Support for this came from what Dixon J said in *Shepherd v Felt & Textiles of Australia Ltd*<sup>52</sup> that, contained within every express promise, is a negative covenant not to hinder or prevent the fulfilment of the purpose of the express covenant.

55 It is necessary, however, to examine carefully the judgment of Mason J (with whom Barwick CJ, Gibbs Stephen and Aickin JJ agreed) in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Limited*.<sup>53</sup> After referring to *Mackay v Dick* and *Butt v M'Donald*, Mason J discussed the implication of a contractual duty to co-operate. He said<sup>54</sup> that it was easy to imply a duty to co-operate contractually in the doing of acts which are necessary to the performance of **fundamental** obligations under the contract. It was, he said, “*not quite so easy to make the implication when the acts in question are necessary to entitle the other contracting party to a benefit under the contract but are not essential to the performance of that party’s obligations and are not fundamental to the contract.*” At this point the importance of implication or imposition of a rule and construction of a particular contract became important. Mason J continued:

“... Then the question arises whether the contract imposes a duty to co-operate on the first party or whether it leaves him at liberty to decide for himself whether the acts shall be done, even if the consequence of his decision is to disentitle the other party to a benefit. In such a case, the correct interpretation of the contract depends, as it seems to me, not so much on the application of the general rule of construction as on the intention of the parties as manifested by the contract itself.”

56 I am, of course, still dealing with the content of good faith, not with the legal technique or mechanism that leads to its presence, or absence. The distinction made by Mason J between the benefit of fundamental or

essential terms and of non-fundamental or non-essential terms may throw doubt upon the entire equivalence of his approach with a more general obligation of fidelity to the bargain that can perhaps be seen in Chief Justice Griffith's expression of the rule in *Butt v M'Donald*. If such a more general obligation subsists, its breach would prima facie occur when a party acted in a way to deny a contractual benefit to the counterparty, whether fundamental or not.

- 57 In any given case, it may or may not be reasonable to expect a party to act, or refrain from acting given the expense or risk of the act, to ensure the benefit to the counterparty. Thus notions of fidelity to the bargain and co-operation to vindicate, or ensure receipt of, benefits can be seen to be restrained or constrained by a sense of reasonableness or fair dealing arising from the parties' mutual rights.
- 58 This is the proper scope and reach of reasonableness in good faith and fair dealing: the element of commercial reasonableness and fairness in behaving with a faithfulness or fidelity to the bargain. As Lord Wright said in *Hillas and Co Ltd v Arcos Ltd*,<sup>55</sup> the legal implication of what is reasonable runs throughout the whole of English law and is easily made.
- 59 Recently in *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service*<sup>56</sup> Hodgson JA in dealing with the content of the phrase "utmost good faith" in express terms in the subject contracts adopted what Sir Anthony Mason had said in a paper in 2000 that a contractual obligation of good faith embraced the following notions:
- (1) an obligation on the parties to co-operate in achieving the contractual objects;
  - (2) compliance with honest standards of conduct; and
  - (3) compliance with standards of conduct that are reasonable having regard to the interests of the parties.

Hodgson JA saw these elements as consistent with the cases in the New South Wales Court of Appeal, in particular *Alcatel v Scarcella* and *Hungry Jack's*. His Honour, however recognised that:<sup>57</sup>

“ ... a contractual obligation of good faith does not require a party to act in the interests of the other party or to subordinate its own legitimate interest to the interests of the other party; although it does require it to have due regard to the legitimate interests of both parties”.

60 The usual content of the obligation of good faith that can be extracted from the New South Wales Court of Appeal cases referred to above can be expressed as follows:

- (a) obligations to act honestly and with a fidelity to the bargain;
- (b) obligations not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for;
- (c) an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.

61 These obligations do not require subordination of a party's own interests, to those of the contractual counterparty. The content and scope of the obligation depends upon the other terms of the contract and the context in which the contract was made. Reasonableness takes its place as an objective element in fair dealing together with honesty and fidelity to the bargain in the furtherance of the contractual objects and purposes of the parties, objectively ascertained.

62 In *United States Surgical Corp v Hospital Products International Pty Ltd* at first instance<sup>58</sup> McLelland J (as he then was) examined New York law and accepted the evidence of Judge Breitel as to the interpretation of § 205 of

the *Restatement (2d) of Contracts*. McLelland J concluded that the approach of New York courts to § 205 did not materially diverge from the law of Australia as expressed in *Secured Income Real Estate* and *Butt v M'Donald*.

- 63 Gummow J in *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd*<sup>59</sup> adopted these views. What Gummow J drew from them, however, was that they supported an approach not to recognise a general obligation of good faith, rather than one to recognise it.
- 64 As noted above, however, the reach of the obligation of good faith may exceed the principle expressed in *Secured Income* if the latter is predicated on only protecting the benefit from fundamental terms. The protection of the benefit derived from non-fundamental terms by a general obligation of good faith may be a material addition to the parties' contractual entitlements and obligations.
- 65 The phrase good faith is, however, capable of being given a much broader reach, as a general obligation to make disclosures of candour and to act fairly and reasonably, generally, by the imposition by the court (through the law) of a obligation so to act – even if it goes beyond, or is inconsistent with, the agreed terms of the parties' contract.
- 66 An example may be taken from Germany. Whilst an analysis of the operation of § 242 of the German Civil Code of 1900, with its apparently narrow expression of good faith<sup>60</sup> is beyond this paper, it is to be noted that it was used in Weimar Germany to revalorise nominal monetary obligations in the face of catastrophic inflation. As Zimmerman and Whittaker say<sup>61</sup> these decisions hit the German legal community like a bombshell.
- 67 At this wider level, the obligation, if it exists, may require general pre-contractual disclosure to a degree which makes bargaining take place on an equal foundation of information and may require that the parties deal

reasonably and fairly with each other, quite apart from the other provisions of the contract, as an independent obligation.

- 68 The legitimacy of, and the likely acceptance of, such a broader imposed norm depends upon the theoretical framework from which one works. It is at this point one needs to consider some of the theoretical underpinnings of a law of contracts, to which I will come shortly. Also important for the common law is the recognition of the need for judicial method and technique in the formation, interpretation and performance of contract.

### **The extent to which good faith subsists or its elements subsist in Australian law**

- 69 Good faith infuses, and its constituent elements infuse, Anglo-Australian law, both public and private law. Whilst time and space permit only a present concentration on the law concerning contracts, it is apt to recognise that the expression “good faith” is embedded in public law,<sup>62</sup> equity and trusts,<sup>63</sup> property<sup>64</sup> and company law,<sup>65</sup> taking its meaning and legal content in those areas from context and the incidents of relationships governed by law and equity.
- 70 In contract law, I have already discussed some of the co-ordinate notions in *Mackay v Dick*, *Secured Income* and *Shepherd v Felt Textiles*. There are, however, a body of cases in contract that deal with the exercises of powers or discretions which affect the counterparty. These cases reveal that there is no novelty whatsoever in constraining powers and discretions by implications of honesty, reasonableness and good faith. Examples are numerous.
- 71 In *Meehan v Jones*,<sup>66</sup> all the members of the High Court implied an obligation to act honestly in a clause providing a party a right to rescind unless satisfied with finance. A majority of the Court concluded that the party also had an obligation to do all that was reasonable to obtain that finance.

- 72 In *Stadhard v Lee*,<sup>67</sup> Cockburn CJ said that building contract clauses dealing with the satisfaction of a party about a state of affairs received “a reasonable construction [securing] only what was reasonable and just” .
- 73 In *Carr v JA Berriman Pty Ltd*,<sup>68</sup> Fullagar J construed a clause giving an architect “absolute discretion ... to issue written instructions ... in regard to the omission of any work” by reference to its purpose and a limitation of reasonableness.
- 74 In *Godfrey Constructions Pty Ltd v Kanangra Park Pty Ltd*,<sup>69</sup> the High Court dealt with cl 14 of the then standard form contract for the sale of land: the clause providing to the vendor who was unable or unwilling to comply with or remove any objection or requisition made by the purchaser with the entitlement to rescind. The use of the clause was confined by the Court by various expressions of value judgment. Barwick CJ<sup>70</sup> said it would be “unconscionable” for the vendor to use cl 14 on the particular requisitions – to permit him to do so would allow him to say that there was a sale conditional on his willingness to perform. Walsh J<sup>71</sup> recognised that the cases prevented the power being used arbitrarily or unreasonably. Gibbs J<sup>72</sup> constrained the clause by the need to act reasonably. Stephen J<sup>73</sup> employed notions of proper purpose and reasonableness.
- 75 Similar views were expressed on the same subject in *Pierce Bell Sales Pty Ltd v Frazer*.<sup>74</sup>
- 76 All this sounds very much like the elements of good faith.
- 77 In *Interfoto Library Ltd v Stiletto Ltd*,<sup>75</sup> Bingham LJ explained the English approach to good faith. He compared civil law systems’ acceptance of an over-riding obligation to “play fair” – a principle of open and fair dealing. English law, on the other hand, has committed itself to no such general principle, developing piecemeal solutions to demonstrated problems of unfairness.



- 78 Lord Wilberforce made a similar comment in *The 'Eurymedon'*<sup>76</sup> that English law had committed itself to a technical and schematic doctrine of contract. See also Lord Hope of Craighead in *R (European Roma Rights Centre) v Immigration Officer, Prague Airport ('The Roma case')*.<sup>77</sup>
- 79 There is no doubt, however, that our law, including the law of contract, is littered with principles, rules and approaches which have as their elements what can be seen as the elements of good faith. What might be said to be absent is the recognition of an expressed norm reflecting its presence as an informing principle.

#### **Internal and external forces pressing for the inclusion of good faith into Australian contract law**

- 80 The domestic and international forces on our law of contract have different but related sources and influence.
- 81 Domestically, in conformity with much of the developed world, we live in a society that expects more justice and accountability. We all experience this daily. Our statute law abounds with provisions requiring persons in and out of commerce to behave fairly or calling for fairness. The *Trade Practices Act 1974* (Cth), the State and Territory equivalents, their attached franchise provisions, and the *Contracts Review Act 1980* (NSW) are but examples. Some statutes require good faith negotiation.<sup>78</sup>
- 82 These provisions, together with the law of unconscionability, equitable estoppel and promissory estoppel, rarely permit injustice to go unremedied, but importantly, sometimes, indeed perhaps too often, do not permit uncomplicated litigation. Thusfar it is a balance of justice, time and cost that society appears to accept.<sup>79</sup>

- 83 Further, and equally pressing, there is the more frequent use of the phrase good faith in express contracts. I state this at an anecdotal level only. In both *United Group Rail*<sup>80</sup> and *Macquarie International Health*<sup>81</sup> the Court was dealing with express clauses in carefully considered written commercial contracts. The business people and advisors who drafted and agreed to these contracts apparently thought the words meant something. In accordance with well-known authority,<sup>82</sup> the Court should strive to give effect to business contracts where there is a meaning capable of being ascribed to a word or a phrase. Good faith is not a meaningless phrase. It is potentially wide and indeterminate in practical application without context; but context, including other terms, and an eye to fostering the commercial bargain will assist with its meaning in any given circumstance.
- 84 Courts must deal with a meaningful phrase in express terms, in its proper context. It might be seen to be an inadequate response if the courts say that its content is vague or uncertain. If the commercial parties use the phrase to express an obligation, commercial judges should do their best to give it the meaning it bears in the context in which it is found.
- 85 The international pressures on our law and legal systems are subtle but real. The description of world commerce as globalised is a cliché. It has been now for decades. What has accompanied that globalised or transnational commercial activity is transnational international dispute resolution and statements of transnational norms or rules.
- 86 International arbitration is a de-localised non-sovereign mechanism of resolving disputes that is used in over three quarters of international commercial disputes. Its importance is to be recognised by the capacity for a general law merchant or *lex mercatoria* to develop outside national courts.<sup>83</sup>
- 87 The pace of development of international commercial law has been remarkable in the last 20 to 30 years. There are international and European restatements, model laws, principles, conventions, directives

and other instruments on contract law,<sup>84</sup> electronic commerce,<sup>85</sup> international sale of goods,<sup>86</sup> agency and distribution,<sup>87</sup> international credit transfers and bank payment undertakings,<sup>88</sup> international secured transactions,<sup>89</sup> cross-border insolvency,<sup>90</sup> securities settlement and securities collateral,<sup>91</sup> conflict of laws,<sup>92</sup> international civil procedure,<sup>93</sup> and international commercial arbitration.<sup>94</sup>

88 Some of these instruments are not legally operative, whether at the level of public international law, or municipal law. Such model laws or principles are sometimes referred to as “soft” law.

89 These conventions, model laws and principles, even if they are only so-called “soft” law, provide rules and principles of a greater or lesser degree of international acceptance in respect of important elements of commercial life: contracts (and their formation, interpretation and performance), the sale of goods, payment and credit, arbitration and civil procedure. These can be used by parties, by arbitrators and by judges as aspects of accepted international approaches to common international transactions. They can also be incorporated into contracts as the rules of procedure or as part of a party-chosen governing law.

90 At the heart of a number of these instruments is good faith. Arguably, it is to be recognised as an attribute of modern international commercial law, as it was of the law merchant.<sup>95</sup> For instance, good faith is avowedly an ethical ambition of the UNIDROIT principles of contract law.<sup>96</sup> These principles are designed to be used by commercial people all around the world. The view embodied in the principles is that they should have an ethical foundation common to all – good faith and fair dealing is such a basal idea.

91 This finds its manifestation in a number of places in the UNIDROIT Principles. Article 1.7 provides that “*each party must act in accordance with good faith and fair dealing in international trade.*” The duty is stated **not** to be derogable. It is frequently referred to in international commercial

arbitration.<sup>97</sup> No definition is given, but its place with “fair dealing” naturally imports an objective sense.

92 Articles 3.5 and 3.10 use the notion of “reasonable commercial standards of fair dealing” in dealing with mistake and rescission.

93 Negotiations are regulated by Art 2.1.15. A party is free to negotiate but must not negotiate or break off negotiations in bad faith. Bad faith is exemplified by entering into or continuing negotiations intending not to reach an agreement. The negative (bad faith) and the exemplification are indications that this is principally an obligation of honesty and genuineness. The notion of negotiating in good faith is well-known in civil law systems.<sup>98</sup>

94 Good faith and reasonableness also attend contract interpretation in the UNIDROIT principles, but in a way we would find more familiar. Article 4 deals with interpretation. Articles 4.1-4.3 introduce the parties’ actual intentions into the interpretive process. This is contrary to our objective construct.<sup>99</sup>

95 Articles 4.4-4.7 deal with interpretive approaches that reflect our law.<sup>100</sup>

96 Importantly, good faith plays a part in implication of terms in Arts 4.8 and 5.1.2. It is one of the factors considered in implying terms in appropriate circumstances.<sup>101</sup>

97 Good faith and fair dealing find their place in contract performance. Article 5.1.3 requires the parties to co-operate with each other where such may reasonably be expected for the performance of that party’s obligations.

98 There are many requirements of reasonableness.<sup>102</sup>

99 None of this is foreign to our system or our contractual conceptions.

100 The Principles of European Contract Law provide for good faith in similar fashion. Articles 1.201 and 1.202 contain general duties to act in accordance with good faith and fair dealing and to co-operate in order to give full effect to the contract.

101 More directly relevant is the *United Nations Convention on Contracts for the International Sale of Goods* 1980 (“CISG”). This convention has been adopted into Australian domestic law by every State and Territory.<sup>103</sup> The CISG applies only to international sales of goods, but that, for Australia, one of the world’s great commodity exporters, is a fundamentally important matter. There is no generally stated obligation of good faith. Art 7, however, in dealing with interpretation of the Convention, says:

“... regard is to be had to its international character and the need to promote uniformity in its application and the observance of good faith in international trade.”<sup>104</sup>

102 The consequences of the insertion of good faith by this clause is a matter of debate<sup>105</sup>; but what is clear is the acceptance by the CISG of the notion as fundamental in international commerce, and the adoption of the CISG in our domestic law.

103 A number of pressures build up from these domestic and international factors. First, it is an expectation both domestically and internationally that the law will coherently express underlying basal norms that inform it. Secondly, good faith in the sense of fair dealing, fidelity to the bargain and reasonableness inform and infuse our law already. That might be seen as a reason for expressing the norms more coherently, rather than for not expressing them at all.

104 International trade and commerce (as is the case in all commerce) is built on honesty, a degree of trust and managing risk. Distances, unfamiliar counterparties, unfamiliar customs and unfamiliar legal systems lead to a desire for accepted and common norms of ethical behaviour and a lack of particularity or parochialism in the governing rules. That is one reason for

the preference for arbitral tribunals over national courts. International norms are preferred to local ones. Good faith and fair dealing are norms found in the law merchant over the centuries, found in contemporary legal systems, including our own, and found in international conventions and statements of principle concerning commercial law.

- 105 A legal system which consciously eschews expression or open recognition of the norm may perhaps risk being viewed (perhaps wrongly) as particularist and exceptionalist. In such circumstances, its law, its lawyers and its ability to participate in international dispute resolution may be viewed with some skepticism and thus compromised, unless, like English law, it has an overwhelming stock of good will.

### **Legal technique**

- 106 The courts do not legislate nor are they law reform agencies.<sup>106</sup> Judges apply judicial method and technique. The place of policy and legal theory in the declaration, development and rationalisation of judge-made law is a topic in itself. Sir Frank Kitto in his luminous and oft referred-to judgment in *R v Spicer; Ex parte Australian Builders' Labourers' Federation*<sup>107</sup> spoke of power intended to be made upon considerations of general policy and expediency as alien to the judicial method, and thus non-judicial. That should not be misunderstood. In *Attorney-General (Cth) v Alinta Ltd*,<sup>108</sup> Gleeson CJ made clear that Kitto J was not propounding a mechanical application of inflexible rules, without regard to wisdom and expediency. The common law, Gleeson CJ said, was judge-made:

“ ... and its development and rationalisation necessarily involve attention to such questions. Furthermore, many of its settled principles, in their application to changing circumstances and social conditions, require judgment about what is wise and expedient”.

- 107 The need for courts to act incrementally building on the past using a judicial method of analysis is not inimical to the recognition of society's

needs and the policy formulation that inheres in a role of adaption and development of law to contemporary society.<sup>109</sup>

- 108 In Australia, the notion of good faith has been recognised at the level of intermediate courts of appeal in the performance of contracts,<sup>110</sup> in the negotiation of contracts<sup>111</sup> and in the settlement of disputes.<sup>112</sup> It is recognised as part of international trade by domestic statutes. Its elements and its place as a concept are recognised throughout law, equity and statute. Internationally, it is (as it has been for centuries) widely recognised as an operative legal norm.
- 109 It is not a large step to recognise the notion generally as an informing principle, expectation or maxim of the common law. As a general rule, parties are assumed and expected to act in a manner consistent with honesty and the reasonable expectations created by them. The vindication of contractual rights and duties thereby created in a manner consistent with a fidelity or faithfulness to any bargain entered should be an aim of the law of contract.
- 110 Nor is it a large step to recognise that “necessity” or “necessary” for business efficacy inheres in fair dealing and vice versa. Efficacious in a business sense includes a notion of fair dealing, if that is an underlying recognised norm. The important analysis by Priestley JA in *Renard*<sup>113</sup> of necessity in this context reveals the circularity that can attend rejection of an implication of good faith because of the need to show necessity for business efficacy.
- 111 If one accepts that honesty, fair dealing and fidelity to the bargain as entered are basal elements of commerce, the recognition of that can manifest itself in a number of ways. It would always inform the interpretation of a written contractual instrument; on this basis there would be seen to be no difference between the approach of Mason J in *Secured Income* and Griffith CJ in *Butt v M'Donald*. It would always inform the consideration of the formation of contracts, in particular those that are not

contained in an apparently comprehensive document.<sup>114</sup> It would be a ready implication in many contracts, at least as a matter of fact.

112 Debates continue about method and mechanism.<sup>115</sup> The real issue, however, is the recognition of the reality and existence of the norm itself and its conformance to governing legal theory. Within the resolution of that issue one finds the true content and scope of the phrase for general application.

### **Legal theory**

113 Law, legal doctrine and legal method are underpinned by legal theory.

114 How one views the legal system and the legal theory underpinning it to a significant degree governs the formulation of the answers to legal questions, such as the role of good faith in contract law.

115 For instance, a view that contract derives from the will of the parties assists in understanding why they should be bound (whether as a matter of decency based on natural law, or pursuant to an individualist notion of will and right) and in understanding how the law should approach their compact and their promises.

116 An underpinning conception or theory that would justify or make sensible a general obligation to disclose information in pre-contractual negotiations or to behave fairly and reasonably in a transaction irrespective of its terms, properly construed, might have a number of features. It would or could include the view that consent required more than formal manifestation and to be “true” consent required a reasonable degree of equality of knowledge. Such symmetry of information may require disclosure to bring it about. It would or could include a view that equality of exchange involved not only symmetry of information, but also equality of exchange and a just price. If such matters were included in the theory underpinning



contract, they would reflect essential or immanent characteristics of the contract as a institution or end informing its essence or being.

- 117 The above elements can be seen underlying pre-19<sup>th</sup> century natural law theory derived from Aristotle and Aquinas, revived in 16<sup>th</sup> and 17<sup>th</sup> century Spain and taken up by the northern European natural law theorists, including Grotius, Pufendorf and Pothier.<sup>116</sup>
- 118 These became problematic notions with the rise of individualism, individual responsibility, competition and market theories of Locke, Mill, Bentham, Adam Smith, Spencer and Darwin. Social contractarianism gave way to individualism and laissez faire economic and political ideas. English legal theory came to be dominated by the legal positivism of John Austin.<sup>117</sup>
- 119 The will theory that had been part of natural law became adapted by the abandonment of moral notions of a just price or equality of exchange. The will and intention of the parties was as objectively manifested to set price and terms as part of contracts becoming mechanisms of risk allocation. Contracts were no longer merely the reflection in the law of obligation of the transfer of property and executed performance; rather, the contract, in its paradigm form, became the exchange of promises by individuals. The promise was not a moral duty, but an exercise of individual free will in the allocation of risk.<sup>118</sup>
- 120 These ideas reflected the movement away from a society whose economic activity was founded upon the physical transactions of land and goods to one whose economic activity was founded to a greater degree on markets and the consequent commercial need for risk allocation. If the paradigm is the exchange of promises to fix a risk by reference to promises, the notion of a just price or an equal exchange becomes problematic.
- 121 Lord Mansfield expressed the view in *Carter v Boehm*<sup>119</sup> in relation to all contracts:

“Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary ...”

- 122 That no longer holds true for contracts generally. It is, of course, the foundation of the general law of insurance. It can also be seen to inhere in contracts to do with the transfer of land in the vendor’s duty to disclose latent defects of title.<sup>120</sup>
- 123 Thus, the contract came to be a legal construct, going beyond restitution for performed consideration or reliance, becoming the method of private parties looking after their own interests, making their private law and allocating business risk. In the conception of justice, notions of equality of exchange and a just price gave way to the law setting a framework for each to protect his interests in nominating his terms for the bargain. In the world of Bentham and Smith, the State was not involved in the regulation of parties’ bargains, which bargains vindicated perceived self-interest in a competitive world.
- 124 In this framework, legal positivism developed. Equity became stabilised into a rule-based structure with a reduced role for discretion as to individual cases<sup>121</sup> and law became separated from morality<sup>122</sup>. This model of contract theory underlying the classical law of contract was lucidly discussed by Patrick Atiyah<sup>123</sup> and Grant Gilmore<sup>124</sup> in their great works. It can be described thus. The parties deal with each other at arm’s length, each relying on his own skill and judgment, negotiating with each other over price and terms through offer and counter offer. Neither party owes a duty of disclosure; silence is not binding. Each must study the circumstances and assess all relevant matters, including risk and look to his own counsel, relying on his own judgment. Contract is made upon manifested acceptance of unrevoked offer. Mistake, pressure or other circumstance vitiating freely manifested consent are narrowly construed. The content of the contract is entirely a matter for the parties. Unfairness is an irrelevant concept. In such a model, as Lord Devlin said<sup>125</sup> “free

dealing was fair dealing”. The court’s function did not include assessing fairness.

125 The accommodation of the duty of good faith or fair dealing into this model is a matter of great importance. The extent of the intrusion of the obligation into that theory depends upon the content of the obligation.

126 Given the familiarity of the law with the notion of good faith in the way I have described an intrusion into contract theory of a principle or obligation of the kind discussed by Judge Breitel before McLelland J is not a radical alteration, indeed it is not an intrusion at all. That is, in part, because the classical model did not succeed in driving out all notions of fairness from the law. In particular, essential to the law of contract was the support of the bargain made as expressed by Cockburn CJ, Lord Blackburn and Griffith CJ. A principle or obligation of good faith of the kind discussed by Judge Breitel is a buttressing of the foundational notions of honesty and faithfulness to the bargain that have always existed. The principle is reinforced by the recognition that contractual obligations do not set up a choice or election to perform or pay damages. Contractual promises supported by consideration constitute legal rights to performance.<sup>126</sup>

127 Such an approach can be seen to reflect the approach of the United States Court of Appeals for the District of Columbia Circuit in *Tymshare Inc v Covell*<sup>127</sup> in an opinion written by Judge Scalia (as he then was). There the “excluder analysis” of Professor Summers and Professor Farnsworth’s view that the significance of the doctrine was in implying terms into an agreement was given particular weight. The doctrine of good faith performance was said to be a means of finding within a contract an implied obligation not to engage in the particular form of conduct. Judge Scalia referred to the modern taste to rely on considerations of morality and public policy, rather than achieving objectives, obliquely by honouring the reasonable expectations of the parties created by their autonomous expressions.

- 128 The same notion was expressed by Posner J in *Market Street Associates Ltd Partnership v Frey*<sup>128</sup> in saying the duty of honesty and good faith is not the duty of pre-contractual candour and that it does not require the subordination of self-interest. In an illuminating discourse,<sup>129</sup> Judge Posner rooted the obligation in the agreement of the parties. He emphasised that contracts come in different forms and for different purposes. Some allocate risks in the participation in markets, some are concerned with family or social relationships, some are to regulate future co-operative adventures. He said that the office of good faith was to forbid opportunistic behaviour that would take advantage of the position of the other in a way un contemplated by the bargain and contrary to the substance of the bargain.<sup>130</sup>
- 129 How good faith operates will depend upon context and the evident contractual purposes of the arrangement. In a risk allocation contract, such as a futures contract or a time charter in an operating market, true good faith may well be the punctilious and complete performance of the bargain, to the letter. Whining about how the market has moved in a market which can move may itself be bad faith.
- 130 On the other hand, in a long term, though non-fiduciary, contract, good faith may require give and take, co-operation and a reasonable consideration of the interests of the other. No business person would find this moralistic or paternalistic – as long as it conformed in structure and intent with the bargain.
- 131 To go beyond this and to posit a wider notion detached from the agreement of the parties, conforming with a duty of general candour and fairness, beyond the structure and terms of the contract faces the problems of lack of legitimacy of underpinning theory and, apart from statute, a lack of legal technique or method of creating the duty. It would also raise a wider question in the law of torts about the development of a doctrine of abuse of rights.<sup>131</sup>

- 132 What may not suffer from any vice in judicial method is the open recognition of good faith and fair dealing as a general norm and operative principle which underpins the assessment of the formation (including implication of terms), interpretation and performance of contracts. This would conform with the content and fabric of our existing law (general law and statute), conform with the core elements of the same principles in the laws of many contemporary legal systems, conform with the law merchant for centuries, conform with the contemporary development of the law merchant and standards in international commercial law, conform with the legal theory that underpins the law of contract and conform with the recognition that honesty and reasonable fair dealing are norms of conduct generally assumed to be exhibited by the commercial community in business dealings.
- 133 An analogy (perhaps imperfect) exists in public international law, where good faith stands as a universally recognised principle and an absolutely necessary ingredient in the operation of the international legal order,<sup>132</sup> without necessarily being an independent source of obligation in itself. Its place and role, as an operative principle can be seen as assisting in giving content and legal reach to acts undertaken. The International Court of Justice in *In re Border and Transborder Armed Actions (Nicaragua v Honduras)*<sup>133</sup> said that good faith “is not in itself a source of obligation where none would otherwise exist”.<sup>134</sup>
- 134 This approach, though constrained, expressly recognises the norm as an underlying and operative principle. If this were the position in private law, the formation, interpretation and performance of contract could all be informed by the express norm. Implication of terms would proceed on the basis of the operative working principle of recognised importance and coherence.
- 135 The fundamental change involved (that has been taken in *Renard, Alcatel* and *Hungry Jack’s*) is the recognition of the norm of good faith as an operative working legal principle. As Judge Posner said, it is not

newfangled welfare-state paternalism or a sediment of altruism; rather, it is a principle which has inhered in the fabric of commerce for centuries and which our courts have recognised on a piecemeal basis for a long time.

- 136 Whilst not always adhered to by all courts in the United States, there is a clear limitation in many American cases that good faith is an interpretative tool and an obligation directed to the terms of the contract itself. It assists in interpretation and implication, but it is not a duty independent standing apart from the contract provisions (including implications), or inconsistent with them.<sup>135</sup> Indeed, such is stated in the commentary to the UCC § 1-304.<sup>136</sup>
- 137 To the extent that such an approach is recognised, questions of the inter-related operation of construction and implication, the legal method of implication and the extent of implication necessary in any particular contract will arise. From the existing authorities in New South Wales, it might be said that these questions should be addressed in the framework of the express recognition of the norm or principle of good faith in the sense that I have discussed.
- 138 Even if it be correct that the doctrine in its operation and extent described by Farnsworth, Scalia J, Posner J and the commentary to § 1-304 of the *Restatement (2d) of Contracts* does not add materially to the well-established legal rules that I have earlier described, as Steytler J said in *Central Exchange v Anaconda*, the implication of a term or the use of the recognised norm or obligation would undoubtedly bring a degree of flexibility that is not present in the law. Further, as Sir Anthony Mason said,<sup>137</sup> the recognition of the concept might bring a degree of coherence to the various rules that presently exist.
- 139 At some point, the High Court will be required to consider these and related issues. The Court's response will be of importance to both the theoretical and practical direction of the Australian law of contract.

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- \* President, New South Wales Court of Appeal. I am indebted to my tipstaff Amanda Foong and researcher Anna Garsia for their assistance and discussion in preparing this lecture.
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- 2 *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.
- 3 *Hughes Bros Pty Ltd v Trustees of Roman Catholic Church* (1993) 31 NSWLR 91.
- 4 *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349.
- 5 *Burger King Corp v Hungry Jack's Pty Ltd* [2001] NSWCA 187; 69 NSWLR 558.
- 6 *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151; P Finn, "Commerce, The Common Law and Morality" (1990) *Melbourne University Law Review* 87.
- 7 A F Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000) 116 *Law Quarterly Review* 66.
- 8 *Central Exchange v Anaconda* [2002] WASCA 94; 26 WAR 33.
- 9 *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228; *Wenzel v ASX Ltd* [2002] FCAFC 400; 125 FCR 570 at 586-587.
- 10 [2002] WASCA 94; 26 WAR 33.
- 11 *Royal Botanic Gardens and Domain Trust v South Sydney Council* [2002] HCA 5; 76 ALJR 436 at 445 [40], 452 [88] and 463 [155].
- 12 *United Group Rail Services Ltd v Rail Corporation New South Wales* [2009] NSWCA 177; 74 NSWLR 618.
- 13 *Macquarie International Health Clinic v Sydney South West Area Health Service* [2010] NSWCA 268.
- 14 Particular reference should be made to: Mason, above n 7; R Powell, "Good Faith in Contracts" (1965) 9 *Current Legal Problems* 16; The Hon. Mr Justice Steyn, "The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy" (1991) 6 *Denning Law Journal* 131; T R H Cole, "Law – All in Good Faith" [1994] *Building and Construction Law* 18; H K Lücke, "Good Faith and Contractual Performance" in P D Finn (Ed), *Essays on Contract* (The Law Book Co Ltd 1987) 155-182; R McDougall, "The Implied Duty of Good Faith in Australian Contract Law" (2006) 108 *Australian Construction Law Newsletter* 28; J Stapleton, "Good Faith in Private Law" (1999) 52 *Current Legal Problems* 1; E Peden, *Good Faith in the Performance of Contracts* (LexisNexis Butterworths 2003); P Finn, "Good Faith and Fair Dealing: Australia" (2005) 11(4) *New Zealand Business Law Quarterly* 378; W Tetley, "Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering" (2004) 35(4) *Journal of Maritime Law and Commerce* 561; C D Gonthier, "Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy" (2000) 45 *McGill Law Journal* 567; E A Farnsworth, "Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code" (1963) 30 *University of Chicago Law Review* 666; R S Summers, "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968) 54(2) *Virginia Law Review* 195; S J Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith" (1980) 94 *Harvard Law Review* 369; S J Burton, "Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code" (1981) 67 *Iowa Law Review* 1; R S Summers, "The General Duty of Good Faith – Its Recognition and Conceptualization" (1982) 67 *Cornell Law Review* 810; M G Bridge, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?" (1984) 9 *Canadian Business Law Journal* 385; Finn (1989), above n 6; J F O'Connor, *Good Faith in English Law*

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15 Devlin J writing extra-judicially, "The Relation Between Commercial Law and Commercial Practice" (1951) 14 *Modern Law Review* 249.

16 [1924] AC 226 at 259.

17 B N Cardozo, *The Nature of the Judicial Process* (Yale University Press 1921) at 165.

18 (1761) 2 Burr 1198 at 1214; 97 ER 787 at 795.

19 (1774) 1 Cowp 143 at 153; 98 ER 1012 at 1017.

20 *Federal Commerce and Navigation Co Ltd v Tradax Export SA (The 'Maratha Envoy')* [1978] 1 AC 1.

21 *Ibid* at 7 and 8, where Lord Diplock said:

"... the freight market for chartered vessels still remains a classic example of a free market. It is world-wide in coverage, highly competitive and sensitive to fluctuations in supply and demand. It is a market in which the individual charterers and shipowners are matched in bargaining power and are at liberty to enter into charterparties in whatever contractual terms they please.

...

No market such as a freight, insurance or commodity market, in which dealings involve the parties entering into legal relations of some complexity with one another, can operate efficiently without the use of standard forms of contract and standard clauses to be used in them. Apart from enabling negotiations to be conducted quickly, standard clauses serve two purposes. First, they enable those making use of the market to compare one offer with another to see which is the better; and this, as I have pointed out, involves considering not only the figures for freight, demurrage and dispatch money, but those clauses of the charterparty that deal with the allocation of misfortune risks between charterer and shipowner, particularly those risks which may result in delay. The second purpose served by standard clauses is that they become the subject of exegesis by the courts so that the way in which they will apply to the adventure contemplated by the charter-party will be understood in the same sense by both the parties when they are negotiating its terms and carrying them out.

It is no part of the function of a court of justice to dictate to charterers and shipowners the terms of the contracts into which they ought to enter on the freight market; but it is an important function of a court, and particularly of your Lordships' House, to provide them with legal certainty at the negotiation stage as to what it is that they are agreeing to. and if there is that certainty, then when occasion arises for a court to enforce the contract or to award damages for its breach, the fact that the members of the court themselves may think that one of the parties was unwise in agreeing to assume a particular misfortune risk or unlucky in its proving more expensive to him than he expected, has nothing to do with the merits of the case or with enabling justice to be done. The only merits of the case are that parties who have bargained on equal terms in a free market should stick to their agreements. Justice is done by seeing that they do so or compensating the party who has kept his promise for any loss he has sustained by the failure of the other party to keep his."

- 22 *Scandinavian Trading Tanker v Flota Petrolera Eucatoriana ('The Scaptrade')* [1983] 1 QB 529 at 540-541; Lord Diplock's agreement on appeal is to be found at [1983] 2 AC 694 at 703-704.
- 23 The debate is famously captured in the essay exchange between H L A Hart and Lon L Fuller, see H L A Hart, "Positivism and the Separation of Law and Morals" (1958) 71 *Harvard Law Review* 593 and in direct response, L L Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart" (1958) 71 *Harvard Law Review* 630. The debate can also be seen by comparing the key works of the eminent legal theorists of the late 19<sup>th</sup> and 20<sup>th</sup> century, see for example J Austin, *Lectures on Jurisprudence, or The Philosophy of Positive Law* (4th Ed, John Murray 1879) (edited by R Campbell); J Austin, *The Province of Jurisprudence Determined* (John Murray 1832); H Kelsen, "The Pure Theory of Law – Its Method and Fundamental Concepts", (1934) 50 *Law Quarterly Review* 474; H Kelsen, "The Pure Theory of Law – Part II", (1935) 51 *Law Quarterly Review* 517; L L Fuller, *The Morality of Law* (Revised Ed, Yale University Press 1969); R Dworkin, *Taking Rights Seriously*, (Duckworth 1977) (containing a reprint of Dworkin's famous early essays "The Model of Laws I" and "The Model of Laws II"); J Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980); H L A Hart, *The Concept of Law*, (2nd Ed, Clarendon Press 1994); W G Friedmann, *Legal Theory* (5th Ed, Columbia University 1967) Ch 3.
- 24 249 NY 458 (1928).
- 25 John 18:38.
- 26 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378; *Twinsectra Ltd v Yardley* [2002] UKHL 12; [2002] 2 AC 164; *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2005] UKPC 37; [2006] 1 WLR 1476; *Westpac New Zealand Limited v MAP and Associates Ltd* [2010] NZCA 404.
- 27 *Westpac NZ v Map and Associates* [2010] NZCA 404 at [46]:
- "[When the bank] has actual knowledge of the circumstances of the transaction ... such as to render its participation contrary to normally acceptable standards of honest conduct ... In assessing whether its participation is contrary to such standards, the concept of the reasonable banker may well prove helpful. In this context, factors such as the significance or unusual nature of the transaction, the customer's banking practices, banking practices within the relevant industry and statutory reporting requirements will all be relevant."
- 28 UCC § 1-201(19).
- 29 UCC § 1-201(20).
- 30 *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The 'Golden Victory')* [2007] UKHL 12; [2007] 2 AC 353.
- 31 *Transfield Shipping Inc v Mercator Shipping Inc ('The Achilleas')* [2008] UKHL 48; [2009] 1 AC 61.
- 32 (1854) 9 Ex 351; 156 ER 145.
- 33 *Koufos v C Zarnikow Ltd ('The Heron II')* [1969] 1 AC 350.
- 34 See the *Marine Insurance Act 1909* (Cth), ss 39-47 for the operation of warranties and *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd (The 'Good Luck')* [1992] 1 AC 233 at 262-264.
- 35 *Marine Insurance Act*, ss 52 and 53.
- 36 *Marine Insurance Act*, s 54.

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37 *Marine Insurance Act*, s 54.

38 *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; 156 CLR 41.

39 *Ibid* at 70 and 72-73 (Gibbs CJ), 96-97 (Mason J); *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* [2010] HCA 19; 84 ALJR 446.

40 Lücke, above n 14 at 155; E A Farnsworth, "Good Faith in Contract Performance" in J Beatson & D Friedmann (Eds), *Good Faith and Fault in Contract Law* (Clarendon, 1997) at 155.

41 *Restatement (2d) of Contracts*; E A Farnsworth, *Farnsworth on Contracts* (3rd Ed, Aspen 2004).

42 See for example *Bush v Marshall* 47 US 284 at 291 (1848) on appeal from a District Court in the Territory of Iowa: "contrary to good faith and fair dealing, he has interfered to overbid his vendor ... [he] ought in justice and equity to pay for it the full consideration"; *Railroad Company v Howard* 74 US 392 (1868) on appeal from the Circuit Court of Iowa; *Marsh v Masterson* 101 NY 401 at 410-411 (1886) in the Court of Appeals of New York; *Uhrig v Williamsburgh City Fire Insurance Co* 101 NY 362 (1886) in the Court of Appeals of New York.

43 74 US 392 at 413 (1868).

44 *Market Street Associates Ltd Partnership v Frey* 941 F2d 588 at 595 (7<sup>th</sup> Cir 1991).

45 Summers (1968), above n 14.

46 Comment d.

47 Burton (1980), above n 14.

48 Farnsworth (1963) above n 14; Farnsworth (2004), above n 41.

49 (1864) 5 B & S 840 at 852; 122 ER 1043 at 1047.

50 (1880-81) LR 6 App Cas 251 at 263.

51 (1896) 7 QLJ 68 at 70-71.

52 [1931] HCA 21; 45 CLR 359 at 378.

53 [1979] HCA 51; 144 CLR 596.

54 *Ibid* at 607-608.

55 [1932] All ER Rep 494 at 507.

56 [2010] NSWCA 268.

57 *Ibid* at [147].

58 [1982] 2 NSWLR 766.

59 [1993] FCA 445; 117 ALR 393 at 402-403.

60 "wie Treu und Glauben" (literal translation: fidelity and faith).

61 R Zimmerman & S Whittaker (Eds), *Good Faith in European Contract Law* (Cambridge University Press 2000) at 21.

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62 A member of the Executive or an administrator must exercise power in good faith, requiring an honest and genuine attendance to the power being exercised. This carries with it the need to act honestly and genuinely for the purposes of the power. The extent to which this carries an element of reasonableness may be debateable. Reasonableness (in the sense of in accordance with reason) may be seen to be a separate requirement, though its place as a necessary element of the exercise of public power is not finally established. Fairness is the central operative consideration of the rules of procedural fairness or natural justice. Here the exercise of the power is conditioned by the largely non-self interested context. The power has a public object.

63 Notions of good faith infuse equity whether in a fiduciary context or generally, such as in the law of mortgages, penalties, unconscionability, clean hands or unconscionability and many other areas. It takes its place in the remedial structure of orders for specific performance and injunctions.

64 Good faith is a central notion in the law of property. It is at the heart of priorities in the place of the bona fide purchaser for value without notice.

65 In company law directors are obliged to act in good faith and in the interests of the company as a whole. This is a fiduciary context, even though, in many practical circumstances, directors and those to whom they answer have an interest. That interest is to be subordinated to the beneficiary, the company as a whole.

66 [1982] HCA 52; 149 CLR 571.

67 (1863) 3 B & S 364 at 371-372; 122 ER 138 at 141.

68 [1953] HCA 31; 89 CLR 527.

69 [1972] HCA 36; 128 CLR 529.

70 Ibid at 538.

71 Ibid at 543.

72 Ibid at 547.

73 Ibid at 549-555. One of the cases discussed by Stephen J in *Godfrey Constructions* was *Gardiner v Orchard* [1910] HCA 18; 10 CLR 722, where Isaacs J in discussing such clauses that gave the vendor the power to rescind said that three considerations attended them: first, the purpose of the clause which was as stated by Sir John Romilly in *Greaves v Wilson* (1858) 25 Beav 290 at 293; 53 ER 647 at 650 to be the case where the vendor was to be put to so much expense and trouble as to make it unreasonable that he be called upon to do it; secondly, the bona fides on the part of the vendor in using the power; and thirdly, the reasonableness of the use of the clause.

74 [1973] HCA 13; 130 CLR 575. See also what Viscount Radcliffe said in *Selkirk v Romar Investments Ltd* [1963] 1 WLR 1415 at 1422-1423 in discussing equitable principles to control such a clause:

“[the vendor] “must not act arbitrarily, or capriciously, or unreasonably. Much less can he act in bad faith. He may not use the power of rescission to get out of the sale ‘brevi manu’, since by doing so he makes a nullity of the whole elaborate and protracted transaction. Above all, perhaps, he must not be guilty of “recklessness’ in entering into his contract .. [being] an unacceptable indifference to the situation of a purchaser who is allowed to enter into a contract with the expectation of obtaining a title which the vendor has no reasonable anticipation of being able to deliver.”

75 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 at 439.

76 *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154 at 167.

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77 [2004] UKHL 55; [2005] 2 AC 1 at 50-53; [59]-[64].

78 See eg, *Civil Procedure Act 2005* (NSW), s 27; *Fair Work Act 2009* (Cth), s 228.

79 The Hon A M Gleeson AC, “Individualised Justice – The Holy Grail” (1995) 69 *Australian Law Journal* 421.

80 [2009] NSWCA 177.

81 [2010] NSWCA 268.

82 *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* [1968] HCA 8; 118 CLR 429 at 436-437; *The ‘Eurymedon’* [1975] AC 154 at 167; and *Meehan v Jones* (1982) 149 CLR 571 at 589.

83 For reference to the literature on *lex mercatoria*, see N van Houtte, *The Law of International Trade* (Sweet & Maxwell 2002) at 24-28; M Pryles, “Application of the *Lex Mercatoria* in International Arbitration” (2004) 78 *Australian Law Journal* 396; and G Petrochilos, *Procedural Law in International Arbitration* (Oxford 2004) at 36 [2.04] ftnt 79.

84 As to international private law, see generally R Goode et al, *Transnational Commercial Law: International Instruments and Commentary* (Oxford 2004); International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts 2004* (Rome, 2004), produced by a group of international scholars and practitioners under the direction of Prof Joachim Bonell (Part I of which was published in 1994); Commission on European Contract Law, *Principles of European Contract Law* (Part I of which was published in 1995, Part II in 1999 and Part III in 2003), prepared by scholars from all member states of the European Community.

85 *UNCITRAL Model Law on Electronic Commerce* (1996), adopted by the UN General Assembly on 16 December 1996 (Report of the 6<sup>th</sup> Committee A/51/628) and *UNCITRAL Model Law on Electronic Signatures* (2001), adopted by the UN General Assembly on 12 December 2001 (Report of the 6<sup>th</sup> Committee A/56/588); Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on Electronic Commerce”) and Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures; Comité Maritime International, *Rules for Electronic Bills of Lading*, 1990; the BOLERO (Bill of Lading Electronic Registration Organization) bill of lading, prepared through the co-operation of the TT Club (Through Transport Mutual Insurance Association Ltd) and SWIFT (Society for Worldwide Interbank Financial Transactions) operating as a joint venture company which was commercially launched on 27 September 1999; *ICC Uniform Customs and Practice for Documentary Credits* UCP 500 (ICC Publication No 500, 1993) and the supplement to UCP 500 for Electronic Presentation (eUCP) as to electronic presentation of documents.

86 *United Nations Convention on Contracts for the International Sale of Goods* (Vienna, 11 April 1980) UN Doc. No. A/CONF 97/19 (“CISG”), which superseded the *Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods* (The Hague, 1 July 1964) and the *Convention relating to a Uniform Law on the International Sale of Goods* (The Hague, 1 July 1964); and the *ICC Official Rules for the Interpretation of Trade Terms* (Incoterms 2000), replacing earlier versions.

87 First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community; Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents; *Convention on Agency in the International Sale of Goods* (Geneva, 17 February 1983); and *UNIDROIT Model Franchise Disclosure Law* (Rome, September 2002).

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- 88 *UNCITRAL Model Law on International Credit Transfers*, adopted by UNCITRAL on 15 May 1992; UCP500 and eUCP, above n 85; *ICC Uniform Rules for Demand Guarantees* (ICC Publication No 458, 1992); *International Standby Practices ISP98* (ICC Publication No 590, 1998) by the Institute of International Banking Law & Practice Inc; *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit* (New York, opened for signature 11 December 1995, entered into force 1 January 2000); *ICC Uniform Rules for Contract Bonds* (ICC Publication No 524, 1993).
- 89 European Bank for Reconstruction and Development, *Model Law on Secured Transactions* (1994); The Organization of American States' *Model Inter-American Law on Secured Transactions* (2002); the various maritime conventions dealing with security: *International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages* (Brussels, 10 April 1926); *International Convention on Maritime Liens and Mortgages* (Geneva, 6 May 1993); *International Convention Relating to the Arrest of Sea-Going Ships* (Brussels, 10 May 1952); *International Convention on the Arrest of Ships* (Geneva, 12 March 1999); *Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft* (Rome, 29 May 1933); *Convention on the International Recognition of Rights in Aircraft* (Geneva, 19 June 1948) ("Geneva Convention"); *UNIDROIT Convention on International Financial Leasing* (Ottawa, 20 May 1988); *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment* (Cape Town, 16 November 2001) ("Capetown Convention and Aircraft Protocol"); *UNIDROIT Convention on International Factoring* (Ottawa, 28 May 1988); *United Nations Convention on the Assignment of Receivables in International Trade* (New York, 12 December 2001).
- 90 *UNCITRAL Model Law on Cross-Border Insolvency* (1997), adopted by the UN General Assembly on 15 December 1997 (Report of the 6<sup>th</sup> Committee A/52/649); *European Union Convention on Insolvency Proceedings* (Brussels, 23 November 1995); and Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.
- 91 Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems; and Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements.
- 92 *Convention on the Law Applicable to Agency* (The Hague, 14 March 1978); *Convention on the Law Applicable to Contracts for the International Sale of Goods* (The Hague, 22 December 1986); *Convention on the Law Applicable to Contractual Obligations* (Rome, 19 June 1980) ("Rome Convention"); *Inter-American Convention on the Law Applicable to International Contracts* (Mexico, 17 March 1994); and *Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary* (The Hague, 13 December 2002).
- 93 *European Convention on State Immunity* (Basel, 16 May 1972); Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I"); *Protocol on International Jurisdiction in Contractual Matters* (Buenos Aires, 5 August 1944) ("Buenos Aires Protocol"), a protocol to the Southern Common Market (MERCOSUR) Agreement or *Treaty of Asunción* (Asuncion, 26 March 1991); *Convention on the Service Abroad of Judicial or Extra-judicial documents in Civil or Commercial Matters* (The Hague, 15 November 1965); the Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters; *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* (The Hague, 18 November 1970); Council Regulation (EC) No 1206/2001 of 28 May 2001 on the cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters; and the American Law Institute and UNIDROIT jointly developed *Principles of Transnational Civil Procedure* (2004).
- 94 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 10 June 1958) adopted in 1958 by the UN Conference on International Commercial Arbitration at its 24<sup>th</sup> meeting ("New York Convention"); *Inter-American Convention on International Commercial Arbitration* (Panama City, 30 January 1975); *UNCITRAL Model Law on International Commercial*

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*Arbitration* (1985); *UNCITRAL Arbitration Rules* (1976); *ICC Rules of Arbitration* (1998); *London Court of International Arbitration Rules* (1998).

95 L Trakman, *The Law Merchant: The Evolution of Commercial Law* (Fred B Rothman & Co 1983).

96 M J Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd Ed, Transnational Publishers, Inc 2005) at 127 ff.

97 Ibid at 128.

98 Ibid at 139. In *United Group Rail* [2009] NSWCA 177, the Court of Appeal upheld the contractual certainty of an express clause providing for good faith negotiations to resolve a dispute. What was required was an honest and genuine attempt to settle the dispute with attendance and fidelity or faithfulness to the bargain and the rights and duties it had created.

99 See eg, *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407. Articles 4.1-4.3 are as follows:

“**Article 4.1** (*Intention of the parties*)

1. A contract shall be interpreted according to the common intention of the parties.
2. If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

**Article 4.2** (*Interpretation of statements and other conduct*)

1. The statements and other conduct of a party shall be interpreted according to that party’s intention if the other party knew or could not have been unaware of that intention.
2. If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.

**Article 4.3** (*Relevant circumstances*)

In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including

- (a) preliminary negotiations between the parties;
- (b) practices which the parties have established between themselves;
- (c) the conduct of the parties subsequent to the conclusion of the contract;
- (d) the nature and purpose of the contract;
- (e) the meaning commonly given to terms and expressions in the trade concerned;
- (f) usages.”

100 **Article 4.4** (*Reference to contract or statement as a whole*)

Terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear.

**Article 4.5** (*All terms to be given effect*)

Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect.

**Article 4.6** (*Contra proferentem rule*)

If contract terms supplied by one party are unclear, an interpretation against that party is preferred.

**Article 4.7** (*Linguistic discrepancies*)

Where a contract is drawn up in two or more language versions which are equally authoritative there is, in case of discrepancy between the versions, a preference for the interpretation according to a version in which the contract was originally drawn up.”

101 “**Article 4.8** (*Supplying an omitted term*)



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1. Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied.
  2. In determining what is an appropriate term regard shall be had, among other factors, to
    - (a) the intention of the parties;
    - (b) the nature and purpose of the contract;
    - (c) good faith and fair dealing;
    - (d) reasonableness.

...

**Article 5.1.2** (*Implied obligations*)

Implied obligations stem from

- (a) the nature and purpose of the contract;
- (b) practices established between the parties and usages;
- (c) good faith and fair dealing;
- (d) reasonableness.”

102 Art 5.1.8 deals with reasonable notice for termination of a long term contract; Art 7.1.7, force majeure; Art 7.2.2, performance of non-monetary obligations; and Art 7.4.8, mitigation of harm.

103 *Sale of Goods (Vienna Convention) Act 1986* (NSW); *Sale of Goods (Vienna Convention) Act 1986* (WA); *Sale of Goods (Vienna Convention) Act 1986* (SA); *Sale of Goods (Vienna Convention) Act 1986* (Qld); *Sale of Goods (Vienna Convention) Act 1987* (VIC); *Sale of Goods (Vienna Convention) Act 1986* (TAS); *Sale of Goods (Vienna Convention) Act 1986* (ACT); *Sale of Goods (Vienna Convention) Act* (NT).

104 For a discussion of the compromise involved, see R Goode, H Kronke & E McKendrick, *Transnational Commercial Law: Text, Cases and Materials* (Oxford University Press 2007) at 278; and Bonell, above n 96. For a similar interpretation clause, see Art 4 in the *Convention on International Factoring*.

105 Bonell, above n 96; Farnsworth in Beatson & Friedmann (1997), above n 40.

106 See the comments of Mason J in *State Government Insurance Commission v Trigwell* [1979] HCA 40; 142 CLR 617 at 633.

107 [1957] HCA 81; 100 CLR 277.

108 [2008] HCA 2; 233 CLR 542.

109 See eg, *Giannarelli v Wraith* [1988] HCA 52; 165 CLR 543 at 584-585; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* [1988] HCA 44; 165 CLR 107 at 160-162; *Mabo v Queensland (No 2)* [1992] HCA 23; 175 CLR 1 at 29-30 and 57-58; *Dietrich v R* [1992] HCA 57; 177 CLR 292 at 318-320.

110 *Renard* (1992) 26 NSWLR 234; *Alcatel* (1998) 44 NSWLR 349; *Hughes Bros* (1993) 31 NSWLR 91; and *Hungry Jack's* (2001) 69 NSWLR 558.

111 *Coal Cliff Collieries* (1991) 24 NSWLR 1.

112 *United Group Rail* [2009] NSWCA 177.

113 (1992) 26 NSWLR 234 at 261-263.

114 See eg, *Hawkins v Clayton* [1988] HCA 15; 64 CLR 539 at 573 (Deane J) ; *Byrne v Australian Airlines Ltd* [1995] HCA 24; 185 CLR 410 at 422 (Brennan CJ, Dawson and Toohey JJ) and 442 (McHugh and Gummow JJ); *Breen v Williams* [1996] HCA 57; 186 CLR 71 at 90-91 (Dawson and Toohey JJ) and 123-124 (Gummow J); *Moneywood Pty Ltd v Salamon Nominees Pty Ltd* [2001] HCA 2; 202 CLR 351 at 374 [80] (Gummow J); *Associated Alloys Pty Ltd v ACN 001 452 106 Pty*

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- Ltd (in liq)* [2000] HCA 25; 202 CLR 588 at 610 [46] (Gaudron, McHugh, Gummow and Hayne JJ).
- 115 See Peden, *Good Faith in the Performance of Contracts* (2003), above n 14, Ch 2.
- 116 P Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1979); J Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Clarendon 1991); R Harrison, *Good Faith in Sales* (Sweet & Maxwell 1997) Chs 1-2.
- 117 See J Austin, *The Province of Jurisprudence Determined and Lectures on Jurisprudence*, above n 23.
- 118 Atiyah, above n 116.
- 119 (1766) 3 Burr 1905 at 1910; 97 ER 1162 at 1165.
- 120 *Carlsh v Salt* [1996] 1 Ch 335; *Beyfus v Lodge* [1925] Ch 350 at 357; P N Wikrama-Nayake, *Voumard: The Sale of Land in Victoria* (4th Ed, Law Book Co 1986) at 216 ff.
- 121 R Meagher, J D Heydon & M Leeming, *Meagher, Gummow & Lehane's Equity Doctrines and Remedies* (4th Ed, LexisNexis Butterworths 2002) at 8 [1-070].
- 122 For a review of the separation of law and morality in the theories of Jeremy Bentham and John Austin and the position of legal positivism in the 20<sup>th</sup> century see: Hart (1958), above n 23. More generally see: Austin (1879), above n 23; Kelsen (1934), above n 23; Kelsen (1935), above n 23; Hart (1994), above n 23; and Friedmann, above n 23, Chs 21-27.
- 123 Atiyah, above n 116 at 402-403.
- 124 G Gilmore, *The Death of Contract* (Ohio State University Press 1976).
- 125 P Devlin, *The Enforcement of Morals* (Oxford University Press 1965) at 47.
- 126 *Ahmed Angullia bin Hadjee Mohammed Salleh Angullia v Estate and Trust Agencies (1927) Ltd* [1938] AC 624 at 634-635 and *Coulls v Bagot's Executor and Trustee Company Ltd* [1967] HCA 3; 119 CLR 460 at 504; *Alley v Deschamps* (1806) 13 Ves Jr 225 at 227 and 228; 33 ER 278 at 279; and *United Group Rail* [2009] NSWCA 177 at [72].
- 127 727 F2d 1145 (1984).
- 128 941 F2d 588 (7<sup>th</sup> Cir 1991).
- 129 *Ibid* at 594-596.
- 130 *Ibid* at 595.
- 131 H C Gutteridge, "Abuse of Rights" (1933-35) 5 *The Cambridge Law Journal* 22; D J Devine, "Some Comparative Aspects of the Doctrine of Abuse of Rights" [1964] *Acta Juridica* 148; J H Crabb, "The French Concept of Abuse of Rights" (1964) 6(1) *Inter-American Law Review* 1; P Catala & J A Weir, "Delict and Torts: A Study in Parallel" (1964) 38(2) *Tulane Law Review* 221; A Mayrand, "Abuse of Rights in France and Quebec" (1974) 34 *Louisiana Law Review* 993; J Cueto-Rua, "Abuse of Rights" (1975) 35 *Louisiana Law Review* 965; V Bolgar, "Abuse of Rights in France, Germany and Switzerland: A Survey of a Recent Chapter in Legal Doctrine" (1975) 35 *Louisiana Law Review* 1015; G M Redmann, "Abuse of Rights: An Overview of the Historical Revolution and the Current Application in Louisiana Contracts" (1987) 32 *Loyola Law Review* 946; J M Perillo, "Abuse of Rights: A Pervasive Legal Concept" (1995) 27 *Pacific Law Journal* 37; A Gambaro, "Abuse of Rights in Civil Law Tradition" (1995) 4 *European Review of Private Law* 561; E Reid, "Abuse of Rights in Scots Law" (1998) 2 *Edinburgh Law Review* 129.

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- <sup>132</sup> Article 2(2) of the *Charter of the United Nations* and Arts 26 and 31(1) of the *Vienna Convention on the Law of Treaties*; Permanent Court of Arbitration, *Venezuelan Preferential Claims Case* (22 February 1904) in J B Scott (Ed), *Hague Court Reports* (1910) Vol 1 at 55; the *Nuclear Tests Case (Australia v France)* [1974] ICJ Rep 253 at 268; and see generally E Zoller, *Good Faith in Public International Law* (Paris 1977), discussed by M Virally in a review essay in (1983) 77 *American Journal of International Law* 130; B Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Cambridge Grotius Publications Ltd 1987) Pt 2 at 105-160.
- <sup>133</sup> [1988] ICJ Rep 69 at 105 [94].
- <sup>134</sup> This was reiterated in *In re Land and Maritime Boundary (Cameroon v Nigeria)* [1998] ICJ Rep 275 at 297 [39]; see generally the discussion in *The Roma Case* [2005] 2 AC 1 at 52 [62].
- <sup>135</sup> *Duquesne Light Co v Westinghouse Elec Co* 66 F3d 604 at 617 (3<sup>rd</sup> Cir 1995); *Riggs National Bank of Washington v Linch* 36 F3d 370 at 373 (4<sup>th</sup> Cir 1994).
- <sup>136</sup> Commentary introduced in 1994 says the following in relation to § 1-304: “This section does not support an independent cause of action for failure to perform or enforce in good faith. Rather, this section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, a remedial right or power. This distinction makes it clear that the doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached”.
- <sup>137</sup> Mason, above n 7 at 94.

**FINANCIAL REVIEW CONFERENCE  
15 October 2010**

**“Key Issues for International Commercial Arbitration in Australia”**

**James Allsop\***

- 1 I am honoured to be asked to speak to this forum, in particular in the company of the speakers gathered, including my judicial colleague, Justice Croft.
  
- 2 Justice Croft will speak about issues concerning the Australian judiciary and the demands that are placed on it in the context of international commercial arbitration. I have interpreted my topic as issues for Australia in international arbitration.
  
- 3 I would like to discuss five issues which I see as important for Australia to deal with. They are drawn from a recognition that delocalised dispute resolution mechanisms (in particular arbitration) outside national courts now account for the overwhelming proportion of international commercial dispute resolution. This raises important questions of international cooperation, sovereignty, commercial justice and the development of international commercial law.
  
- 4 All countries have a choice: participate in, and help shape the conduct of, this system, or be prepared to cede the task to others. International commercial arbitration is a truly international endeavour of great international importance. Successful participation in it, however, requires a recognition of a number of important considerations – by the legal

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\* President, NSW Court of Appeal

profession, by the commercial community and by the arbitration community.

5 The issues that I wish to address briefly are as follows:

1. Maintaining and strengthening the growing familiarity of the legal community in Australia with international commercial arbitration, by strengthening the education and skill of the profession in respect of it: professional education of the legal community.
2. Strengthening the Australian commercial community's recognition of the importance of dispute resolution clauses and of the already high level of skill and sophistication in the Australian legal community: education of the commercial community.
3. Continuing the leadership role being played by government in ensuring the regional and worldwide recognition of the skill and talent of the arbitration and legal communities in this country, including practitioners, arbitrators and judges: government sponsorship.
4. Creating and building a vibrant, individual and cost-effective arbitral methodology in Australia.
5. Reviving and energising domestic arbitration.

### **Issue 1: Professional education of the legal community**

6 Whilst arbitration should always be seen from the commercial perspective, it is rarely a "lawyer-free-zone". Commercial arbitration is about resolving commercial disputes; such disputes are generally disagreements about rights. Lawyers will rarely be irrelevant to such matters, whether appearing as counsel or as part of the arbitral panel.

- 7 The legal community in Australia has undergone a significant transformation in the last thirty years in dispute resolution. The degree and frequency of ADR, especially but not only mediation, is remarkable. The revolution in case management originated in its most successful form in the Commercial List in the Supreme Court of New South Wales run by Justice Andrew Rogers from 1979, and shortly afterwards in the Commercial List in the Supreme Court of Victoria run by Justice Marks. These judges and a number of judges in the Federal Court in the 1980s laid the foundation for what was a revolution in the handling of commercial litigation all around Australia in the 1990s and the first decade of the 21<sup>st</sup> century. These fundamental changes in the approach to commercial litigation predated, by years, the significant changes in England in the Woolf Reforms.
- 8 The use of, and familiarity with, arbitration, in particular international commercial arbitration requires a similar cultural change and (dare I say it given the language of political discourse in recent times) a paradigm shift in legal practice.
- 9 In particular, the commercial bars and solicitors of the major legal centres must recognise that part of their **staple skill** is a deep familiarity with the structure, principles and conduct of international commercial arbitration. Even transaction lawyers need to understand this in order to advise any client properly on the risks and costs in a transaction by reference to appropriate dispute resolution clauses. No longer can practitioners simply assume that a competent local commercial judge will necessarily deal with the matter if disputes arise. Some at the Bar, and many solicitors, have recognised these matters, but it is not a thorough-going and widespread recognition and understanding. To be a commercial practitioner in the coming generation will require knowledge and skill based on international convention, comparative law, private international law, the approach of major commercial legal systems to any particular problem and the practice of international commercial arbitration. These matters will become as

important as tax, security and revenue in assessing any transaction. Indeed this is already the case.

- 10 The Australian profession must quickly appreciate this. Unless it does, it risks relinquishing the field to foreign practitioners who do.
- 11 The solicitors branch is somewhat ahead of the Bar in terms of general appreciation of the matters, to my observation; nevertheless, both sides of the profession need to understand these matters as **basic and staple**. They are not exotic specialities.

## **Issue 2: The education of the commercial community**

- 12 I make the following comments with due recognition that I am not a businessman. My experience as a barrister practising to a significant degree in commercial law and as a judge with interest in commercial law has led me to come to two views.
- 13 First, at the stage of the deal and contract, parties sometimes appear to give inadequate thought to the importance, and the hidden transaction costs, of dispute resolution clauses.
- 14 Secondly, many businesses operating in Australia appear to undervalue the high level of sophistication of the Australian profession. It is one of the best commercial legal professions in the world.
- 15 These two points are related. Bitter experience of disadvantageous jurisdiction clauses can leave deep scars. Sometimes it is thought that the only way to avoid that is to trust in lawyers in a legal system overseas. This tendency is weakening, but it still exists. I recently was told that a major petroleum company operating in Australia was conducting a London maritime arbitration in respect of an Australian inter-state charterparty. There are ample and deep skills in Australia in maritime law and maritime arbitration. The transport of that dispute to London beggars belief.

### Issue 3: Government sponsorship

- 16 In the last thirty years (but most particularly in the last five to ten years), governments in Australia have come to recognise the importance of international commercial arbitration not only as a vital part of the Australian legal system, but also as a service this country can offer the region and the world. This is to be measured not only in terms of revenue, but also important cultural influence.
- 17 If I may be permitted particularly to single out in this regard the Commonwealth Attorney-General, the Honourable Robert McClelland and the NSW Attorney-General, the Honourable John Hatzistergos, as well as the former Commonwealth Attorney-General, the Honourable Philip Ruddock. The support of ACICA and the Australian Maritime and Transport Arbitration Commission, the opening of the International Arbitration Centre in Sydney and the promotion of the reform of the Commonwealth *International Arbitration Act* and the New South Wales *Commercial Arbitration Act* are examples of that support.
- 18 On 8 October 2010 (last Friday) the Straits Times in Singapore ran a piece on the success of the Singapore International Arbitration Centre in attracting arbitration to Singapore. The article stated:
- “... [A] senior arbitration partner at [a] Global Law Firm ... pointed out that London had been arbitrating cases for many decades, but Singapore owed its quick rise to good government support, excellent infrastructure and updated SIAC rules.
- Among other things, Singapore has a highly skilled judiciary which is supportive of arbitration added (another) arbitration partner at [the firm].”
- 19 In Australia, we have all these things: government support, excellent infrastructure, updated arbitration rules and a highly skilled judiciary support of arbitration. What we really need is a heightened cultural



awareness in the profession and commercial community about the importance of Australian arbitration clauses, of Australia as an arbitration seat whatever may be the law of the contract or the law of the dispute and of the significant skills in Australia concerned with international commercial arbitration.

- 20 Once it becomes recognised that the dispute resolution clause is important in relation to possible future transaction costs, the importance of bargaining for suitable clauses becomes apparent. There is no reason why Australian commercial parties should not insist on, or at least bargain for, Australian clauses, whether Australian law clauses or Australian seat clauses.
- 21 One of Australia's great advantages, held along with Hong Kong and Singapore, is a familiarity with English law. We all grew up on it. English law is a vital and stable foundation of a developing *lex mercatoria*. If Australia takes its task seriously, it has this significant platform to work from.
- 22 It is not my place to formulate government policy, but the importance, both commercially and nationally, of a vibrant participation in regional and worldwide commercial dispute resolution should be recognised for the importance it carries. If I might respectfully suggest, it should be a standing item on the SCAG agenda and a standing and important matter of consideration for all Attorneys-General (State and Federal). It presently appears to be so for the Commonwealth and New South Wales Attorneys.
- 23 I am not suggesting government control; rather, active sponsorship and support in conjunction with the commercial community, the arbitration community and the legal profession. This may involve resources, but modest ones, to underpin structures, venues and conventions.

#### **Issue 4: Development of a fresh procedural model**

- 24 There has been discussion in journals and at conferences about a growing degree of dissatisfaction of the costs and length of international commercial arbitration.<sup>1</sup>
- 25 There is a perception that the worst features of common law commercial litigation (in particular huge discovery and overly-long and tedious cross examination) are infecting the running of arbitration.
- 26 Litigation can be run badly or it can be run well. Modern case management powers can be exercised aggressively and even brutally, but justly. Modern litigation can be controlled. Though this has not been uniformly successfully achieved. But, it is still litigation based on evidence. Arbitration can be organised and conducted much more flexibly.
- 27 Australian commercial courts and the profession are at the forefront of this judicial control of litigation. They have been for 25 to 30 years. There have been less than successful examples of litigation management, but, by and large, complex commercial litigation is dealt with highly efficiently by superior courts in Australia. The running of the Commercial Lists and case management powers in Supreme Courts and the Federal Court make Australian superior court procedure as good as any in the world, if not better. Australian practitioners in arbitrations ought be able to take this practical experience into arbitration practice, but, being mindful that arbitration should not be seen as mimicked litigation.
- 28 The invaluable platform of modern case management and Commercial List practices married with an appreciation of the important differences in arbitration give Australian lawyers and commercial arbitrators an opportunity to create a distinctively efficient and cost effective style of

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<sup>1</sup> See for example, Toby Landau QC, "The day before tomorrow: Future developments in International Arbitration with Toby Landau QC", 21 October 2009, Clayton Utz and University of Sydney International Arbitration Lecture 2009.

arbitration that reflects a practical and efficient approach to dispute resolution.

### **Issue 5: Reviving domestic arbitration**

- 29 It is important to have an efficient and healthy domestic arbitration system. If one cannot do one's domestic arbitration efficiently, it may be difficult to persuade foreigners that international commercial arbitration can be done efficiently.
- 30 One aspect that has in the last twenty years drawn oxygen away from domestic arbitration (at least in New South Wales) is the success of the referee system in the Commercial and Technology and Construction List in the Supreme Court of New South Wales. The Technology and Construction List basically acts as a clearing house for technology and construction disputes. Matters are filed and initially examined by a judge; they are generally then referred out for report; a hearing is held, often informal and without the necessity for the strictures of the rules of evidence; a report is made and sent to the Court; the Court adopts or not the report in whole or in part; reagitation of the factual dispute is rare. This is a generally very efficient system under the supervision of skilled and experienced commercial judges. It has become a model often preferred to domestic arbitration.
- 31 The skills developed in this referee system are vital for transplantation into arbitral practice. The reform of the domestic *Commercial Arbitration Act* that has been put in place is also important for the revival of domestic arbitration.

## **Conclusion**

- 32 In my view, the most pressing issues in Australia raised by international commercial arbitration are educational and cultural concerning both the profession and the commercial community. Both communities need to understand the importance of international structures and practices that throw up real commercial and legal challenges. Australia has the intellectual infrastructure to meet these challenges. If the commercial community and the legal profession more widely appreciate the challenges in front of them I am confident that they will respond.

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**“Is there a place for regional dispute resolution structures?  
- Maritime law as a case study”**

**Justice James Allsop\***

Abstract: Admiralty and maritime law has a significant element of internationality. It takes meaningful form not only in national laws but also as a body of principles largely common to shipping and trading nations. These characteristics make it particularly adapted to the development of regional dispute resolution structures, whether arbitral or judicial. The paper will explore possibilities for such regional structures.

- 1 The possibility of regional dispute resolution arrangements is, I think, worthy of discussion by judges. That is so even if effectuation is not a matter for the judiciary.
- 2 Let me summarise what I wish to say:
  - (a) First, maritime law has a truly international and maritime character, notwithstanding that it takes its form in the positive law of individual nation states. The international character of maritime law derives from the international and maritime forces that shape it. These forces are common to all trading nations and their commercial relations.

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\* President, New South Wales Court of Appeal.

- (b) Secondly, over the last 50 years, international dispute resolution, in particular in the form of international commercial arbitration, has become increasingly anational and delocalised in its execution.
- (c) Thirdly, the place of efficient skilled commercial courts should not be lost sight of as playing, at the very least, a vital role in the encouragement and support of the health and efficiency of commercial arbitration.
- (d) Fourthly, these considerations, in conjunction with the weight of maritime related trade in the region, may make this region ripe for the consideration of working regional structures for the resolution of maritime disputes.

3 Let me deal with these elements in turn.

**A The international character of maritime law**

4 Few maritime ventures are undertaken without a complex interconnection of international participants. Though not all are in direct legal relations with each other, the conduct by each of its part in the venture will generally have an effect on the safety or commercial viability of the venture for the others. That maritime activity is often international or transnational provides one essential characteristic of maritime law. The second essential characteristic is, of course, provided by the sea, and her demands.

5 The character of internationality is not limited, of course, to maritime law. Commercial law and its elemental concepts – the bargain and promise, the means of exchange of value, including in particular, the promissory note and bill of exchange, performance, the spreading of risk by such means as insurance, partnership and joint venture, the lending and repayment of money and notions of restitution all bear the hallmarks of internationality in

their history and development. For present purposes, however, I will focus on maritime law.

6 In eras more attuned to the broad sweep of natural law, maritime law (and indeed commercial law) was seen as part of a transnational law of nations, rather than of particular countries.<sup>1</sup> The proposition is not a fanciful one even in an era based on more positivist notions underpinning national sovereignty and national law. Its limitations must, however, be recognised in that modern context.

7 Four expressions of view are worthy of repetition and recall:

(a) In 1875, speaking for the United States Supreme Court, Bradley J said the following about “the general maritime law” and its relationship with municipal maritime law:

“Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law. And thus it happens, that, from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common, comes to be the common maritime law of the world.”

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<sup>1</sup> Lord Mansfield in *Luke v Lyde* (1759) 2 Burr 882 at 887; 97 ER 614 at 617; Story J in *De Lovio v Boit* 7 F Cas 418 (1815); Marshall CJ in *American Ocean Insurance Co v 356 Bales of Cotton* 26 US 511 at 54-546 (1928); In 1801, *The Gatitudine*, 3 C.Rob 240; 165 ER 450, Sir William Scott (later Lord Stowell) recognised the *lex mercatoria* as the practice of merchants “which all tribunals are bound to respect, whenever that practice does not cross upon any known principle of law, justice or national policy.” In 1834, in *The Neptune*, 3 Hagg 129 at 136, 166 ER 354 at 356, Sir John Nicholl referred to the law marine, together with the civil law and the law merchant as governing the court of Admiralty, as part of the law of England. In the same year, in *The Girolamo*, 3 Hagg 169 at 185-186; 166 ER 368 at 374, Sir John Nicholl applied Blackstone and described the law merchant as “the true principles of international law” and emphasising the phrase in the extract “and take notice of” as a recognition of the need for municipal adoption (by the Admiralty Court). In 1846, in *Brandao v Barnett*, (1846) 3 CB 519; 136 ER 207, Lord Campbell, in a non-maritime context, recognised the lien of bankers as part of the law merchant.

- (b) In 1946, Scott LJ in *The Tolten*<sup>2</sup> recognised in the discernment and declaration of English Admiralty and maritime law the need to resort to, and not depart unduly from, what he described as “the general law of the sea”. He described the importance of uniformity of development of maritime law in terms which recognised, explicitly, the existence of the general maritime law and its place in influencing the development of contemporary municipal maritime law. To Scott LJ, the general maritime law was a living force in the development of contemporary municipal law.
- (c) In 1953, in *Lauritzen v Larsen*<sup>3</sup>, Jackson J not long returned from prosecuting Nazi war criminals under the authority and legitimacy of the law of nations, and speaking for a Court which included Frankfurter J, one of the great judicial scholars of the 20<sup>th</sup> century, summed up both the nature and importance of the general maritime law. He referred to a “non-national or international maritime law of impressive maturity and universality”. The terms in which he described the nature of this law are instructive. It had, he said, “the force of law, not from extra-territorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilised communities of rules designed to foster amicable and workable commercial relations.” Maritime law derived from the common acceptance of principles at a level of generality sufficient to enable its local adoption and adaption. As such, it was a body of accepted principles capable of meaningful description as law. Justice Jackson then went on to discuss the importance of the international character of maritime law in human affairs and of adhering, as far as possible, to these common principles to further the aims of stability, comity, forbearance, reciprocity and long-range national interest. Underlying these aims was the desire to avoid parochial national

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<sup>2</sup> [1946] P 135 at 142

<sup>3</sup> 345 US 571 at 581-582 (1953)



jealousies and competing laws governing international conduct, in particular commercial conduct, in order to advance the mutual interests of all countries.

(d) In 1999, in *The 'Titanic'*<sup>4</sup>, the Fourth Circuit Court of Appeals applied the general maritime law as the effective governing law of salvage rights over the wreck of *Titanic* on the seabed in international waters.

8 These views reflect the reality of the existence of maritime law as more than a shadow of the similar forms of municipal laws perceived through the prism of the study of conflict of laws and comparative law. The general maritime law is, perhaps, an early example of what people today call “soft law”, being legal norms not strictly binding in terms of sovereign authority, but generally adhered to by those who subscribe to them because of contract, moral suasion or fear of other adverse consequences.<sup>5</sup> Numerous forms of drafted principles now exist divorced from national legislative origins, but taking their place among the available accepted bodies of principles to assist in the regulation of human behaviour.<sup>6</sup> In large part, these form, in many fields of commercial law, the building blocks of common principle and a modern *lex mercatoria*.<sup>7</sup> The general maritime law is, however, more than that. It is the living source of principle derived from ancient practice, custom, codes and organised doctrine which affects, constrains and inspires the development of contemporary legal doctrine.

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<sup>4</sup> 171 F 3d 943 at 960-964 (1999).

<sup>5</sup> Goode R *Commercial Law* (2<sup>nd</sup> Ed Penguin) pp 21-22.

<sup>6</sup> See generally Goode, Kronke, McKendrick and Wool *Transnational Commercial Law* (Oxford 2004).

<sup>7</sup> See generally Tetley “The General Maritime Law – The Lex Maritima” (1994) 20 *Syracuse J Int'l L & Com* 105 at 133-145 and the literature referred to therein; Galgano “The New Lex Mercatoria” (1995) 2 *Annual Survey of International and Comparative Law* 99; Goode, Kronke, McKenrick and Wool *op cit*; Dalhuisen J *Transnational and Comparative Commercial, Financial and Trade Law* (Hart Publishing 2007); Goode R “Usage and its Reception in Transnational Commercial Law” (1997) 46 *Int'l & Comparative Law Quarterly* 1; Wiggers W *International Commercial Law* (Kluwer 2007); Marquis L *International Uniform Commercial Law* (Ashgate 2005).

- 9 It can be readily accepted that the body of principles called the general maritime law described as such, and as separately existing, by lawyers and judges of distinction over the centuries does not, without more, bind a sovereign nation, a national court or a national community. But, to say as much, does not deny its existence as a body of law and principles broadly accepted and capable of adaption to national circumstances, in particular by judges in their role in the declaration and development of municipal maritime law.
- 10 It is also necessary to recognise that, as law, the general maritime law is not all judge or scholar made in the sense of common law or *la doctrine*. It exists in international treaty and convention, international regulation, codes, both historical and contemporary, and judicial and scholarly exposition.<sup>8</sup>
- 11 The importance of this international character of maritime law is that it fulfils the need for foreign merchants and sea-faring people to be admitted to common protection of their rights by a uniform system. In particular, questions of ownership of the ship, the rights concerned with contracts of affreightment, sale of goods, payment and exchange, insurance and co-partnership should be dealt with in a way common to accepted commercial usages. Vital, indeed the essence of this, is the prompt and just settlements of disputes.
- 12 The clearest illumination of the above comes from the enforcement of maritime claims, the carriage of goods by sea and judicial technique in the resolution of maritime claims and in the declaration of maritime law.

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<sup>8</sup> Tetley W “The General Maritime Law – The *Lex Maritima*” (1994) 20 *Syracuse J Int’l L & Com* 105 and Tetley W “International Maritime Law” (1999 – 2000) 24 *Tul Mar LJ* 775.

- 13 As Professor Tetley makes clear<sup>9</sup> the varied arrangements of different legal systems through the maritime lien, the action *in rem*, the action *in personam* and maritime attachment have the effect of creating a coherent and harmonised (though not uniform) system of enforcement of maritime claims. Personal claims are transformed, by the exercise of maritime jurisdiction by maritime courts, into secured claims over defined and quarantined property, taking their ranking by reference to well-known harmonised rules, regulated in part by international convention<sup>10</sup> and in part by the general law.
- 14 The regulation of carriage of goods by sea, whether under bill of lading carriage regulated by international convention since 1924 or under charterparties, has been broadly similar for decades. Differences of national law exist; but the underlying uniformity of principle is striking.
- 15 Judicial technique in the interpretation of international conventions and maritime law has for much of the 20<sup>th</sup> century reflected, at least in principle, the need for comity and uniformity. The international character of maritime law means that the judicial development of municipal maritime law should take place, not merely by reference to domestic interests and considerations, but also by reference to the recognition of the common international interests in harmony and uniformity and the principles of the general maritime law, if discernible. The recognition of the desirability of international uniformity has not always been found in analysis of foreign jurisprudence whether the court in question be English, American, Australian or other. Two recent examples show how the task should be undertaken. Lord Justice Rix in the English Court of Appeal in *The Rafaela S*<sup>11</sup> and the judges of the Fourth Civil Division of the Supreme People's

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<sup>9</sup> Tetley *International Maritime and Admiralty Law* Ch 10.

<sup>10</sup> International Convention for the Unifications of Certain Rules Relating to Maritime Liens and Mortgages 1926 (the 1926 Lien Convention); International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1967 (the 1967 Lien Convention); International Convention on Maritime Liens and Mortgages 1993 (the 1993 Lien Convention).

<sup>11</sup> [2003] 2 Lloyd's Rep 113 at 126-139 (on appeal to the House of Lords in [2005] 2 AC 423).

Court of the People's Republic of China in *American President Lines v Guangzhou Feida Electrical Apparatus Factory of Wanbao Group*<sup>12</sup> both dealt with the problem of straight bills of lading in the carriage of goods by sea. Both these scholarly and important judgments can be seen to undertake not merely an analysis of comparative law in order to aid the development or identification of municipal law, but also an engagement with the existing and historical state of maritime law in order that the maritime law of England and China should conform with fundamental international principle.

- 16 It can legitimately be argued that there is a responsibility upon courts and judges to interpret and develop maritime law with an international and balanced approach, because to do so reflects the immanent fabric of maritime law. If balance be lost, whether because courts are seen to favour ship or cargo or some other particular national interest the international basis of maritime law is undermined to the good of no one. In such circumstances, decisions lose their international acceptance and the need arises to expend vast bodies of energy to devising new conventions.
- 17 This should be the approach not only to solving problems involving international conventions, but also in solving other maritime law problems. To do otherwise will only provoke distinctions based on national interests in a field of jurisprudence and human endeavour necessarily international.

## **B The increased delocalisation of international dispute resolution**

- 18 One striking contemporary phenomenon is the globalisation of commerce, brought about by astonishing changes in communications and the

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<sup>12</sup> 4<sup>th</sup> Civil Division, unreported 25 June 2002, referred to by Rares J of the Federal Court of Australia in *Beluga Shipping GmbH & Co v Headway Shipping Ltd* [2008] FCA 1791.

integrated global and regional markets created or fostered thereby.<sup>13</sup> The supranational forces impinging on municipal states have influenced virtually all economies of the world, creating linkages, dependencies and opportunities quite unrelated to sovereign nation states and their borders.

19 The pace of development of international commercial law has been remarkable in the last 20 to 30 years. There are international and European restatements, model laws, principles, conventions, directives and other instruments on contract law,<sup>14</sup> electronic commerce,<sup>15</sup> international sale of goods,<sup>16</sup> agency and distribution,<sup>17</sup> international credit transfers and bank payment undertakings,<sup>18</sup> international secured transactions,<sup>19</sup> cross-border insolvency,<sup>20</sup> securities settlement and

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<sup>13</sup> See Galgano, F “The New Lex Mercatoria” (1995) 2 *Annual Survey of International and Comparative Law* 99; and Bonell, MJ *An International Restatement of Contract Law* (Transnational Publishers 3rd Ed 2004) at 11-13.

<sup>14</sup> As to international private law, see generally Goode, R et al *Transnational Commercial Law: International Instruments and Commentary* (Oxford 2004). The UNIDROIT Principles of International Commercial Contracts 2004, produced by a group of international scholars and practitioners under the direction of Prof Joachim Bonell (Part I of which was published in 1994); the Principles of European Contract Law completed in 2003 prepared by scholars from all member states of the European Community.

<sup>15</sup> UNCITRAL Model Laws on Electronic Commerce (1996) and on Electronic Signatures (2001); EC Directives on Electronic Commerce (2000) and on Electronic Signatures (1999); CMI Rules for Electronic Bills of Lading 1990; the Bolero (an acronym from Bill of Lading Registration Organisation) bill of lading prepared through the co-operation of the Through Transport Mutual Insurance Association (the TT Club) and the Society for Worldwide Inter Bank Financial Telecommunications (SWIFT) which operates through a joint venture company; and the ICC rules as to electronic presentation of documents.

<sup>16</sup> The United Nations Convention on Contracts for the International Sale of Goods done at Vienna 11 April 1980 (“CISG”) which superseded the Uniform Law on the Formation of Contracts for the International Sale of Goods, 1964 and the Uniform Law on the International Sale of Goods, 1964; and the ICC Official Rules for the Interpretation of Trade Terms (Incoterms 2000), replacing earlier versions.

<sup>17</sup> The First Company Directive (EEC) (1968); the EEC Directive on Commercial Agents (1986); the UNIDROIT Convention on Agency in the International Sale of Goods done at Geneva 17 February 1983; and the UNIDROIT Model Franchise Disclosure Law (2002).

<sup>18</sup> UNCITRAL Model Law on International Credit Transfers (1992); ICC Uniform Customs and Practice for Documentary Credits (1993) (UCP 500) and electronic supplement (EUCP); ICC Uniform Rules for Demand Guarantees (1992); International Standby Practices (ISP 98) by the Institute of International Banking Law & Practice Inc; UN Convention on Independent Guarantees and Stand-by Letters of Credit done at New York 11 December 1995; ICC Uniform Rules for Contract Bonds (1993).

<sup>19</sup> The European Bank for Reconstruction and Development (ERBD) Model Law on Secured Transactions (1994); the Model Inter-American Law on Secured Transactions (2002); the various

securities collateral,<sup>21</sup> conflict of laws,<sup>22</sup> international civil procedure,<sup>23</sup> and international commercial arbitration.<sup>24</sup>

- 20 There has been for many years a significant debate about the extent to which these kinds of instruments, at their varying level of legal standing, can be said to create a law merchant or *lex mercatoria* existing above and distinct from municipal laws.

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maritime conventions dealing with security: on Maritime Liens and Mortgages (1926 and 1993) and on Arrest (1952 and 1999); the Convention on the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft done at Rome on 29 May 1933; the Convention on the International Recognition of rights in Aircraft done at Geneva on 19 June 1948; the UNIDROIT Convention on International Financial Leasing done at Ottawa 28 May 1988; the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment and Protocol done at Cape Town on 16 November 2001; the UNIDROIT Convention on International Factoring done at Ottawa 28 May 1988; the UN Convention on the Assignment of Receivables in International Trade done at New York 12 December 2001.

- 20 The UNCITRAL Model Law on Cross-Border Insolvency (1997); the European Union Convention on Insolvency Proceedings; and the EC Council Regulation NO 1346/2000 on Insolvency Proceedings.

- 21 The EC Settlement Finality Directive (1998), 98/26/EC; and the EC Directive on Financial Collateral Arrangements (2002), 2002/47/EC.

- 22 Convention on the Law Applicable to Contracts for the International Sale of goods done at the Hague on 22 December 1986; the Convention on the Law Applicable to Contractual Obligations done at Rome on 19 June 1980; the Inter-American Convention on the Law Applicable to International Contracts done at Mexico on 17 March 1994; and the Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary done at the Hague in 2002.

- 23 The European Convention on State Immunity done at Basle on 16 July 1972; European Community Council Regulation No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters; a MERCOSUR Convention and Protocol on jurisdiction in civil and commercial matters; the Buenos Aires Protocol to the Treaty of Asuncion signed on 26 March 1991, on International Jurisdiction in Contractual Matters done at Buenos Aires on 5 August 1944; the Convention on the Service Abroad of Judicial or Extra-judicial documents in Civil or Commercial Matters done at the Hague on 15 November 1965; the European Community Council Regulation No 1348/2000 of 29 May 2000 on the service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters; the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters done at the Hague on 18 November 1970; European Community Council Regulation No 1206/2001 of 28 May 2001 on Cooperation of Courts of Member States in the Taking of Evidence in Civil or Commercial Matters; and the American Law Institute and UNIDROIT jointly developed Principles of Transnational Civil Procedure.

- 24 The Convention on the Recognition and Enforcement of Foreign Arbitral Award adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its 24th meeting (the New York Convention); the Inter-American Convention on International Commercial Arbitration done at Panama City on 30 January 1975; the UNCITRAL Model Law on International Commercial Arbitration (1985); the UNCITRAL Arbitration Rules (1976); the ICC Rules of Arbitration (1998); and the London Court of International Arbitration Rules.

- 21 One of the least outwardly exciting, but one of the most important, body of principles that has been developed is the American Law Institute and UNIDROIT Principles of Transnational Civil Procedure. This was a hugely important project with an object that some said could not be achieved: the harmonisation of the civil law and the common law dispute resolution procedures. The project was begun by distinguished American and European professors. Their vision was to develop a body of principles for transnational cases which could apply in national courts (or arbitral bodies) and in so doing replace domestic procedural rules when the parties to litigation involved nationals of different states or when the case could otherwise be described as international. The Principles are an attempt to approximate, in a flexible way, important issues common to the two dominant legal systems. They are available for adoption and adaption by courts and arbitral bodies. They form a bridge between two very different legal cultures and provide a common and fair basis for hearing international disputes. Importantly, they provide a procedural foundation that can give confidence to parties in litigation who come from different legal cultures.
- 22 Thus, we find ourselves in an era of the active development of international legal principles, in the fertile environment of active global commerce, in a prevailing framework of freedom of international trade.
- 23 The last 50 years, in particular the last 20 to 30 years, have seen changes to dispute resolution which reflect the growth of international commerce and the transnational principles governing it. There has been a significant shift away from municipal courts towards commercial arbitration. This is particularly so in the resolution of international commercial disputes. This can be seen in the development of international conventions promoting arbitration,<sup>25</sup> in the development of rules and model laws by supranational

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<sup>25</sup> The United Nations Conference on International Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 (the New York Convention).

bodies such as UNCITRAL and UNIDROIT, in the development of scholarship dealing with international commercial arbitration<sup>26</sup> and by the reduction of hostility of municipal courts to arbitration.<sup>27</sup> This shift, in what might be referred to as the consumption patterns of parties to commercial litigation, and the public policy now recognising the legitimacy of such choice, has occurred for many reasons. The reasons vary from country to country and region to region. The reasons most usually put forward are flexibility, expertise, party autonomy, confidentiality, greater speed, lower cost and better enforcement. In part, the shift is explained by the failures or inadequacies of court systems, but I think that denigration of all national judicial systems as inherently incapable of satisfying the needs of international commerce is both wrong as a general proposition and overly simplistic.

24 It is important to recognise that the growth and development of commercial arbitration is no more or less than the setting up, in the field of international commerce, of a worldwide de-localised private (or semi-public) dispute resolution system made up of a large number of self-created and self-administered, largely non-governmental, organisations.<sup>28</sup> With its importantly different characteristics or attributes, such as confidentiality, commercial arbitration, however, often seeks the status of court determination. One only has to see the use of the word “court” in the names of some arbitral bodies or to ponder the use of powers of interlocutory injunction by arbitrators to appreciate this.

25 There are now numerous arbitral institutions worldwide catering for international commercial arbitration, including maritime arbitration.<sup>29</sup>

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<sup>26</sup> It is impossible to survey the literature adequately in a short footnote.

<sup>27</sup> See the cases referred to in *Incitec Ltd v Alkimos Shipping Corporation* (2004) 138 FCR 496 at [36].

<sup>28</sup> There are important theoretical debates in relation to the sovereign role of the *lex arbitri*, of the seat of the arbitration and of the extent of lawful de-localisation: see generally Petrochilos, *G op cit* chs 1, 2 and 3.

<sup>29</sup> For example, the International Court of Arbitration, the London Court of International Arbitration, the Inter-American Arbitration Commission, the Singapore International Arbitration Centre, the



Arbitration is active in this region. The Asia Pacific Regional Arbitration Group (APRAG) is an association of 24 arbitration centres in the region<sup>30</sup> which has a panel of arbitrators drawn from constituent arbitration centres and approved by the APRAG executive.

### **C The place of efficient skilled commercial courts**

26 In many countries, the legislatures and the courts themselves have recognised the need for efficient skilled commercial and maritime courts.

27 It also must be said, however that commerce demands more than individual municipal court systems have provided, and to some degree, can provide:

- the autonomous choice of a perceived reliable and skilled adjudicator, without trusting to the municipal judicial organ to provide such a person in a manner which cannot be controlled or perhaps predicted
  
- a potentially wider enforcement regime

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Australian Chamber of International Commercial Arbitration, the Australian Maritime and Transport Arbitration Commission, the Chartered Institute of Arbitrators, the American Arbitration Association, the London Maritime Arbitration Association, various national associations of maritime arbitration, the Paris Chambre Arbitrale Maritime, the Regional Centre for Arbitration Kuala Lumpur, the Association of Maritime Arbitrators Canada, Vancouver Maritime Arbitrators Association, the Society of the Maritime Arbitrators Inc, the Houston Maritime Arbitrators, the Japan Shipping Exchange, the Tokyo Maritime Arbitration Centre, the China Maritime Arbitration Commission. The list can go on, and on.

<sup>30</sup> Arbitrators and Mediators Institute of New Zealand, Australian Centre for International Commercial Arbitration, Australian Commercial Disputes Centre; Arbitration Association (Brunei), Beijing Arbitration Commission, Chartered Institute of Arbitrators (Australia), Chartered Institute of Arbitrators (East Asia) Chartered Institute of Arbitrators (Malaysia), China International Economic and Trade Arbitration Commission, Hong Kong International Arbitration Centre, ICC Asia, Indian Council of Arbitration, Indonesian National Arbitration Board, Institute of Arbitrators and Mediators Australia, Japan Commercial Arbitration Association, Korean Commercial Arbitration Board, Korean Council for International Arbitration, Kuala Lumpur Regional Centre for Arbitration, Malaysian Institute of Arbitrators, Mongolian Chamber of Commerce & Industry, Philippine Dispute Resolution Centre Inc, Singapore International Arbitration Centre, Tokyo Maritime Arbitration Commission, Vietnam International Arbitration Centre.

- the measure of control over the appeal structure in respect of the award
- the de-localisation of the process, away from the courts of the nationalities of the parties (the removal of “home-town risk”, or worse)
- in some cases a desire for confidentiality
- sometimes, perceived greater speed and lower cost

28 That said, a number of attributes of the judicial system must be recognised. A good court system is vital for the health and well being of arbitration in any country. The skill and efficiency of the courts in supervision, enforcement and collateral assistance is vital for successful arbitration. In that sense, arbitration and the court system have a symbiotic relationship.

29 Whilst recognising the above advantages of arbitration, it should be said that very often a commercial court can provide a skilled judge as promptly and effectively as any system of arbitration can provide an arbitrator.

30 Also, the development of maritime or commercial law, whether municipal or in the form of a *lex maritima* or *lex mercatoria*, is assisted by good commercial courts retaining a real role in the development of the jurisprudence of maritime and commercial law. To a not insignificant extent, the attraction of places such as London for commercial arbitration is founded on the reputational legacy or goodwill of the great commercial judges of years past and upon the continuing quality of judges (as well as arbitrators) with deep experience of commercial law.

#### **D The place for regional dispute resolution structures for maritime disputes**

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- 31 What can be referred to as the Asia Pacific Region has changed enormously in 60 years. Without being wedded to precise definition of the boundaries of the area under discussion, all countries in the region have experienced, in some form or other, some or all of war and conflict, the end of colonial rule, the emergence of independent sovereignty and, with the presence of relative peace in the last few decades, significant material growth. Indeed, it is not an overstatement to say that the growth of economic activity in the region has led to intercontinental shifts in economic power. The economies of China, Japan, the Republic of Korea, India, the countries of South East Asia, Australia, New Zealand and Canada now represent a significant part of world economic and financial activity. The financial centres of the region are some of the most important in the world. If one includes the United States of America as a Pacific littoral state, one has a preponderance of world economic activity.
- 32 Given the importance of maritime activity in international commerce, given the underlying international character of maritime law that I have referred to and given the region's significant place in maritime commerce, could there not be an Asia Pacific Maritime Arbitration Commission?
- 33 On a regional basis, with uniform rules as to the law of the arbitration, as to rules of procedure, with available transnational principles of contract and contractual interpretation, and with a uniform approach to curial supervision, enforcement and collateral assistance based on international conventions and regional agreement, such an organisation could call upon the maritime skill of the whole region – arbitral, judicial, scholarly and professional for the resolution of disputes. Hearings could take place at the most convenient place, with the use of widespread video link facilities. Parties could be given the choice of language and identity of arbitrator. A uniform approach to the *lex arbitri* and law of procedure would enable the development of a truly transnational arbitration structure to deal with maritime disputes in the region. A generous right of appearance could be

given to lawyers of the litigants' choice who would not necessarily be admitted in the place where the arbitration takes place.

- 34 This region has enormous skill to harness in the formation of such a regional body. There are many scholarly institutions in the region with a significant, or sole, focus on maritime affairs and maritime law.<sup>31</sup> Maritime scholars and experienced maritime lawyers, arbitrators and judges are to be found throughout the region. There are flourishing arbitration centres in many countries of the region.
- 35 What then could be the advantage of a regional structure? There might be a number: the harmonisation of the laws and rules of the arbitration, the harmonisation of the place of courts in support of the arbitration process, the deepening of the available pool of arbitrators for any particular dispute, the strengthening of the reputation of the region in the provision of maritime dispute resolution, the removal or amelioration of apparent fragmentation of approach by individual centres, the harmonisation of procedural law and the fostering of the development of a more consistent body of substantive maritime law.
- 36 These suggestions may be said to gloss over some of the theoretical questions as to: the nature of, and the legal theory governing, international arbitration; the role of different laws impinging on an arbitration; and the relationship between supervision, annulment and enforcement. That said, the coherent organisation of regional arbitral decisionmaking might be a goal worthy of aspiration and realistic effort.
- 37 In order to ensure harmony and comity it would be necessary to have a clear regime dealing with the law of the seat of the arbitration<sup>32</sup> and a clear

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<sup>31</sup> An incomplete list is Shanghai Maritime University, Dalian Maritime University, National University of Singapore, Maritime and Shipping Law Unit of the University of Queensland, Kobe University of Maritime Sciences, Vietnam Maritime University, McGill University, Korean Maritime University, Centre for Ocean Law and Policy Maritime Institute of Malaysia, the Australian Maritime College, to mention only a few.

<sup>32</sup> Involved in that is the question whether to make it central or peripheral.

regime of inter-jurisdictional curial supervision. These kinds of considerations would overcome, in a pragmatic way, any potential practical differences in the operation of the rival theories explaining the nature of international arbitration.

38 Such a structure could place this region far ahead of any individual local maritime arbitration centre anywhere in the world.

39 To illuminate its potential effect, let me explore one issue which might be addressed, at least in a practical sense, by this framework: the anti-suit injunction. This instrument of contractual enforcement has become the tool of choice of many litigants to stay legal proceedings in national courts in apparent contravention of an exclusive jurisdiction or arbitration provision. This is not the place to discuss the debates about the application of this remedy in the context of various classes of contracts, including contracts evidenced by bills of lading in liner trade, or about the risk the use of the injunction can pose to comity between courts. In cargo-claims, in particular ones of modest size (as many are), it may be an effective denial of any remedy to require the holder of a bill of lading (or its insurer) to cross the globe for enforcement. This problem has led to national legislation nullifying such clauses<sup>33</sup> and to discussion at international level.<sup>34</sup>

40 The existence of a regionally based and supported arbitration commission chosen in a jurisdiction clause could give cargo interests in the region enhanced confidence in international commercial arbitration and thus avoid the occasion for the perceived need for the use of the injunction.

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<sup>33</sup> Such as s 11(2) of the Carriage of Goods by Sea Act 1991(Cth) and s 46(1) of the Canadian Marine Liability Act 2001.

<sup>34</sup> In this regard see Ch III of the Proposed Hague Convention on Exclusive Choice of Court Agreements and in particular the exceptions set out in cl 7 of the draft: Hague Conference on Private International Law Working Document No 110E (27 April 2004); and see Meeson, M “Comparative Issues in Anti-Suit Injunctions” in Davies, M *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honour of Robert Force* (Kluwer Law International 2005) ch 2.

- 41 The same kind of co-operation might be possible in a regional court structure. Given the dominance of international commercial dispute resolution through arbitration, this may be seen as an unnecessary or irrelevant consideration.
- 42 Nevertheless, a regional international maritime court with appointments of undoubted experience and quality providing non-partisan (that is, other than the nationalities of the parties) judges of recognized skill, supported by regional recognition of judgments and combining civil and common law procedures along the lines of the UNIDROIT/American Law Institute transnational procedures is a structure to consider.
- 43 As a regional maritime court, its procedures could be adopted to fit most harmoniously with the resolution of maritime disputes: judges, assessors and expert witnesses drawing on the whole region's expertise.
- 44 If such a court were established as an alternative to arbitration, the shipping and commercial interests of the region might have the advantage of the availability of arbitral and curial structures providing a non-partisan, independent, and skilled curial tribunal delivering widely enforceable judgments, assuming that the structure was underpinned by a regional regime of enforcement.
- 45 The maritime and commercial interests of the region might be well served.
- 46 In referring to harmonization of the common law and civil law, Sir Otto Kahn-Freund said in 1977<sup>35</sup>:

“[It was] not only useless, but dangerous to extend attempts at harmonisation into fields in which legal differences reflect differences in political or social organisation or in cultural or social mores.”

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<sup>35</sup> In Capelletti (ed) *New Perspectives for a Common Law of Europe* p 164

- 47 Maritime dispute resolution may fall outside this stricture, because of the underlying international character of maritime law and the ability to synthesise civil and common law procedure. It may therefore be worth thinking about regional structures for its organization.

Hong Kong

January 2010

**Marine Insurance Act 1909**  
**100<sup>th</sup> Anniversary**

**11 November 2009**

**Justice James Allsop<sup>\*</sup>**  
**Michael Wells<sup>\*\*</sup>**

- 1 In 2006 the marine insurance market marked the 100<sup>th</sup> anniversary of the English *Marine Insurance Act 1906* (UK) 6 Edw 7 c 41, drafted by Sir Mackenzie Dalzell Chalmers.
- 2 On this day in 1909 Royal Assent was given to the Australian Act, the *Marine Insurance Act 1909* (Cth). (The Act commenced on 1 July 1910.)
- 3 The Commonwealth adopted the English Act, in whole, without substantive amendment.
- 4 I would like to begin by making some brief remarks about its drafter, Sir Mackenzie Chalmers, and about his mentor Lord Herschell. I will then say something about the Act and its attached policy (the SG policy), the structure and language of the Act and the SG policy and some important Australian cases on the Act. I give you no great insights, just, I hope, some things of common interest to those interested in maritime law.
- 5 Unless necessary to distinguish them, I will refer to the UK and Australian legislation as “the Act”. Unless otherwise made clear, I will refer to the provisions of the Australian Act.

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<sup>\*</sup> President of the New South Wales Court of Appeal  
<sup>\*\*</sup> Researcher to Justice Allsop



## **Sir Mackenzie Chalmers**

- 6 Sir Mackenzie Dalzell Chalmers was a barrister, civil servant, parliamentary draftsman and judge. He was made Companion of the Order of the Star of India in 1898, Companion of the Order of the Bath in 1904 and Knight Commander of the Order of the Bath in 1906.
- 7 He was born on 7 February 1847 in Nonington, Kent, and was educated at Kings College, London and Trinity College, Oxford from where he graduated in 1868.
- 8 He was called to the Bar by the Inner Temple in 1869, but soon after went to India as a member of the Indian Civil Service. In 1872, he resigned from the civil service and returned to London, joining the Home Circuit.
- 9 He was appointed to the County Court at Birmingham in 1884, an office he held until 1896; he was appointed Acting Chief Justice of Gibraltar in 1893, and Commissioner of Assize in 1895.
- 10 He subsequently held positions as legal member of the Viceroy of India's Council (1896-1899), Assistant Parliamentary Counsel (1899), First Parliamentary Counsel (1902), and Permanent Under-Secretary of State, Home Department (1903-1908).
- 11 Chalmers had a long, prosperous, and enduringly important association with Farrer Herschell (later Lord Herschell) at the Bar and when Herschell was Solicitor General and Lord Chancellor. This relationship was instrumental in the codification of the law of bills of exchange, the law of the sale of goods and law of marine insurance. Chalmers and Herschell shared an interest in law reform and commerce. In 1875, Herschell, having recently taken silk, invited Chalmers to move into his chambers at 3 Harcourt Buildings. Herschell subsequently encouraged Chalmers to take up a position as parliamentary draftsman, during which time Chalmers worked on his *Digest of the Law of Bills of Exchange* and draft Bill of the

*Bills of Exchange Act*. As Solicitor-General, Herschell exercised his influence to have Chalmers appointed Standing Counsel to the Board of Trade in 1882 and, as Lord Chancellor, appointed Chalmers a Commissioner of Assize in 1895. Chalmers consulted Herschell in settling the draft Bill codifying the sale of goods, and in 1888 Herschell introduced the Bill into the House of Lords and sat on the select committee on the Bill. Most significantly, in 1894, Herschell appointed the committee considering the draft Marine Insurance Bill when it was first introduced into the House of Lords.

- 12 Chalmers undertook three highly significant projects of codification. Chalmers' first exercise in codification, having been appointed parliamentary draftsman in 1882, was in relation to bills of exchange. In 1878 he had published his *Digest of the Law of Bills of Exchange*, the product of the study of 2500 cases and 17 statutes. The *Digest* contained numbered propositions in bill form accompanied by commentary. In 1880, he delivered a paper to the Institute of Bankers on codification of law which subsequently commissioned him to draft a bill. This bill, essentially a reproduction of the *Digest*, was introduced into Parliament and became the *Bills of Exchange Act 1882*.<sup>1</sup>
- 13 While a county court judge, Chalmers started on the codification of the law relating to the sale of goods and completed the draft, in consultation with Lord Herschell, in 1888. It was published as *The Sale of Goods* in 1890 and the next year the draft bill was introduced before the House of Lords for the purpose of review before it was introduced again in 1891. It received Royal Assent on 20 February 1894 as the *Sale of Goods Act 1893*.<sup>2</sup>
- 14 The law of marine insurance was the subject of his third project of codification, which he completed shortly before his retirement from office in 1908.

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<sup>1</sup> (UK) 45 & 46 Vict. c 61.

<sup>2</sup> (UK) 56 & 57 Vict. c 71.

- 15 In his retirement, he held a variety of positions on committees and commissions, notably for present purposes, British delegate to the Hague Conferences on the Unification of Law of Bills of Exchange in 1910 and 1912.
- 16 In addition to the *Marine Insurance Act 1906*, *Sale of Goods Act 1893*, *Bills of Exchange Act 1882*, he drafted the *Negotiable Instruments Act 1881* (India) and was involved in the drafting of the *Bankruptcy Act 1883* (UK).
- 17 He died on 22 December 1927 in London.
- 18 He was a remarkably skilled drafter. It is difficult to exaggerate his legacy to clarity, simplicity and brevity to central concepts of the English based common law.

### **Lord Herschell**

- 19 Farrer Herschell was a lawyer, politician, judge and statesman. He was educated at University College London and was called to the Bar in 1860, taking silk in 1872.
- 20 He was elected to Parliament as member for the City of Durham in 1875 and remained the sitting member for that seat until 1885. In 1880, he was appointed Solicitor-General by Prime Minister Gladstone. Between 1880 and 1885 he is reported to have been offered, but refused, appointment as Lord Justice, Master of the Rolls, and Speaker. He was Lord Chancellor in 1886 and again between 1892 and 1895.
- 21 In 1897 he was appointed British delegate to the Venezuela Boundary Tribunal to adjudicate the dispute over the boundary between British Guiana and the United States of Venezuela and subsequently sat on the joint High Commission appointed to adjudicate the Alaska boundary

dispute between Great Britain and Canada and the United States. He died in 1899 in the course of the sittings of the joint High Commission in Washington. He was regarded as one of the foremost jurists of his time, “a law reformer ... who devoted his best energies to putting right in the law whatever was wrong.”<sup>3</sup>

### **Drafting history of the Marine Insurance Act 1906 (UK)**

- 22 The Marine Insurance Bill was first introduced into the English Parliament in 1894, by the Lord Chancellor, Lord Herschell. It was considered by a committee under the presidency of the Attorney-General, Sir Robert Threshie Reid QC, and on his death, Lord Herschell. The membership of the committee comprised shipowners, average adjusters, underwriters and insurance companies. The Bill was again introduced in 1899, this time by the Lord Chancellor, Lord Halsbury, and again in 1900; but did not proceed.
- 23 A second committee was formed, comprising underwriters, shipowners and average adjusters appointed by Lord Halsbury and over which he presided. The Bill passed through the House of Lords, but was blocked in the House of Commons until 1906.
- 24 In 1906 in the Commons, the Bill was sent to Grand Committee, and after further amendments in the committee and at report stage, the Bill was returned to the House of Lords and received Royal Assent on 21 December 1906.

### **Marine Insurance Act 1906**

- 25 The *Marine Insurance Act 1906* codified the law of marine insurance. The Long Title of the 1906 Act is “An Act to Codify the Law relating to Marine

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<sup>3</sup> Lord Halsbury, Hansard, House of Lords Debates, 2 March 1899, vol 67 pp 1003-1004

Insurance”. (Cf the Long Title of the 1909 Act: “An Act relating to Marine Insurance”.)

26 The law of marine insurance had, to that time, consisted of a vast body of judicial decisions and treatises on the area. It remains untouched by statute in the United States.

27 In the introduction to the first edition of his *Digest of the Law of Marine Insurance* Chalmers wrote:

“The law of marine insurance rests almost entirely upon common law. Only a few isolated points are dealt with by statute. The reported cases are very numerous, being over 2,000 in number. On some points there is a plethora of authority. On other points of apparently equal importance the decisions are meagre, and not always satisfactory. Some important questions are still untouched by authority, and the rule depends on recognised commercial usage. Again, many of the older cases turn upon commercial conditions which are now obsolete.”

28 Chalmers’ intention in writing his digest and in drafting the Bill is disclosed in the Memorandum attached to the 1894 Bill, in which he said:

“In dealing with rules of law, which may be modified by stipulations of the parties, it is to be borne in mind that the certainty of the rule laid down is of more importance than its theoretical perfection. ... What mercantile men require is a clear rule to provide for cases where the parties have neither formed no intention or have failed to express it clearly. Where the rule is certain, the parties know when to stipulate and what to stipulate for.”

29 These ideas rest on the potency of the idea that commerce requires clarity and simplicity. They reveal a healthy scepticism of any “genius” in the organic development of unstructured principle.

### **Significant sections**

30 The *Marine Insurance Act 1909* (Cth) is short, by modern standards: 40 pages.

31 It is simple in structure. It is in nine parts:

- Part I contains the usual preliminary matters.
- Part II is the heart of the Act. It contains provisions relating to the limits of marine insurance, insurable interest, insurable value, disclosure and representations, the requirements of the policy, double insurance, warranties and the voyage.
- Part III concerns when, how and by whom the policy is assignable.
- Part IV deals with the premium.
- Part V addresses the loss or abandonment of the ship, including the issues of total constructive loss, salvage and general average.
- Part VI concerns the measure of indemnity and the rights of subrogation and contribution.
- Part VII concerns the return of the premium.
- Part VIII notes how the Act is modified in the case of mutual insurance.
- Part IX addresses supplementary matters of ratification, the ability to vary implied rights by agreement or usage, the identification of what is reasonable as a question of fact, and reference to a policy in legal proceedings.

32 There are only 95 sections, economical in their expression and tolerably easy to understand.

33 The Act is marked by care and deliberation displayed in its drafting and the clear eye for simple drafting of a commercial character. It is not merely a document for lawyers, but is accessible to commercial people.

34 Of particular significance are:

- ss 7, 8 and 9 – Limits of “marine insurance” (1906 Act, ss 1, 2 and 3)
- s 11 – Requirement of insurable interest (1906 Act, s 5);
- s 23 – Duty of utmost good faith (1906 Act, s 17);
- s 24 – Obligation of full disclosure (1906 Act, s 18);
- s 28 – Contract to be contained in a marine policy (1906 Act, s 22);
- ss 39-47 – Warranties (1906 Act, s 33-41).

35 Let me give you some examples of the language of the text. I will begin with Part II Div 1, ss 7, 8 and 9: “The Limits of Marine Insurance”. Section 7 defines a contract of marine insurance as:

“...a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.”

36 The section introduces the notion of “indemnity”, “marine losses” and the “marine adventure”. Section 9(2) gives a non-exhaustive statement of the notion of the “marine adventure”, as follows:

“In particular there is a marine adventure where:

(a) any ship, goods, or other movables are exposed to maritime perils. Such property is in this Act referred to as **insurable property**;

(b) the earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils;

(c) any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.”

- 37 Each of s 9(2)(a), (b) and (c) introduces the notion of “maritime perils”. This is then described in a simple paragraph under s 9(2) as follows:

“**Maritime perils** means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind, or which may be designated by the policy.”

- 38 Section 8 extends the reach of the Act to inland waters and land risks and to analogous circumstances as follows:

**“8 Mixed sea and land risks**

(1) A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage.

(2) Where a ship in course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a policy in the form of a marine policy, the provisions of this Act, in so far as applicable, shall apply thereto; but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined.”

- 39 The enduringly simple character of the notions expressed in, and structure of, these provisions can be seen in a modern (and fine) example of the codifier’s art, the *Maritime Code of the People’s Republic of China 1993*. It is a law which in English translation all Australian maritime lawyers should have, along with the companion legislation, the *Maritime Procedure Law 1993*. The Maritime Code was the careful and thoughtful work of Chinese maritime scholars and officials to introduce into Chinese law, in simple



language, a law reflective of accepted international standards.<sup>4</sup> Articles 216 and 218 employ some of the elemental notions in the language and structure of the 1906 Act:

**“Article 216** A contract of marine insurance is a contract whereby the insurer undertakes, as agreed, to indemnify the loss to the subject matter insured and the liability of the insured caused by perils covered by the insurance against the payment of an insurance premium by the insured.

The covered perils referred to in the preceding paragraph mean any maritime perils agreed upon between the insurer and the insured, including perils occurring in inland rivers or on land which is related to a maritime adventure.

...

**Article 218** The following items may come under the subject matter of marine insurance:

- (1) Ship;
- (2) Cargo;
- (3) Income from the operation of the ship including freight, charter hire and passenger’s fare;
- (4) Expected profit and cargo;
- (5) Crew’s wages and other remuneration;
- (6) Liabilities to a third person;
- (7) Other property which may sustain loss from a maritime peril and the liability and expenses arising therefrom.

...”

40 The status of the Act as a code has a number of consequences. A codifying Act restates the whole of the law on the relevant topic, whether common law or statutory. Lord Herschell, whose zeal for reform led to the handful of (hugely valuable) English codes of the late 19<sup>th</sup> and early 20<sup>th</sup> centuries made clear in *The Governor and Company of the Bank of England v Vagliano Brothers* [1891] AC 107 at 144-145 that the proper course is to examine in the first instance the language of the statute and to examine its natural meaning, uninfluenced by considerations derived from the previous state of the law. He said:

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<sup>4</sup> See K X Li and C W M Ingram *Maritime Law and Policy in China* (Cavendish Publishing) pp 6-8.

“I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence. I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground.”

- 41 A similar view was taken in Australia by Justices Dixon and Evatt in *Brennan v R* [1936] HCA 24; 55 CLR 253 at 263 concerning the interpretation of the Western Australian Criminal Code. These views are not, however, unanimous: see generally D C Pearce and R S Geddes *Statutory Interpretation in Australia* (6<sup>th</sup> ed Lexis Nexis 2006) at 274-275.
- 42 Nevertheless, two propositions can be accepted reasonably readily. First, there will be occasions on which the pre-existing law will need to be examined, as Lord Herschell himself recognised. Secondly, given that the aim of a code is to simplify the past into digested language it hardly seems sensible, in order to understand that digest, to ignore its terms and proceed first to recreate the codifier’s work of producing the terms of the status quo ante.

- 43 One recent and topical example of the problem is the treatment of ss 18 and 20 of the UK Act (ss 24 and 26 of the Australian Act) dealing with non-disclosure and misrepresentation. Sections 18(1) and (2) and 20(1) and (2) (ss 24(1) and (2) and 26(1) and (2) of the Australian Act) are in the following terms:

**“24 Disclosure by assured**

(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him or her. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he or she will take the risk.

...

**26 Representations pending negotiation of contract**

(1) Every material representation made by the assured or his or her agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he or she will take the risk.”

- 44 For many years the elements of these provisions dominated the law of insurance for all risks, with the exception that the deeming provision in s 24(1) tended to be limited to marine insurance. The materiality of the fact or circumstance was judged by the standard of the prudent insurer – a mythical and hypothetical creature who took the anthropomorphic form of a kindly expert witness, who, often more in sorrow than in anger, expressed his view of the relevance of the circumstance to the judgment of this curious creature of both fable and statute. If the circumstance was material to this hypothetical creature, the real underwriter (who may have been less than prudent and who made have had a ravenous appetite for premium income) could be kept a safe distance from the witness box and

his documents could be shielded from disclosure as irrelevant to the issues.

- 45 The debate, in particular enlivened by the decision of the English Court of Appeal in *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476, was substantially about the degree of influence that the circumstance would have had on the decision of the prudent underwriter. Was it necessary to demonstrate that the decision would be affected in terms of price or acceptance of the risk or terms, or was it only necessary for the circumstances to be relevant for consideration – something the prudent underwriter would want to take into account? One of the difficulties with the decisive influence test was the position of the prudent underwriter as a hypothetical person, who did not in fact make the underwriting decision in question.
- 46 In 1995, in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501, the House of Lords, in an important judgment, brought a degree of fairness back into misrepresentation and non-disclosure, principally by reaching back to understand the context in which the Act was passed. Sections 18(1) and 20(1) (ss 24(1) and 26(1)) seem simple. Yet they were given an important (and very sensible) gloss. A majority of the House rejected the decisive influence test for materiality: Lord Goff of Chieveley at 517, Lord Mustill at 530-531, 532, 541 and 550 and Lord Slynn of Hadley at 551-552. Nevertheless, their Lordships required that before an underwriter could avoid the policy for non-disclosure or misrepresentation he not only was required to prove the materiality of the circumstances (through his imaginary friend the prudent underwriter) but also was required to show that he had actually been induced by the non-disclosure or representation to enter into the policy on the relevant terms (and thus brave the witness box and make his underwriting documents and practices subject to discovery). Lord Mustill, in a towering speech, examined the 19<sup>th</sup> century law of insurance and later authorities to conclude (at 549-550) that it was to be implied into the Act that material

misrepresentation or non-disclosure must induce the contract of insurance in the sense that the word “induce” is used in the general law of contract. Lord Goff and Lord Slynn agreed with Lord Mustill.

### **The SG Policy**

- 47 The Act requires the contract of marine insurance to be embodied in a marine policy in accordance with the Act: s 28 (in the Australian Act). A contract of marine insurance which was not embodied in a marine policy is inadmissible in evidence.
- 48 Section 36 (in the Australian Act) provides that a policy may be in the form in a schedule to the Act – the SG Policy.
- 49 The SG Policy, also known as Lloyd’s standard marine policy or English marine policy and standing for “Ships and Goods” Policy, was the standard form policy for marine insurance in England and insurance markets throughout the world issued for insurance on the ship, as well as goods and freight.
- 50 The policy is an old document. It has been traced back to at least 1613. The form preserves the archaic language of that time. In *Marten v Vestey Brothers Limited* [1920] AC 307 Lord Dunedin said of the history of the policy (at 314-315):<sup>5</sup>

“... The form known as ‘Lloyd's Policy’ is a very ancient document. It undoubtedly owed its original form to the time now long past when the ordinary state of affairs was that the shipowner and the merchant were one and the same person. Like Antonio in the *Merchant of Venice*, he sent out his argosy laden with his own goods to be disposed of in foreign lands and to bring back foreign goods in exchange.

The oldest policy known in England is of date 1613, a copy of it being preserved in the Bodleian Library at Oxford, and differs little from the policy of the present day; but the actual printed form of

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<sup>5</sup> See also Kerr LJ in *Shell International Petroleum Co Ltd v Gibbs* [1982] 1 QB 946.

policy which we now have was arranged in 1779 at a general meeting of members of Lloyd's, who undertook to establish a particular form of marine insurance policy and not to allow any alterations in that policy. With the exception of the introduction in 1874 of what is known as the 'Waiver Clause' and the alteration in 1850 of the phrase at the commencement of the policy 'In the name of God Amen' to 'Be it known that' the printed policy at present is the policy of 1779."

51 It can be seen to be an early standard form contract, no doubt playing its own part in market stability and certainty in the way described by Lord Diplock in *The 'Maratha Envoy'* [1978] AC 1 at 7-8.

52 The policy contains some lovely curiosities of language. Consider for example the statement of the perils insured:

"Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage: they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or any part thereof."

53 Donald O'May, late Senior Partner at Ince & Co, in his text *Marine Insurance: Law and Policy* (Sweet & Maxwell 1993) noted its poetry and he "rendered into verse form the sonorous cadences" of the policy:

"Touching the Adventures and Perils  
They are of the seas  
Men of war, fire, enemies,  
Pirates, rovers, thieves,  
Jettisons, letters of mart  
And countermart  
Surprisals, takings at sea,  
Arrests, restraints and detainments  
Of all Kings, princes and people,  
Of what nation, condition or quality  
soever ..."

54 In *Shell International Petroleum Co Ltd v Gibbs* [1982] 1 QB 946 Kerr LJ said of the interpretation of the policy:

“As it has been said many times in many authorities, in construing the various archaic expressions which are still to be found in this form of policy, one cannot go by their ordinary meaning in our language today, but one must treat them as terms of art and interpret them in accordance with their original meaning. There are also other quirks in the S.G. form of policy, and in the additions which have been superimposed upon it piecemeal, which defy any ordinary approach to construction.”

### ***Barratry and takings at sea***

- 55 Some of you will remember the sanctions against apartheid South Africa. Much money was to be made “busting” sanctions. It gave rise to the case of *Shell International Petroleum Co Ltd v Gibbs* heard by some of the then stars of the English commercial and maritime judiciary (Mustill J, Lord Denning MR, Kerr LJ and May LJ).
- 56 Conspirators planned and executed a fraud against Shell and a charterer (Pontoil) and busted the oil sanctions. The conspirators purchased and crewed the tanker *Salem* which they chartered to an innocent charterer for a laden voyage from Kuwait to Europe. The charterer purchased 200,000 tons of oil from innocent Kuwaiti shippers who loaded 195,000 tons at Mina al Ahmadi. The master (one of the conspirators) issued bills of lading for the voyage to Italy. The charterer declared the cargo under an open cover written by a Lloyds Syndicate. Risks were SG policy with Institute Cargo Clauses, with Institute Strikes, Risks and Civil Commotion Clauses.
- 57 The ship left Mina al Ahmadi and instead of heading around the Cape turned off to Durban where 1½ miles off-shore she made fast to a mooring and pumped 180,000 tons of oil to tank farms on-shore through sub-sea hoses. \$32 million was paid into Swiss bank accounts and \$12 million to the sellers of the ship to the conspirators, by South African importers. Meanwhile, the charterer had sold the cargo cif to Shell. After the ship left Durban, two weeks later she was scuttled off Senegal with her remaining 15,000 tons of oil (the oil being left in the hold no doubt for verisimilitude in

the scuttling). These prosaically expressed facts were expressed in the linguistic skill of Lord Denning as follows:

“A gigantic ship was used for a gigantic fraud. She was the *Salem*, a super-tanker. It was in December 1979. She loaded 195,000 tons of crude oil in the Arabian Gulf for carriage from Kuwait to Italy. Going down the east coast of Africa, she suffered a sea-change. She changed her name from *Salem* to *Lema*. Done by painting out ‘Sa’ and adding ‘a.’ Then instead of going straight down to the Cape she turned off to Durban. She made fast to a single buoy mooring one and a half miles offshore. She pumped most of the oil through hoses into the tank farms ashore. She pumped ashore 180,000 tons, leaving only 15,000 tons in the ship. The South African importers paid for the oil through their banks. It came to over U.S. \$50 million. Most of this money was paid at once into numbered accounts in Switzerland where no one could get at it. That payment was done by telex in a few minutes. The *Salem* then took in sea-water to take the place of the oil. She set off again on her voyage round the Cape - looking to all the world as if she still had her full cargo of oil. She sailed northward until she was off Dakar and Senegal. Then in a calm sea there was a series of explosions on board. She was in danger of sinking. Not far off there was a British tanker, the *British Trident*. She put out her lifeboats and picked up the crew. The *Salem* went to the bottom. The captain of the *British Trident* took a film of the sinking. It came in useful afterwards to find out why she sank. A little oil slick was seen on the water. Only 15,000 tons. The rest was all sea-water.

She had been scuttled. Those aboard, of course, denied it. The *Salem* had sunk, they said, because of the explosions.

The captain and chief officer were Greek. There was a Tunisian crew of 22. There was a preliminary inquiry in Senegal. The captain produced his credentials. It was a Liberian master's certificate. But it was forged. He and the chief officer were extradited to Liberia. The Tunisian crew were paid substantial ‘hush money’ and went back to Tunisia. Not long afterwards there was a change of government in Liberia. The master and chief officer were set free. The Liberian government apologised for their ‘illegal detention.’ They went back to Greece where proceedings have been instituted, but not completed. Will they ever be?

Behind this gigantic fraud there were of course gigantic swindlers. The captain and chief officer were only the tools in their hands to do the dirty work. The wicked minds behind it were those of a group of cosmopolitan crooks. They have never been caught. They are still at large. They seized their opportunity when in 1979 the Arab countries put an embargo on oil supplies to South Africa. So South African importers were keen to get supplies. So the crooks made a plot to get oil from Kuwait on the pretence that it was to go to Italy. Then to divert it to Durban and sell it to the South Africans there. It was all to be done in the name of limited



companies. No crook ever operates in his own name. Every country in the world recognises the corporate personality of every company registered in every other country of the world. The crooks use these companies as puppets with which to mount their frauds and to escape being discovered.

The first step done by the crooks was to form or take over a company in the U.S.A. They gave it a high-sounding name as if it was a big oil company. It was American Polamax International Inc. with an address in Houston, Texas, U.S.A. The second step was to form or take over a Swiss company under the name of Beets Trading A.G. with an address in Zug, Switzerland. Using that name the crooks went to South Africa and approached a governmental concern, South African Strategic Fuel Fund Association ('S.F.F.'). The crooks told this concern that they could supply them with oil. So persuasive were they that the South African concern entered into a purchase contract to buy from Beets Trading A.G. 190,000 tons of crude oil to be delivered to Durban, payment to be by letter of credit in favour of American Polamax. The price would be about U.S. \$50 million.

The third step done by the crooks was to form or take over a Liberian company called Oxford Shipping Co. Inc. It had never traded. They took its name 'off the shelf.' Brandishing that name they agreed to buy a vessel called the *South Sun*, a super-tanker of 200,000 tons deadweight. It was owned by a Liberian company called Pimmerton Shipping Ltd. The crooks, in the name of the Oxford Shipping Co. Inc., agreed to buy it for U.S. \$12.3 million payable by letter of credit on completion of the sale.

The crooks had no money with which to pay for the vessel, but they persuaded the South African concern (who were buying the oil) to pay U.S. \$12.3 million in advance - on account of the U.S. \$50 million they would have to pay for the oil when it arrived at Durban. So gullible were the South African concern that they got their bank to issue an irrevocable letter of credit for U.S. \$12.3 million in favour of the sellers of the *South Sun*. With this credit the crooks, as the Oxford Shipping Co. Inc., bought the *South Sun* and changed her name to the *Salem*- not having paid a penny for her themselves.

The fourth step was to let the vessel out on charter. Using the name of the Oxford Shipping Co. Inc. the crooks offered her on the London market as available to carry a cargo of oil from the Arabian Gulf to Europe. This offer was taken up by a very respectable company, Pontoil S.A. of Lausanne. It had nothing to do with the crooks and was absolutely innocent of any wrongdoing. Pontoil had already made a contract with the very respectable Kuwait Oil Co. to buy about 200,000 tons of oil f.o.b. Kuwait. The Kuwait Oil Co. also had nothing to do with the crooks and were innocent of any wrongdoing. In order to carry out this contract of purchase, Pontoil chartered the *Salem* for a voyage from Kuwait to Europe. She was to go to Kuwait, load the 200,000 tons of oil and proceed via the Cape to Europe. The freight was to be paid to Swiss banks in favour of a company called Shipomex S.A. in Switzerland. That

company was in the fraud. It had recently been formed by the crooks in Liberia but with an accommodation address in Zurich.

Pontoil, in complete innocence and entire ignorance of the fraud, as charterers, directed the *Salem* to Kuwait. When she arrived there, the crooks (in the name of the Oxford Shipping Co. Inc., the owners of the *Salem*) put on board a new crew. They were Greek officers and Tunisian crewmen. They were the crooks' men. They were parties to the conspiracy.

The Kuwait Oil Co., in complete innocence and entire ignorance of the fraud, loaded 195,000 tons of oil on to the *Salem*. Pontoil paid for it. They believed it was to be carried to Italy. The crooked master issued bills of lading for 195,000 tons of oil to be delivered to Italy to the order of Pontoil S.A., Lausanne. The *Salem* left Kuwait apparently bound for Italy - going straight down the east coast of Africa, round the Cape and up the west coast through the Straits of Gibraltar to Italy. Soon after she left, Pontoil, quite innocently, sold the cargo to the plaintiffs, Shell, on c.i.f. terms. So Shell, quite innocently, became then the owners of the oil.

I have already described what happened to the vessel. But I would add that at Durban the South African concern, through its bankers, paid the purchase price of the oil. In this way U.S. \$12.3 million went to pay the sum due for the *Salem*. U.S. \$32 million went to Beets Trading A.G. It was remitted to Switzerland immediately and distributed among the crooks via numbered accounts which cannot be traced. Their plan had succeeded. They had the money for the oil. They did not mind losing the ship. She was scuttled in order to avoid detection.

The losers were Shell. They had paid in full for 195,000 tons of crude oil and had got none of it. They went to South Africa and tried to trace the receivers of the oil. They managed to get quite a lot of money out of them. But they were still a great deal out of pocket. So they claimed on the insurers. That is what this case is about.”

58 Mustill J found no loss by barratry, but there was, he found, a taking at sea when *Salem* deviated to approach Durban.

59 The appeal was upheld.

60 All the judgments are a joy to read.

61 “Barratry” was discussed. This is the fraud or trickery of master or crew against the interests of the shipowner, not, as here, involving the shipowner.

62 It was argued, however, that the necessary shipowner interest for barratry could include a charterer. This raised the question whether this extended notion of barratry and shipowner interest required a demise or bareboat charter. Here the charter was a single voyage charter. The argument of Shell required the application of the 18<sup>th</sup> century law of charterparties as it was at the time of the development of the law of barratry. One finds in Mustill J's reasons (at 961) an interesting discussion of the less than straightforward law of charterparties before the greater regularity of steam shipping and the modern commercial reliance on standard forms. With longer voyages of more unpredictable duration, even if a ship was not owned or demise chartered, a charterer in the 17<sup>th</sup> or 18<sup>th</sup> century might have responsibility to equip or man or supply the vessel and have a close degree of control over the voyage and the master and crew. This was a charter intermediate between an ordinary voyage contract of carriage and a bareboat charter – the contract (different in conception from the modern time charter) for letting of ship with master and crew on board. Mustill J found that the words of the policy must be given their old meaning, but applied to modern day facts. Thus, barratry, must be committed against the owners, including owners pro hac vice. No longer do charterers, other than demise charterers, exercise direct control over the master and crew. The argument therefore failed. Mustill J said at 964:

“When construing an agreement in order to ascertain the intention of the parties, the court must have regard not simply to the words used but to the commercial purpose which the contract was designed to fulfil, and there is nothing in the doctrine of stare decisis which requires a court to hold that because a particular effect was held a century or more ago, to follow from the use of a particular form of contract, the same effect must inevitably follow today. Circumstances alter cases, and it seems to me impossible to say that in the very different conditions of modern commerce it would ever occur to the participants in an ordinary time or voyage charter that the owner thereby transferred possession and direct control of the ship to the charterer, or that the contract called into existence the relationship of master and servant between the charterer and the crew.”

63 In relation to “takings at sea” Kerr LJ said at 990 and 990-991:

“... I think, clear that the historical interpretation of ‘takings at sea’ in all the textbooks, and sub silentio in the decisions, was to the effect that it is a peril similar to capture, seizure, etc., in fact, this peril had found its way into the ancient S.G. policy together with ‘surprisals’ by the middle of the 17th century. As it has been said many times in many authorities, in construing the various archaic expressions which are still to be found in this form of policy, one cannot go by their ordinary meaning in our language today, but one must treat them as terms of art and interpret them in accordance with their original meaning. There are also other quirks in the S.G. form of policy, and in the additions which have been superimposed upon it piecemeal, which defy any ordinary approach to construction.”

...

... the policy was never intended to insure any of the three possible parties to the marine adventure, i.e., ship, cargo and freight, against wrongful action by any of them against any other party to the adventure, but only against action by outsiders to the prejudice of the parties’ common interest in the adventure. Thus, the cover against ‘thieves’ can only apply to what have become known as ‘assailing thieves’; this was recognised by the plaintiffs in the present case when they accepted that they could not rely on this cover, which would otherwise have precluded any answer to their claim, since this cargo of oil was clearly stolen by the shipowners.

...

For the same reasons ‘barratry’ can only include acts on the part of the master and crew, who are treated as being distinct from the shipowners, and it ceases to be barratry if the shipowners are privy to such acts.”

### ***Letters of Mart and Countermart***

- 64 “Letters of mart<sup>6</sup> and countermart” (or “letters of marque and countermarque”) were licences granted by a sovereign to subjects authorising them to make reprisals on the subjects of a hostile state for

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<sup>6</sup> “Mart” is an alteration of “marque” (also mark, marc, markque, merk and marke), a noun of French origin used in the phrase “lettre de marque”: Oxford English Dictionary at p 1732. The Oxford English Dictionary includes in the usages of “mart”: Warner (1603) “With letters then of credence for himselfe, and marte for them, He puts to sea for England”; and Harington (1612) “You’le spoile the Spaniards, by your writ of Mart”; and “marque”: Act 27 Edw III Stat 2 c 17 (1354): “Purveu...que...nous eions la lei de Mark & de represailles”; Act 4 Hen V Stat 2 c 7 (1417) “Que de toutz attemptatz faitz par ses ennemys ...encounter le tenure daucunes Trieuves ... en les quelles nest pas fail expresse mencion que toutz marques & reprisailles cesseront ... nostre Signior le Roi a toutz qi lour sentiront en tiel eas grevez, voet grauntier marque en due forme; Rolls of Parliament (1447) “To graunte to youre saide Besechers, letters of Marc and Reprisail”; Royal Declaration (1702): “Her Majesty having Impowered the Lord High Admiral of England to grant Letters of Marque or Commissions for Privateers”.

injuries done by the enemy's acts.<sup>7</sup> Such privateers, sailing under a national flag, did not fall within the concept of "pirate". The Congress of Paris in 1856 abolished the practice of privateering and the issue of letters of marque and countermarque. The term is widely considered to be co-extensive with reprisals or "surprisals" as termed in the policy.<sup>8</sup> While remaining a listed peril in the policy, the term is no longer of any significance<sup>9</sup> and meaningless in popular speech.<sup>10</sup>

### **Rovers**

65 A "rover" was a noun of Dutch origin<sup>11</sup> referring to one who practiced robbery on the seas.<sup>12</sup>

66 The peril of "piracy" and the scope of the term was most fully explored by Staughton J in *Athens Maritime Enterprises Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd (The "Andreas Lemos")* [1983] QB 647. Turning to consider the related concepts of "rovers" and "thieves", Staughton J commented:

"The relevant perils in the standard form of marine policy are 'pirates, rovers, thieves.' I am by no means clear as to what are rovers, and no attention was directed to them in argument. So I consider only pirates and thieves."

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<sup>7</sup> "Marque" Oxford English Dictionary p 1730

<sup>8</sup> S S Huebner, *Marine Insurance* 60.

<sup>9</sup> Although it remains in Article 1 section 8 of the *Constitution of the United States*, which provides: "The Congress shall have Power ... To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water".

<sup>10</sup> *Athens Maritime Enterprises Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd (The "Andreas Lemos")* [1983] QB 647 at 661 (Staughton J).

<sup>11</sup> A form of "roven", meaning to rob.

<sup>12</sup> The Oxford English Dictionary includes in the usages of "rover": Fortescue (c 1460) "It shalbe nescessarie that the kynges haue always some ffloute apou the see, ffor the repressynge off rovers"; Hall (1548) "The kynges subiectes...were greuouly spoyled and robbed on the sea, by Frenchemen, Scottes and other rouers"; Fleming (1576) "You are in peril of Pyrates and Rouers to spoyle you"; Webbe (1590) "I went againe into Russia ... in which our voyage we met with Rovers or men of war, whom we set upon, and burnt their Admirall"; Cogan (1653) "This Rover, believing that we were Chineses, came and assailed us with two great Juncks".

He continued, addressing the submission that he should employ the current and ordinary meaning of the words in interpreting the policy, somewhat amusingly (at 661):

“That approach attracts considerable sympathy, at any rate from me, and at any rate in theory. But on further examination it cannot be adopted for an English policy of marine insurance. Take, for example, the word ‘rovers.’ Its only current and popular meaning is, I suppose, a species of motor car, such as Fords or Vauxhalls.”

### **Criticisms of the policy**

- 67 The form has been criticised for at least 200 years.<sup>13</sup> In *Forestal Land Timber and Railways Co Ltd v Rickard* [1941] 1 KB 225 MacKinnon LJ said (at 246-247):

"The truth is that this law of marine insurance is nothing more than a collection of rules for the construction of the ancient form of policy and such additions as are from time to time annexed to it. The ancient form dates back at least to the sixteenthth century, and it is a document which the late Sir Frederick Pollock characterised, with justifiable asperity, as 'clumsy, imperfect, and obscure.' Many of the imperfections had to be resolved by Lord Mansfield, with the assistance of his famous special jurymen."

- 68 In *Shell International Petroleum Co Ltd v Gibbs* [1982] 1 QB 946 May LJ said (at 998-999):

"I fully appreciate the arguments on the construction of the policy which are based upon the history of its growth and the fact that its terminology has to be applied and indeed is used worldwide. I accept that in consequence at least the majority of the descriptions of the relevant perils in the policy have become terms of art. I do not think, however, that this contributes to the desirable quality of certainty which should exist in the written expression of a commercial transaction. I think that it tends to have the opposite effect. For the same reason I deprecate the mystique which the subject of marine insurance has acquired.

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<sup>13</sup> See for e.g. *Brough v Whitmore* (1791) 4 Term Rep 206 at 210 (Buller J).

In recent years there has been a welcome tendency to redraft many policies of insurance to provide greater simplicity and certainty. It is an approach to be encouraged in respect of policies issued by both Lloyd's and other insurers. We were told that there have been international discussions extending over a number of years seeking to achieve just this in relation to the Lloyd's S.G. policy and its association clauses. For my part, I hope that these are brought speedily to a satisfactory conclusion.”

69 As is well-known, the content of the SG policy was commonly altered by the attachment of additional clauses, most notably the standardised “Institute Clauses” developed by the Institute of London Underwriters.

70 In 1982 the United Nations Conference on Trade and Development released a report *Legal and Documentary Aspects of the Marine Insurance Contract*.<sup>14</sup> This report was critical of the outmoded form of policy and of London’s dominance of the market. London responded. A simplified Lloyd’s Form of Marine Policy was promulgated (the MAR policy) which was apt to take relevant standard form Institute terms as attachments, depending on the business and the risks: cargo, hull, freight, war etc. The Institute of London Underwriters has evolved into the International Underwriting Association.

71 However there was some feeling of sentimentalism at the replacement of the SG Policy with the new Institute Clauses. As put by O’May:

“It was, however, with pangs of regret that many practitioners saluted the passing of the traditional wording of the SG Policy. It had stood the test of time for more than two hundred years. Notwithstanding the onslaught of critical comment from judges, it had that inestimable attribute: ‘It worked.’”

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<sup>14</sup> TD/B/C 4/ISL/27/Rev 1

## Warranties

- 72 The Act contains one of the most powerful contractual weapons in the common law – the (marine insurance) warranty. The marine warranty is defined by s 39(3) (s 33(3) of the UK Act) as:

“... a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him or her before that date.”

- 73 The House of Lords in the *The “Good Luck”* [1992] 1 AC 233 refused to construe this as a condition – that is giving the insurer an entitlement to terminate. Rather the breach of warranty discharged the insurer immediately. Thus, the cause of the loss is de-coupled from the breach of warranty. The policy has ceased to attach at the time of loss. This operative effect or consequence of a true warranty must always be understood.

## Marine insurance cases in Australia

- 74 The High Court has dealt with only a handful of cases on the Act. In 1914 in *Campbell v Yorkshire Insurance Company Limited* [1914] HCA 65; 19 CLR 166 the High Court found a statement in a proposal about the pedigree of a horse not a warranty for a policy covering the carriage by sea of a racehorse from Sydney to Perth. The Privy Council disagreed and overturned the decision: [1916] UKPCHCA 4; 22 CLR 315.
- 75 In *Skandia Insurance Company Limited v Skoljarev* [1979] HCA 45; 142 CLR 375, the High Court, through Mason J, provided a valuable and lasting discussion of loss by perils of the sea, unseaworthiness, burden of proof and presumptions. If I may say so, the judgment of Mason J is a fine example of a masterly work recognising the international character of this question without self-conscious flourish.



76 It was a marine insurance dispute about the position of the broker that led to the case of *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Limited* [1986] HCA 14; 160 CLR 226 dealing with the position of the marine broker and the implication of terms by custom and usage.

77 In *Gibbs v Mercantile Mutual Insurance (Australia) Ltd* [2003] HCA 39; 214 CLR 604, the Court had the opportunity to deal with the nature of marine insurance. The case is a disappointing one for a number of reasons. First, only five justices sat, notwithstanding the critically important question for marine insurance – its scope and nature. Secondly, there was a lack of uniformity in approach in four judgments: Gleeson CJ, McHugh J, Kirby J and Hayne and Callinan JJ, thereby undermining the lasting value of the decision.

78 The case illuminated the place of the “sea” in the Anglo-Australian statutory concept of marine insurance. All the judgments examined this question up to a point, some more so than others. What went only lightly remarked upon was the broader international maritime concept of marine insurance. The various judgments only touch upon what might be thought to be a basal underlying conceptual proposition that marine insurance, as part of Admiralty and maritime jurisdiction: *De Lovio v Boit* 7 F Cas 418 (1815), has a deep international (and not just English) history. The Act may be taken from the UK Act, but the UK Act is based upon fundamental maritime conceptions. As the French scholar Emerigon said in 1783:

“Marine Insurance is a law not peculiar to one, but common to all commercial nations. Whence is it derived but from natural reason, existing in all men, and reaching the same results in all countries alike.”

79 The text of the Act may in fact confine marine insurance to geographic or jurisdictional limits not informed by these wider considerations: see the references to “the sea” and “inland waters” in ss 8 and 9. Gleeson CJ

agreed with the conclusion of the Full Court that the estuarine waters of “the Narrows” on the Swan River that were subject to ebb and flow of the tide were to be regarded as the sea. McHugh J and Kirby J (in dissent) disagreed with this view that an estuary was the sea. Hayne and Callinan JJ (forming the majority with Gleeson CJ) rejected this identification of the estuary with the sea as the critical consideration. They focussed on the nature of the risks insured against and their maritime character, which risks could have occurred on the sea. Though Kelly and Ball<sup>15</sup> describe this view of Hayne and Callinan JJ that the phrase “perils of the sea” has no necessary connection with the location of the risk (the sea) as a “remarkable proposition”, it does decouple the Act from limited historical links with the geographic and physical restrictions on Admiralty jurisdiction in England (the sea and the ebb and flow of the tide) and link it to the essential maritime notions in the phrase “maritime perils”.

- 80 Intermediate appellate decisions of importance are few also. First among them is the judgment of Handley JA in *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd* (1991) 25 NSWLR 699. There Handley JA dealt, in a concise and commanding way, with the passing of property and risk in FOB contracts, the relationship of passing of risk and property to loading, insurable interest and lost or not lost clauses. It is, if I may say so, a classic example of his Honour’s work, revealing both his learning and his writing skill.
- 81 In *Franke v CIC Generale Insurance Ltd (The “Coral”)* (1994) 33 NSWLR 373 Gleeson CJ and Sheller JA both delivered valuable judgments on the ascertainment of value in marine insurance.
- 82 In *Switzerland Insurance Australia Limited v Mowie Fisheries Pty Ltd* (1997) 74 FCR 205, a divided Full Court of the Federal Court revealed the difficulties and potential hardship in the application of the notion of warranty.

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<sup>15</sup> *Principles of Insurance Law* (2<sup>nd</sup> Ed, Butterworths, 2001 at) [15.0015].

83 In *HIH Casualty & General Insurance Ltd v Waterwell Shipping Inc* (1998) 43 NSWLR 601 Sheller JA delivered an important judgment on proximate cause in marine (and general) insurance. His judgment is important in the rejection of the idea that there can only ever be one proximate cause in insurance law.

### **Recent reform considerations**

84 The reform of marine insurance was considered by the Comité Maritime Internationale (CMI) at successive conferences between 1998 and 2004. In 2001 the International Working Group on Marine Insurance (IWG) produced a Discussion Paper on Marine Insurance. The Discussion Paper evaluated the national regimes of marine insurance of member countries and considered whether to continue the inquiry to produce a model law, international convention, or set of CMI Rules relating to marine insurance. The working group produced valuable comparative material up to that time.

85 In January 2000 the Commonwealth Attorney-General referred to the Australia Law Reform Commission an inquiry into the review of the *Marine Insurance Act*. The Terms of Reference included:

“(b) the desirability of having a regime consistent with international practice in the marine insurance industry, noting in particular that the Act is based very closely on the Marine Insurance Act 1906 (UK) and whether any change to the Act might result in a competitive disadvantage for the Australian insurance industry.”

86 In April 2001 the ALRC produced its valuable report, ALRC 91 *Review of the Marine Insurance Act 1909 (Cth)*. The reforms to the Act have not been implemented. This is not the occasion to undertake a detailed consideration of the reform proposals of the ALRC. Nevertheless, the ALRC’s suggestions for the removal of non-commercial consumer insurance to the *Insurance Contracts Act* made some obvious good sense.

That has occurred with respect to pleasurecraft.<sup>16</sup> Otherwise, there is much to be said for retaining a structural coherence with the main markets for reinsurance. International attempts at reform and consistency have been attempted, without thunderous acclaim. The work of the CMI was invaluable. Non-consumer based reform should be predicated upon the recognition of marine insurance as an international commercial concept, not one circumscribed or influenced by the idiosyncrasies of geographic coverage of English Admiralty jurisdiction. If to be the subject of fresh Australian legislation, marine insurance should be controlled by international norms rather than parochial ideas of control of insurance or national considerations of drafting. A truly international approach most appropriately reflects Australia's modern place as a great trading nation.

- 87 Whilst the Act has served the commercial community for a century, one wonders whether the marine insurance markets would not be better served by a more up to date and comprehensively adopted contemporary model.
- 88 Nevertheless, though the SG policy may now have passed into history, the structure of the law is still governed by the text of Chalmers in the Act.
- 89 Whilst there no doubt can be a powerful case for some degree of reform and international coherence, I challenge the modern drafter to be as economical and enduringly precise as Mackenzie Chalmers.

**Sydney**  
**11 November 2009**

**Justice James Allsop**  
**Michael Wells**

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<sup>16</sup> *Insurance Contracts Act 1984* (Cth), s 9A

## **7<sup>th</sup> Annual University of South Australia**

### **Trade Practices Workshop**

**17 October 2009**

### **The Judicial Disposition of Competition Cases**

**Justice James Allsop\***

- 1 After I had moved to the New South Wales Court of Appeal, Professor Round asked me to comment on the jurisprudence of the Federal Court in competition cases in the last decade or so. I thought that to comply with this request might be impolitic. It did put me in mind, however, of speaking on a topic in respect of which I have had an interest for some time, and continue to have an interest. It is a topic central to the administration of civil justice in this country, not just competition cases. I will, however, focus my remarks upon that latter topic since that is the common interest that brings us to Adelaide.
  
- 2 The topic is how the courts deal, in the exercise of judicial power, with factual material of a specialised or expert nature. In the present context, it is the expert material presented in competition cases.

#### **The nature of judicial and non-judicial power**

- 3 One needs to begin by recognising the basic constitutional architecture in Australia in which judges, here federal judges, work. The importance of this is in considering procedural reform is often lost on commentators. The Federal Court is not the Competition Tribunal. The fundamental

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\* President, New South Wales Court of Appeal

differences in their institutional and governmental character must be appreciated before one discusses procedural change.

- 4 Chapter III of the Australian Constitution provides for a basal distinction between judicial and non-judicial power. This is both elementary and elemental.
- 5 Only judges and courts can exercise federal judicial power. Those judges and courts may belong to the Commonwealth polity, State polities or Territory polities. The Australian Constitution, unlike the United States Constitution, provides for Commonwealth judicial power being exercised (at the choice or will of the Commonwealth Parliament) by State courts. From the earliest days of Federation this has been done<sup>1</sup>. One consequence of the use of this mechanism is that the Commonwealth Parliament must take the State courts as it finds them. One consequence of this is that acting or part-time judges sitting as Supreme Court judges can hear cases in federal jurisdiction<sup>2</sup>.
- 6 On the other hand, federal judges under s 72 of the Constitution, cannot be part-time or acting<sup>3</sup>.
- 7 Thus, in a Commonwealth or federal court, judicial power must be exercised by a judge. There is now an exception to this by the recognition that Registrars may do so, but only in circumstances of the effective supervision by review by a judge<sup>4</sup>.

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<sup>1</sup> *Judiciary Act 1903* (Cth), s 39 (2).

<sup>2</sup> *Forge v ASIC* (2006) 228 CLR 45.

<sup>3</sup> *WWF v TW Alexander Ltd* (1918) 25 CLR 434.

<sup>4</sup> *Harris v Caladine* (1991) HCA 172 CLR 84.

- 8 For present and practical purposes, this means that in the federal judiciary only judges can decide competition cases, to the extent that they are required by law, or chosen by Parliament, to be heard in the exercise of judicial power.
- 9 The fact is, of course, the very same question can often be decided judicially (by a court) or non-judicially (by a tribunal). For example, many questions under the *Trade Practices Act 1974* (Cth) may be dealt with by the Competition Tribunal: for example, s 50<sup>5</sup>. In other fields, such as taxation and intellectual property, virtually the same question can be committed for apparent resolution to a court or to an administrative decision-maker.
- 10 What is this “judicial power” then? Is it a trick? If the Tribunal can deal with the same issues, what is the difference and what is happening?
- 11 Commonwealth judicial power (in the present context, exercised by the Federal Court) derives from Ch III of the Constitution. Commonwealth executive power (in the present context, exercised by the Competition Tribunal) derives from Ch II of the Constitution.
- 12 Executive power and judicial power, as species of power, can both affect the individual or the group. It is important to understand the nature of the each, because non-judicial power (other than such power ancillary or incidental to the exercise of judicial power) cannot be conferred on a federal court or a State court exercising federal jurisdiction; and judicial power cannot be conferred on a body which is not a court (federal or State) within the meaning of s 71 of the Constitution.
- 13 Section 61 (in Ch II of the Constitution) provides as follows:  
The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's

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<sup>5</sup> See *AGL v ACCC* [2003] FCA 1525; 137 FCR 317.

representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

- 14 Executive power can simply be seen as power, other than legislative and judicial power, conferred by law<sup>6</sup>. This tripartite division of governmental authority (legislative, executive and judicial) is one upon which, in important respects, the Australian Constitution and system of government is founded<sup>7</sup>.
- 15 Executive power derives from the Constitution, from statute, and from the prerogative of the Crown. The executive power relevant for present purposes is the power exercised by officers of the Commonwealth who are authorised by Commonwealth legislation, in this context, the *Trade Practices Act*, to make decisions under that Act in the Tribunal.
- 16 Judicial power is a concept not easily defined. Indeed, cases of the highest authority warn against attempts at exhaustive definition.<sup>8</sup> No single simple encapsulation is possible. Central to the notion, however, is the adjudication and **conclusive** settlement of controversies or disputes between parties as to their rights and duties under law.<sup>9</sup>
- 17 The notion of “controversy” is central<sup>10</sup>. Courts do not advise Parliament or the executive. They resolve argued controversies. Yet, this is not the

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<sup>6</sup> See Renfree *The Executive Power of the Commonwealth of Australia* (Legal Books, 1984). As to the lack of an accepted definition, see *Davis v The Commonwealth* (1988) 166 CLR 79, 92-3 and 107 and M Sunkin and S Payne *The Nature of the Crown: A Legal and Political Analysis* (Oxford 1999) pp 78-87.

<sup>7</sup> *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Limited* (1970) 123 CLR 361, 389-97 per Windeyer J.

<sup>8</sup> See *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 391 per Windeyer J.

<sup>9</sup> Griffiths CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*<sup>9</sup>:

[T]hat the words “judicial power” as used in sec. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

<sup>10</sup> *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.



determinant of judicial power. Administrators sometimes deal with controversies, as is well illustrated by the kinds of application decided by the Tribunal.

- 18 The notion of rights is central. This means existing rights<sup>11</sup>. Again, this is not the determinant of judicial power. Administrators sometimes deal with people's rights.
- 19 The notion of binding and authoritative refers to conclusiveness, even if subject to appeal. It means not open to collateral review<sup>12</sup>. This is closer to a determining factor. Administrators generally do not decide matters in a way that is not open to collateral attack, especially if a method of compulsory enforcement is given to the decision.
- 20 The paradigms of power belonging to the three arms of government are easy to recognise. Take these hypothetical examples:
  - (a) Parliament's exercise of power to enact legislation – for instance creating a right with certain characteristics.
  - (b) The executive's power granted by statute that if in all the circumstances, in the national interest and in accordance with prevailing government policy it is satisfied that the statutory privilege be granted for three years. The executive makes that decision and grants that right.
  - (c) The courts' power to declare that as a matter of statutory construction non-citizens cannot seek the statutory privilege in question or that the right purported to be granted by the executive is in fact outside the terms of the statute and so is unauthorised.
  - (d) Only courts, with or without juries, can adjudicate criminal guilt or innocence.
  - (e) The executive, not the courts, can dispense the prerogative of mercy.

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<sup>11</sup> *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434.

<sup>12</sup> *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530

- 21 These are fairly clear examples. Often the characterisation of the power is not so straightforward. Section 61 of the Constitution, in describing the executive function, refers to the execution and maintenance of the Constitution and of the laws of the Commonwealth. In carrying out that function the executive (officers of the public service) must, every day, make decisions about legal rights. If a customs official decides to levy duty at X% on your imported goods, he or she is not usurping the courts' exercise of judicial power of the Commonwealth. Yet he or she has, as between you and the Crown, decided that the law is such as to lead to the conclusion that you must pay duty of \$Y. There may be an "appeal" to a reviewing officer who may have the function of examining or even remaking the decision. There may be an "appeal" to the Administrative Appeals Tribunal. In all this, there may be an element of a controversy; there may be an element of someone making a decision about rights, about the meaning of a statute and about the consequences of such. There will, however, be no conclusiveness. In part, this is by reason of who is deciding it – by definition it cannot be conclusive, meaning that the decision is always open to collateral challenge because the customs officer is not a judge. One may detect a degree of circularity in all this. There is an element of the asserted or agreed characterisation of the type of power being exercised affecting the content of the power being exercised. So, if we are all agreed that the decision is being made by a clerk behind the counter at Customs, we know that he or she cannot make a decision settling a controversy about present rights according to law in a way that is immune from challenge.
- 22 Another way of looking at the issue is to say the customs officer has not decided any rights, he or she has merely purported to apply or execute the law which either does or does not provide for that result.

- 23 Sometimes, administrators can be seen to be creating, or doing acts as part of the creation of, rights or liabilities. This can be seen to be distinct from adjudicating on present rights conclusively. Sometimes, one will be able to see the hallmark of the conduct of the administrator as not so much deciding something on the basis of rights, but on the basis of policy of such a broad social or political (in the broad sense) character that a decision so based could not be other than administrative or the act of the executive government.
- 24 Yet sometimes the courts also exercise wide discretions; sometimes they make orders which, at least in point of practical substance and sometimes in point of law, create new rights and liabilities; and sometimes they take policy into account.
- 25 Sometimes, the answer as to whether something is an exercise of judicial or non-judicial power is not provided merely by *a priori* reasoning. Notions of history, tradition, method, technique and procedure are importance. For instance, advisory opinions are generally considered outside judicial power but courts have historically permitted trustees, liquidators and court appointed receivers to approach them for advice and directions. Also, the declaration is a remedy of wide scope. In public interest cases where *locus standi* is broadly viewed, the notion of settlement of a controversy can be flexible.
- 26 For present purposes, it is a helpful taxonomy to divide functions into three categories: those that can only be conferred on courts; those that can only be conferred on administrators; and those that can be given to either<sup>13</sup>. It is the third category with which we are primarily concerned. The framework of analysis in dealing with this third category was laid down in High Court and Privy Council cases in different generations that concerned tax “appeals” and intellectual property “appeals”. In a series of cases the

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<sup>13</sup> See *British Imperial Oil v Federal Commissioner of Taxation* (1926) 38 CLR 153 (the *Second BIO case*) at pp 175-76

High Court recognised that there were some powers not distinctively judicial or administrative which could be assigned to either arm of government subject to certain requirements. An examination of the main tax and intellectual property cases suffices to explain the approach.

27 This overlap in the third category appears in many contexts: tax, intellectual property and competition amongst them.

28 Essential to the distinction is the choice of which power is to be exercised. It is not just a matter of labelling, or of incantation of a legal spell. It is related to how the **power**, which is of a kind which can be exercised by one or other (or both) arms of government, is exercised, in order to understand what power is being exercised.<sup>14</sup> In *R v Spicer; Ex parte Australian Builders' Labourers' Federation*<sup>15</sup>, Kitto J, at 305, explained the importance of the character of the repository of the power in a way that bears repeating:

“The reason for concluding in some such cases that the judicial character of the repository imparts a judicial character to the power is simply that the former provides a ground for an inference, which in those cases there is nothing or not enough in other considerations to preclude, that the power is intended and required to be exercised in accordance with the methods and with a strict adherence to the standards which characterise judicial activities.

...

The circumstances in which the power is to be exercisable may be prescribed in terms lending themselves more to administrative than to judicial application. The context in which the provision creating the power is found may tend against a conclusion that a strictly judicial approach is intended. And there may be other considerations of a similar tendency.”

29 Having decided, however, that a controversy is to be decided by judicial power, one must conform to the methods of exercise of that power.

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<sup>14</sup> *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 189; *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617, 628; and *Re Ranger Uranium Mines* (1987) 163 CLR 656, 665.

<sup>15</sup> (1957) 100 CLR 277

## **The constrictions of judicial power**

- 30 Principally for the present debate that means that the Court cannot be constituted by part-time or acting judges chosen for their specialised knowledge in economics or other subject matter. The Federal Court cannot therefore be adorned in a competition case by having Prof Maureen Brunt or Prof David Round sitting as a judge, as can take place in a New Zealand Court. That is a fundamental difference between the Tribunal and the Court. Of course, judges sit on the Tribunal, but they are NOT exercising judicial power in that role. They function as part of the executive in that role.
- 31 A Federal Court judge, alone, must decide the controversy if it has been committed to the Court for resolution.
- 32 This may, perhaps, be seen to pose two difficulties for the Federal Court. The two difficulties are related and derive from the fact that many important, indeed central, factual questions are referable to, or answerable by reference to, concepts from one or more separate sciences – the social science of economics, the sciences of mathematics and statistics and theories of human behaviour. The concepts of markets, market power, competition, lessening of competition, substantial lessening of competition, market concentration, import competition, substitutability, vertical integration, cost, profit etc are all in this category.
- 33 The nature of these issues calls unquestionably for expert consideration and evidence.
- 34 The two related difficulties are (a) the need to receive, understand, digest and synthesize often complex expert evidence; and (b) the question of the degree of specialisation that judges who do these kinds of cases should exhibit.

- 35 To a significant degree the second issue has reached a measure of resolution in the Court. Panels exist in the Court for judges to hear these cases. Though, that said, the development of expertise in these cases requires time and experience. Not all judges start from any base of formal training in economics, let alone statistics or mathematics. There is, however, nothing like the degree of expertise as exists in some other jurisdictions.
- 36 It would not be appropriate for me, as a judge from another court, to say any more about this, beyond saying that the balance of this discussion will assume a body of judges who have variable but more than passing familiarity with economics and related disciplines from the developing to the highly developed.
- 37 The first difficulty is the reception and utilisation of often complex evidence. The judge in the exercise of judicial power must decide on the basis of evidence placed before the Court and any legitimate judicial notice. That means he or she must understand and deploy the evidence put before him or her.
- 38 We are all familiar with the range of evidence being spoken of: the social science of economics, mathematics, statistics, psychology, human behaviour, game theories and other. What are the satisfactory mechanisms of assisting judges understand, synthesise and deploy such material?
- 39 The judicial process has developed a number of mechanisms of bringing expert assistance to the court.

## Expert evidence

- 40 At one end of the spectrum, there is the traditional presentation of privately chosen and retained expert evidence given in the case of each party. Each side's lawyers cross-examine, and the judge is left to assess, weigh and choose from amongst the competing opinions.
- 41 This process epitomises the resolution of disputes by the adversarial system. It can lead to a degree of tension in its undertaking. Sometimes that tension derives from a failure by lawyers to understand what the experts in these cases are setting out to achieve. I discussed this in the *Liquorland* case [2006] FCA 826 at [836]-[842]. What I there said was not novel. Other judges of the Federal Court have said similar things. Some commentators ignore the recognition that the Federal Court has given to the character of the expert evidence before it in competition cases. Let me set out what I said in *Liquorland* at [838]-[840] and [842]:

[838] In cases such as this dealing with a social science, the views of Professor Brunt expressed, if I may respectfully say so, with her customary clarity in chapter 8 of the helpful compendium of her work *Economic Essays on Australian and New Zealand Competition Law*, illuminate one aspect of the helpful, indeed essential, role for expert evidence in this field. In that chapter, Professor Brunt quoted Keynes at page 358, where that learned economist said:

'The Theory of Economics does not furnish a body of settled conclusions immediately applicable to policy. It is a method rather than a doctrine, an apparatus of the mind, a technique of thinking, which helps its possessor draw correct conclusions.'

[839] The 'economic' questions here involved the assessment of the purposes of humans working in a commercial environment and the appropriate economic framework in which to discuss them.

[840] With the taxonomy of expert evidence of fact, assumptions, reasoning process and opinions as an accepted (indeed necessary) framework, one then comes to the role of the economist in a case such as this. Because it is a social science, and because it is a way of approaching matters and a way of thinking about matters, there is a role, for the economist to assist the court by expressing, in his or her own words, what the human underlying facts reveal to him or her as an economist and what it

reflects to him or her about underlying economic theory and its application.

...

[842] The recognition of the place of expert economic assistance in the manner described by Professor Brunt means that often the point of the expert opinion is to give a form or construct to the facts. It may appear to be an argument put by the witness. So it is. The discourse is not connected with the ascertainment of an identifiable truth in which task the Court is to be helped by the views of the expert in a specialised field. It is not, for example, the process of ascertaining the nature of a chemical reaction or the existence of conditions suitable for combustion. The view or argument as to the proper way to analyse facts in the world from the perspective of a social science is essentially argumentative. That does not mean intellectual rigour, honesty and a willingness to engage in discourse are not required. But it does mean that it may be an empty or meaningless statement to say that an expert should be criticised in this field for 'putting an argument' as opposed to 'giving an opinion'."

### **Concurrent evidence**

- 42 A modern variation to the calling of separate expert evidence, pioneered by the Tribunal in the 1970s and 1980s by Prof Brunt and Justices Woodward and Lockhart and which has been taken up energetically by the Federal Court and the New South Wales Supreme Court is the "hot tub" (a ghastly sobriquet). It is the use of privately retained expert evidence, controlled to a greater degree by the court through conclaves, joint reports and concurrent evidence. Space and time do not permit a detailed discussion. It is now widely used in Australia. It is no longer novel. Recently, in a medical negligence case, a judge in the Supreme Court of New South Wales took evidence concurrently from 11 specialist medical practitioners concerning the brain damage of a plaintiff.
- 43 There is often a complaint by lawyers that they feel a loss of control over "their" experts. They do lose a significant measure of control. That **is** the idea. There is intended to be a reduction in the emphasis on cross-examination, and an increase in emphasis upon professional dialogue.



- 44 There can be problems; but the technique has great potential. I do not intend to discuss it in detail here, beyond making one point that is often lost sight of. For the process to be effective, the judge has to be well prepared and very familiar with the technical issues in order to absorb and participate in the professional exchange. The hot tub is not necessarily the best way of filling an intelligent vessel with expert knowledge.

### **The single expert**

- 45 One technique used in some courts is the ordering of one single expert. This requires statutory authority because it deprives the parties of calling evidence. Its utilisation in competition cases would be problematic. The difficulties of deriving assistance from only one witness in any discipline is immediately appreciated if one recognises what Professor Brunt said in *Economic Essays on Australian and New Zealand Competition Law* at 358 set out above in *Liquorland* and if one recognises the argumentative and contestable character of much of the relevant evidence of a social science nature. Unless the relevant field is relatively stable in principle and technique (such as valuation of land) the choice of the single expert may go a long way to determine the answer to the question under consideration.
- 46 In these circumstances, a single expert is not likely to be illuminating of the relevant full range of possible views.

### **The court expert**

- 47 Next, there is the court expert. In addition to the expert witnesses called by the parties, the Court can direct the calling of an expert. Under the Federal Court Rules Order 34 rule 2, if a question for an expert witness arises in a proceeding the Court may appoint an expert as a court expert to inquire into and report upon any question and upon any facts relevant to the inquiry. The Court may direct the court expert to make a further supplemental report or inquiry and report and may give such instruction as

the Court thinks fit relating to any inquiry or report of the court expert. These instructions may include provision for experiment or test. Under Order 34 rule 3, the court expert is required to send his or her report to the Court and the report shall, unless the Court otherwise orders, be admissible in evidence on the question on which it is made, but shall not be binding on any party except to the extent to which that party agrees to be bound by. Under Order 34 rule 4, upon application to the Court, the Court may permit cross-examination of the expert either before the court or before an examiner. Under Order 34 rule 5, the remuneration of the expert is to be paid jointly and severally by the parties, unless the court otherwise orders. Under Order 34 rule 6, where a court expert has made a report any party may adduce evidence of one or other expert on the same question, but only if he or she has at a reasonable time before the commencement of the trial given to any other interested party notice of an intention to do so.

48 I have not seen the court expert provision used. Inherently, it may contain a degree of inflexibility. It may duplicate costs. Further, it takes the expert assistance given no further than the receipt and employment of further evidence. It may, however, solve a problem of intransigent or intractably positioned experts.

### **The expert assistant**

49 More flexible assistance may be derived from the use of the expert assistant pursuant to the Federal Court Rules Order 34B. Under Order 34B rule 2 the Court or a Judge may at any stage of the proceeding and with **the consent of the parties** appoint an expert as an expert assistant to assist the Court on any issue of fact or opinion identified by the Court or Judge (other than issue involving a question of law).

50 The primary restriction on this mechanism is the requirement for the consent of the parties. If that is forthcoming, there is a helpful degree of

flexibility built into the use of such an expert assistant. If it is not, the mechanism is unavailable.

- 51 Order 34B rule 2 prohibits a person who has given evidence or whom a party intends to call evidence from being appointed as an expert assistant. The expert assistant must give the court a written report on issues identified by the Court or Judge. Order 34B rule 3 requires that the expert assistant state in the report each issue identified and give a copy of the report to each party. The Court must give each party a reasonable opportunity to comment on the report and may allow party to adduce or further evidence in relation to an issue identified in the expert assistant report. The party, however, is not permitted to examine or cross-examine the expert assistant. A party must not communicate directly or indirectly with the expert assistant about issue to be reported on without the leave of a judge. The expert assistant is not to give evidence in the proceeding. See generally Order 34B Rule 3. Order 34B rule 4 provides for an order for the remuneration of the expert assistant.
- 52 This order brings in a degree of flexibility, although once again, the report is in terms of written material which is given to the judge. It is implicit within the order that the judge may rely upon this material.
- 53 I have never seen the order used.

### **The influence of case management and of the fact of penalty hearings**

- 54 Before turning to some more controversial and different mechanisms, it is worth saying at this point that there is an extra dimension to the use of the above mechanisms by the current active case management which modern judges employ. Where full case management powers are available, and used properly, experts can be brought together early, primers developed, issues defined and refined and reports prepared with a knowledge of the

boundaries of the dispute. The court can control the deployment of the expert evidence under such case management powers.

55 One significant qualification to this must be made in that many competition cases are penal in their character and there is a difficulty forcing admissions of fact and evidence from parties who may not have to give evidence at all and may not be prepared to assist with the sensible deployment of evidence when they are facing multi-million dollar penalties.

56 The three further mechanisms that I wish to discuss are referees, assessors and the use of more than one judge.

### **Referees**

57 The Commonwealth Government has proposed to amend the *Federal Court of Australia Act 1976* (Cth) to specifically provide for rules in relation to referees<sup>16</sup>.

58 The Supreme Court of New South Wales has been using referees for many years in commercial disputes, in particular building, technology and construction disputes.

59 I will first explain what a referee is. I will then describe how the Supreme Court of New South Wales has utilised the facility. I will then discuss how referees, when introduced in the Federal Court, may assist in the disposition and resolution of competition claims.

### ***What is a referee?***

60 In *Buckley v Bennell Design & Constructions Pty Ltd*<sup>17</sup> Stephen J and Jacobs J explained the history and nature of references and referees. The

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<sup>16</sup> Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008

<sup>17</sup> (1978) 140 CLR 1 at 15-22 and 28-38, respectively.

Court was dealing with a provision of the *Arbitration Act 1902* (NSW), s 15 which provided that the court might at any time order the proceedings or any question or issue of fact arising therein to be tried before an arbitrator agreed on by the parties or before a referee appointed by the court. The power could be used compulsorily in both respects – arbitration or reference.

- 61 A question arose as to the principles by reference to which an award by an arbitrator made after an order under s 15 had been made could be set aside. The Court of Appeal in New South Wales said that the principles were the same as applied in the case of an arbitration pursuant to a submission. This was overruled in the High Court. Although the case concerned an arbitral award, the discussion also concerned references.
- 62 Stephen J described the hearing before the arbitrator or referee as a “trial”. It was a form of special trial. He said that in such a reference the court’s procedures of adjudication are not abandoned in a favour of extra-curial settlement of the dispute; rather, the court directs that for better resolution of the particular proceedings initiated before it, resort should be had to this special mode of trial which the legislation made available. Stephen J then discussed the origin and development of this mode of trial and how distinct it was from conventional arbitration.
- 63 Time and space do not permit a discussion of this history, but the above pages of the reasons of Stephen and Jacobs JJ make valuable reading for the recognition that the reference is not the abandonment of the method of resolution by the judicial arm, rather it is the use by the judicial arm of a special method of trial for the particular dispute.
- 64 In New South Wales, the rules made under the authority of relevant legislation enable a degree of flexibility to be employed by the referee in how the inquiry is undertaken. Under Part 20 of the Uniform Civil

Procedure Rules provision is made for the referring out of proceedings or parts of proceedings to a referee for a report: see Uniform Civil Procedures Rules, Rule 20.14. Any person may be appointed a referee whether legally qualified or not: Rule 20.15. The choice of person depends upon the nature of the dispute. Two or more referees can be appointed: Rule 20.16. An inquiry and report can be directed: Rule 20.17. Provision is made for the remuneration of the referee: Rule 20.18. The court may give directions for the provision of services of officers of the court or courtrooms or other facilities for the purpose of any reference: Rule 20.19. The court may give directions with respect to the conduct of proceedings under the reference and the manner in which the referee may conduct himself. Included in this is the question whether the referee will be bound by the rules of evidence and how he or she may inform him or herself in relation to any matter: Rule 20.20. The court may at any time and from time to time on application of the referee or a party give directions in respect of any matter arising under the reference. The court may of its own motion or on application vary or set aside any part of any order for referral: Rule 20.22. The referee must submit a written report: Rule 20.23. The court may on a matter of fact or law or both do any of the following in relation to the report: adopt, vary or reject the report in whole or in part, require an explanation by way of report from the referee, remit for further consideration by the referee the whole or any part of the matter referred for a further report or decide any matter on the evidence taken before the referee with or without additional evidence and makes such order as it thinks fit: Rule 20.24.

65 The court has on a number of occasions identified the considerations which will be taken into account in the review of the report. In *Bellevarde Constructions Pty Ltd v CPC Energy Pty Ltd*<sup>18</sup> Chief Justice Spigelman and I discussed these authorities<sup>19</sup>.

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<sup>18</sup> [2008] NSWCA 228

<sup>19</sup> See generally *Chocolate Factory Apartments Pty Ltd v Westpoint Finance Pty Ltd* [2005] NSWSC 784 at [7]. *Super Pty Ltd v S J P Formwork (Aust) Pty Ltd* (1992) NSWLR 549 at 562-565 (Gleeson CJ with whom Mahoney JA and Clarke JA agreed); *Cloride Batteries Australia Ltd v Glendale Chemical Products*

- 66 The general principles are that questions of law will be reviewed by the court as on a rehearing. As to questions of fact the court generally needs to be persuaded of the clarity and seriousness of any error before even considering entertaining a rehearing on the facts. The degree of scrutiny will depend upon the individual case<sup>20</sup>.
- 67 The court is exercising a form of discretion when it adopts or varies the report. It is to be recalled that a (special) trial has been held, not the mere production of evidence.
- 68 The success of this procedure in the Supreme Court of New South Wales can be measured by the huge extent of the building, technology and construction list. Any perusal of the newspapers, generally on a Friday, will indicate a huge number of matters in the list. However, there has not been a judge hear the factual basis of a building case in the Supreme Court for some years. The Court effectively acts as a clearing house for such disputes with careful supervision of directions and references to a wide variety of referees. An enormous body of work is dealt with to the general satisfaction of the commercial community, which brings disputes from all over Australia to be dealt with in this fashion.
- 69 Turning to the use of referees in competition matters, when the power is given to the Federal Court, it is necessary to consider a matter that has concerned people in the past as to the constitutional validity of the use of referees when the matter is one of federal jurisdiction. My predecessor, Keith Mason, when he was President of the Court of Appeal, dealt with this matter in some detail in *Multicon Engineering Pty Ltd v Federal Airports*

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*Pty Ltd* (1988) 17 NSWLR 60; *White Constructions (NT) Pty Ltd v Commonwealth of Australia* (1990) 7 BCL 193; and *Foxman Holdings Pty Ltd v NMBE Pty Ltd* (1994) 38 NSWLR 615.

<sup>20</sup> see *Nicholls v Stamer* [1980] VR 479.

*Corporation*<sup>21</sup>. His views had the concurrence of Gleeson CJ and Priestley JA.

- 70 The argument was that the judge hearing the application to adopt the referee's report was obliged to conduct a hearing de novo having received a report from referee in a matter in federal jurisdiction. Whilst the decision is in relation to State courts exercising federal jurisdiction, properly understood, it assists in any argument that might be made in the Federal Court. As I have previously said, in the Federal Court Registrars can exercise judicial power. In *Harris v Caladine*<sup>22</sup> the High Court indicated that as long as there was a requirement of appropriate control and supervision, the exercise of federal jurisdiction and powers by a Registrar could be permitted. As Mason P said<sup>23</sup> in *Multicon* nothing in *Harris v Caladine* indicates that a full de novo hearing is required for validity. Once one understands that the reference is a special form of trial having a history of some centuries the legitimacy of the procedure in federal jurisdiction can be seen as based on facts other than the delegation of hearing.
- 71 The control and supervision discussed in *Bellevarde* is such that it remains flexible and responsive to the needs of particular circumstances. *Multicon* is authority for the proposition that the use of references with appropriate court supervision in accordance with established principle does not violate the requirements of Chapter III in the exercise of federal jurisdiction.
- 72 What then can referees be used for? In the building, technology and construction list they are used for the resolution of whole disputes. I would not suggest that is appropriate in the context which we are discussing – competition cases. But there is no reason why a judge could not appropriately fashion orders during the case management of the case for a

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<sup>21</sup> (1997) 47 NSWLR 631 at 639-642

<sup>22</sup> (1991) 172 CLR 84

<sup>23</sup> at 640-641



report to be brought forward on particular issues that have been identified through case management procedures for resolution. These issues might be interlocutory or they may be part of the final trial. Issues of discovery, issues of appropriate scope of evidence, issues of market, issues of competition and product substitutability may well be able to be sent off to referees for a report or for reports which can then form part of the fabric of the trial process.

- 73 Likewise questions of damages, often complex and time consuming could be dealt with by the process of reference.
- 74 The use of such procedures could, in many cases, be distinctly advantageous. To the extent that a judge wished to have an issue or issues masticated or partly-digested by a specialist before considering the matter the special trial could take place. Whilst one way of using references is to have a bias in favour of adoption, another way might be to use the process as an initial digestion process giving wider or more flexible rights to the parties to contest aspects, thereby shortening judicial consideration, but enabling the parties to engage the judge with the report at a more detailed level than might otherwise be the case in other contexts.
- 75 I should say that there may be seen to be disadvantages in this process. In my personal experience, the hard work in understanding the market evidence provides one with a base of deep knowledge when one comes to understand the actions of the individual parties in the living market. Having deeply engaged in the factual understanding of a particular market, the actions of the impugned participants often become pellucid with that deep knowledge. If an expert or commercial person has prepared a report on the market, that deep imbibing of the underlying facts may be lacking in the judge and that may bring about a disadvantage in the ability to

perceive the reasons for action and thus to assess the purpose involved in any particular body of circumstances.

76 Nevertheless, I think Federal Court judges armed as they, in all likelihood, will be in due course with powers to refer out to referees have a highly advantageous tool to enable them more efficiently to deal with complex factual and technical issues.

### **Assessors**

77 In the *Patents Act 1990* (Cth), s 217 the following appears:

“A prescribed court may, if it thinks fit call in the aid of an assessor to assist it in the hearing and trial or determination of any proceedings under this act.”

78 No rules or further explanation are given by the *Patents Act* or the Patent Regulations. In *Genetic Institute Inc v Kirin-Amgen Inc (No 2)*<sup>24</sup> Heerey J in a patent case dealing with biotechnology made an order under the *Patents Act*, s 217 for an assessor. The making of the order was contested. It was argued that Order 34 of the Federal Court Rules (the court expert) somehow overrode or modified the effect of a law of the Parliament (the *Patents Act*, s 217). This submission, unsurprisingly, was rejected. Heerey J referred to the New Zealand decision in 1980 of *Beecham Group Ltd v Bristol-Myers Co*<sup>25</sup> in which Barker J made an order under the relevant provision in the New Zealand Act providing for the appointment of:

“... an independent scientific advisor to assist the court or to enquire and report on any questions of fact or opinion not involving questions of law or constructions.”

79 Heerey J found that the use of an assessor as an assistant for him was conformable with the exercise of federal judicial power. One aspect of the

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<sup>24</sup> (1997) 78 FCR 368

<sup>25</sup> [1980] 1 NZLR 185

matter which was complained of was that the consultation that would take place privately between the judge and the assessor. This was inimical, it was said, to the exercise of judicial power. Heerey J rejected this. In doing so he called in aid what Mason J said in *Re L: Ex parte L*<sup>26</sup>. There Mason J discussed the proscription of persons communicating with the judge about his or her decision. His Honour said:

“This proscription does not, of course, debar a judge hearing a case from consulting with other judges of his court who have no interest in the matter or with court personnel whose function is to aid him in carrying out his judicial responsibilities ...”

80 Heerey J said that an assessor appointed under s 217 was to be included in the category of court personnel referred to by Mason J. Heerey J went on to say<sup>27</sup>:

“How the assessor appointed under s 217 performs his or her role in the actual conduct of this case will of course be governed by law, including the rules of natural justice. It is not appropriate at this early stage to lay down any detailed prescription. Suffice to say that the practical experience of *Beecham* shows how an appointment can work well and be of great assistance to a trial judge, without infringing natural justice.”

81 There was an application for leave to appeal to the Full Court. The Court (Black CJ, Merkel and Goldberg JJ)<sup>28</sup> refused leave. The Court said<sup>29</sup>:

“... the questions of the role of the assessor, and of the potential impact of that role of the parties’ rights of natural justice and his Honour’s obligations to perform his judicial functions fairly and independently, were considered an address by his Honour before commencement of the trial. Against the background we are not persuaded that any aspect of his Honour’s conduct with respect to the assessor provides a basis for leave to appeal.”

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<sup>26</sup> (1986) 161 CLR 342 at 351.

<sup>27</sup> at 372

<sup>28</sup> (1999) 92 FCR 106

<sup>29</sup> 92 FCR at 118.

- 82 To understand what an assessor is and how in competition cases this facility (of course with any necessary statutory authority) could be of help, it is of utility to examine the historically most used type of assessors – in shipping and Admiralty cases.

***The assessor in maritime cases***

- 83 The functions of assessors in Admiralty is explained in *Roscoe's Admiralty Practice* 5<sup>th</sup> Ed at 330-331, McGuffie *British Shipping Laws Vol 1 Admiralty Practice* at [1212] ff and [1331] and Australian Law Reform Commission Report 33 on Civil Admiralty Jurisdiction [288]-[291].
- 84 Assessors in maritime cases were brought in when questions of seamanship were in issue – especially in collision and salvage cases. The assessors in England were the Elder Brethren of the Corporation of Trinity House. This was and is an old body whose first official record was a charter from Henry VIII on 20 May 1514 to regulate pilotage. In 1604, James I conferred rights of compulsory pilotage and rights to license pilots in the Thames. The Corporation remains a maritime specialist organisation able to provide skilled assistance to the courts and the commercial community generally.
- 85 The function of assessors was to advise the court upon matters of nautical skill. The responsibility for the decision and the weight to be attached to the advice of the assessor remained with the judge. In *The 'Nautilus'* [1927] AC 145 the House of Lords made clear that the judge must not surrender to the assessor the judicial function of determining the issue before him, however technical it may be.
- 86 There are number of expressions in the English cases that assessors provided a form of evidence of an expert character. In *Richardson v Redpath, Brown & Co* [1944] AC 62 at 70-71 this view was heavily criticised by Viscount Simon. I will come back to Viscount Simon's views shortly. The view that the assessor's advice was evidence sits uneasily

with the reality of his or her contribution. They could assist an appellate court (the Court of Appeal or the House of Lords) in understanding the evidence led below. Further, there was no right of cross examination, indeed assessors were not sworn as witnesses. Nevertheless, when assessors assisted the court, without the leave of the court, the parties were not permitted to call their own expert evidence.

87 Assessors were used in other countries in Admiralty claims. In the United States their use was, however, discontinued in the 19<sup>th</sup> century. New Zealand and Australia no longer make use of them. This is in part because of the dearth of collision and salvage cases, at least in Australia. Canada, however, has always made more use of assessors than its Commonwealth cousins. Its Admiralty rules provide for them, encouraging both the use of assessors and expert evidence in the same case.

88 You have not all gathered here this weekend in Adelaide to hear me speak on maritime law and procedure. However the tool of the assessor, if carefully and thoughtfully used, could be of great utility to the modern judge hearing a case about any expert discipline, in particular in my view, competition cases. One of the most helpful discussions of the place of the assessor can be found in a Canadian case: *The Ship "Diamond Sun" v The Ship "Erawan"*<sup>30</sup>. There, Collier J surveyed the variety of procedural approaches to the use of assessors. In that survey, Collier J cited Viscount Simon in *Richardson v Redpath, Brown & Co* to which I have already made mention. *Richardson* was not a shipping case. It was a workers' compensation case in which the practice that had grown up in England (and seemed to be a very sensible practice) of using medical assessors to assist judges in dealing with workers' compensation claims was discussed. It is worth setting out some of the views of Viscount Simon. As one reads the words of Viscount Simon one can immediately

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<sup>30</sup> (1975) 55 DLR (3d) 138.

see their relevance, and the utility of the assessor to fields such as competition cases. Viscount Simon said the following<sup>31</sup>:

“... to treat a medical assessor, or indeed any assessor, as though he were an unsworn witness in the special confidence of the judge, whose testimony cannot be challenged by cross examination and perhaps cannot even be fully appreciated by the parties until judgment is given, is to misunderstand what the true functions of an assessor are. He is an expert available for the judge to consult if the judge requires assistance in understanding the effect and meaning of technical evidence. He may, in proper cases, suggest to the judge questions which the judge himself might put to an expert witness with a view to testing the witness’s view or to making plain his meaning. The judge may consult him in case of need as to the proper technical inferences to be drawn from proved facts or, or as to the extent of the difference between apparently contradictory conclusions in the expert field. ... It would seem desirable in cases where the assessor’s advice, within its proper limits, is likely to affect the judge’s conclusion, for the latter to inform the parties before him what is the advice which he has received. ...”

- 89 This is a very helpful and clear expression of the consultative non-evidential task of the assessor.
- 90 The modern English practice can be seen in cases such as *The “Bowspring”*<sup>32</sup>. There the Court of Appeal of England and Wales examined the question of the use of assessors against the common law principles of natural justice and article 6 (1) of the European Convention on Human Rights. The principle of fairness, it was said, required that any consultation between the assessors and the court should take place openly as part of the assembling of the evidence.
- 91 I am not sure that is not putting the matter too highly. It goes without saying that statutory authority would be required, but as long as it is clear that the task of consultation and its extent is to be disclosed, it is difficult to see why the judge should not have the availability of the assessor out of court as well as in court. The scope and difficulty of the evidence in many

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<sup>31</sup> [1944] AC at 70-71.

<sup>32</sup> [2005] 1 Lloyds Rep 1 at [57]-[65].

cases, including competition cases, is such that a single judge is often left with a vast task which can take months to unravel. The availability of a consultative agency such as an assessor would be of considerable assistance. It is not as if judges do not talk to others.

92 Let me give you an example. My late colleague, Justice Peter Hely, heard a particularly difficult collision case involving the ramming of a coal berth at Port Kembla by a 140,000 tonne bulk carrier. The case involved a matrix of conflicting human evidence of crew, pilot and bystanders as well as a significant body technical evidence around the subjects of close ship handling, pilotage practice, the handling of tugs and the forces of tide and wind on a large object such as a bulk carrier in a confined water space. His Honour did his customary magnificent job at first instance in marshalling the facts. I sat on the appeal. After we finished the appeal (upholding all his findings of fact) I asked him whether he would have preferred to have the assistance of an assessor. He was unequivocal in his expression of view that this would have been of great assistance. The fact was that night after night, week after week this diligent, hugely competent man struggled with his 28 year old associate to understand the detail and complexity of the lay and expert evidence. His judgment was a masterpiece of careful organisation and thoroughness. Many judges would not have been able to do what he did. It would have been of great assistance to him had he had a generalist maritime assistant familiar with charts, familiar to a degree with ship handling, familiar to a degree with bulk carriers and tugs to help him marshal and interpret the evidence before him.

93 In some of my competition cases I had the benefit of associates with sophisticated economic training. In others, I did not.

94 There is, of course, an overlap between evidence and interpretation of evidence. But the world is not perfect. Judges are not super human. A degree of assistance in the interpretation of expert evidence would often be of significant assistance to the judge making it likely that time taken to

resolve cases would be shorter and the physical energy demanded of judges to command the facts would be relieved.

- 95 If one contemplates the size of many competition cases, the sometimes platoon-like manning of each side with expert witnesses, solicitors, junior counsel, senior counsel and the recognition that one judge will decide the case at first instance leads one to conclude that it is often quite unfair to expect a judge to be able to deal with these without some degree of assistance.
- 96 One of the loneliest feelings in the world is finishing a long case having had the assistance of the teams and platoons from both sides for weeks, or months and then hearing the court door close behind you realising that the thousands of pages of transcript and of exhibits are now yours, and yours alone, to understand, to distill and to deploy in a synthesised way to reach an answer. Your only friend may be the associate or tipstaff who has been with you during the case. There is no one to talk to. The task and its difficulty should not be underestimated.

### **More than one judge**

- 97 I will raise briefly one other issue which I have spoken of in various contexts before. Some cases (perhaps only the exceptional) are so large and so complex that it is simply unfair to burden one person alone with the responsibility of writing. I am firmly of the view that in some cases a second judge could usefully be allocated to the hearing of the matter. This person could play a number of functions. First, both judges could be responsible for distilling and assessing the evidence. Of course, one must have dispositive capacity in one judge because there may be disagreement. However, the presence in a working capacity of a colleague could be extremely valuable. Also, people die. There is often not much choice when this occurs. Long cases can cost many millions of dollars. The second judge can step in.



- 98 I have not had much success in persuading anyone that long difficult trials could legitimately attract this additional judicial function. It would cost money within the judicial budget. It could be used flexibly, perhaps merely having the second judge as a sounding board on a formal basis and able to step in if the primary judge becomes ill or otherwise infirmed.
- 99 I raise it because one day a long case will have a significant effect on the health of a judge. In administration speak, it can be seen as an OH & S "issue". The difficulty and weight of many of these cases is not appreciated by the general community, is not appreciated by the commercial community, is not appreciated by counsel and solicitors. It should be. Using, in the very exceptional case, more than one judge may be one mechanism of ensuring that not only the possibility of which I just spoke never occurs, but also that more expeditious resolution of very long cases can occur.

### **Conclusion**

- 100 These are some ideas for discussion and consideration by superior courts generally. They are, I think, worth considering. They may help to alleviate the hand-wringing that tends to occur about expert evidence.

Adelaide

17 October 2009

# 36<sup>th</sup> AUSTRALIAN LEGAL CONVENTION

Perth, 19 September 2009

## APPELLATE JUDGMENTS – THE NEED FOR CLARITY

Justice James Allsop<sup>\*</sup>

1 I approach this subject with some trepidation born of the following four factors:

(a) an appreciation of the number and standing of the judges who have preceded me in discussing the topic of judicial judgment writing;<sup>1</sup>

(b) an appreciation of the large body of professional work on judgment writing;<sup>2</sup>

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<sup>\*</sup> President, NSW Court of Appeal

<sup>1</sup> Sir Harry Gibbs “Judgment Writing” (1993) 67 *ALJ* 494; The Hon Michael Kirby “Appellate Reasons” in G Blank & H Selby (eds) *Appellate Practice* (The Federation Press, 2008); The Hon Michael Kirby, “Ex Tempore Judgments - Reasons on the Run” (1995) 25 *UWAL Rev* 213; The Hon Michael Kirby, “Reasons for Judgment: ‘Always Permissible, Usually Desirable and Often Obligatory’” (1994) 12 *Aust Bar Rev* 121; The Hon Michael Kirby “On the Writing of Judgments” (1990) 64 *ALJ* 691; The Hon Michael McHugh, “Law Making in an Intermediate Appellate Court: The New South Wales Court of Appeal” (1986-1988) 11 *Sydney Law Rev* 183; Sir Frank Kitto, “Why Write Judgments” (1992) 66 *ALJ* 787; The Hon Chief Justice John Doyle, “Judgment Writing: Are There Needs For Change?” (1999) 73 *ALJ* 737; Sir Lawrence Street, “The Writing of Judgments: A Forum” (1992) 9 *Aust Bar Rev* 139; The Hon Dennis Mahoney, “Judgment Writing: Form and Function” in Ruth Sheard (ed) *A Matter of Judgment: Judicial Decision-Making and Judgment Writing* (Judicial Commission of New South Wales, 2003); The Hon Dennis Mahoney “The Writing of a Judgment” (1994) 2 *Judicial Review* 61; The Hon C S C Sheller, “Judgment Writing” (1999) 4(2) *Judicial Review* 127; The Hon C S C Sheller, “Good Judgment Writing” (1996) 8(1) *Judicial Officers Bulletin* 3; The Hon Bryan Beaumont, “Contemporary Judgment Writing: The Problem Restated” (1999) 73 *ALJ* 743; The Hon Justice Linda Dessau and the Hon Judge Tom Mack “Seven Steps to Clearer Judgment Writing” in R Sheard (ed) *op cit*; L Mailhot and J Carnwarth *Decisions, Decisions: A Handbook for Judicial Writing* (Editions Yvon Blais, 1998)

<sup>2</sup> E Campbell, “Reasons for Judgment: Some Consumer Perspectives” (2003) 77 *ALJ* 62; M Duckworth, “Clarity and the Rule of Law: The Role of Plain Judicial Language” in R Sheard (ed) *op cit*; R Eagleston, “Judicial Decisions – Acts of Communication” (1994) 6(2) *Judicial Officers Bulletin* 1; E Elms, “Ex Tempore Judgments” in R Sheard (ed) *op cit*; M Groves and R Smyth, “A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903-2001” (2004) 32 *Fed Law Rev* 255; C Moisisdis, “Achieving World’s Best Practice in the Writing of Appellate Judgments” (2002) 76(10) *Law Institute Journal* 30; C Moisisdis, “Dispelling

(c) a keen appreciation of my own inadequacies in the writing of judgments; and

(d) a recognition of the presumption necessarily involved in commenting on the work of others, even if indirectly.

2 Nevertheless, having been a school teacher for three years in a past life, I am inured to the charge of “do as I say, not as I do” or “those who can, do; those who can’t, teach”.

3 I will limit my comments to appellate judgment writing – primarily intermediate appellate courts. I propose, however, to say something, by way of “consumer” comment, on ultimate appellate court judgments.

### **The functional dichotomy of appellate judgment writing**

4 At the outset, one must recognise the two incidents of the function of an appeal court (in the exercise of the power of the judicial branch of government):

(a) disposition – by way of correction of error or affirmation of correctness in the judgment below; and

(b) declaration or development of the law – by way of judicial exposition of the general law or the meaning of legislation.<sup>3</sup>

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Misconceptions about Appellate Judgments” (2004) 78(12) *Law Institute Journal* 70; and the large volume of work by Prof James Raymond, for example R Goldfarb and J Raymond *Clear Understanding: A Guide to Legal Writing* (Random House, 1957); J Raymond “The Architecture of Argument” (2004) 7 *Judicial Review* 39; J Raymond “Writing to be Read or Why Can’t Lawyers Write like Katherine Mansfield?”(1997) 3 *Judicial Review* 153; J Raymond “Legal Writing: an Obstruction to Justice” (1978) 30 *Alabama Law Rev* 1

<sup>3</sup> See M Kirby in G Blank & H Selby (eds) *op cit* at 229; F Kitto (1992) 66 *ALJ* 787; C Moisisdis (2002) 76(10) *LIJ* 30

- 5 This may be an oversimplification and one that is not without its own debate, especially as to (b) above.<sup>4</sup>
- 6 These functions are common to intermediate and final appellate courts. Intuitively, one can conclude that at the level of intermediate appellate courts the dispositive function outweighs the declaratory or developmental and vice versa at the final appellate level. (Though, if one considers the burden of special leave applications in the High Court and its original jurisdiction, one should not underweight the dispositive function of that court.)
- 7 Notwithstanding the heavy dispositive function of the intermediate appellate courts, the important role of these courts in the declaration and development of the law should be recognised. A detailed discussion of the freedoms and restraints upon intermediate appellate courts is beyond this paper.<sup>5</sup> It can readily be accepted that many areas of the law lack authoritative statements of principle, whether from *ratio decidendi* or considered *obiter dicta*, of the High Court. There are many legitimate examples of intermediate courts of appeal declaring or restating important areas of the law. When existing principle is clear no such restating is necessary; indeed, it is to be discouraged as mere proliferation of *dicta* away from the original source. Care and rigorous discriminating judgement is called for in deciding whether this task need be undertaken. If it does not need to be, restatement of principle is not only unnecessary, but also potentially dangerous, for the reasons discussed below. Nevertheless, it should be said that it is not always straightforward to determine how far principles should be analysed in respect of their particular application.

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<sup>4</sup> See the discussion in M McHugh 11 *Syd Law Rev* at 184

<sup>5</sup> See for example M McHugh 11 *Syd Law Rev* 183 at 188; M Kirby 4 *Aust Bar Review* 51-66; M Kirby in G Blank & H Selby (eds) *op cit* p 229

8 Sometimes, there may not only be a lack of clarity in the expression of principle, but also there may be a lack of binding authority. In such cases an intermediate appellate court has a choice to make as to the content of the relevant legal rule.

9 In my view, it is clear that intermediate appellate courts have declaratory and developmental roles. These are, of course, secondary roles to the final appellate court.

### **The place of reasons in this functional dichotomy**

10 The requirements for, and the necessary content of, reasons depend, of course, upon the context and purpose of the judicial act in question.

11 Common to all contexts and purposes, however, is the role of the court as an arm (the judicial arm) of government to quell controversies.<sup>6</sup> The importance of this fact manifests itself in different ways.

12 In its dispositive function, the court should quell the controversy with as much surety and clarity as possible. If no novel or unusual principle arises, if only facts or otherwise uncontroversial matters attend the resolution of the dispute, the court's governmental role will generally require that no more than the immediate dispute be disposed of. In such cases, the court should be economical and clear in its reasons. The loser should understand simply and directly why he or she has lost. A great equity judge in New South Wales, Mr Justice John Kearney, said at his farewell to the profession on his last sitting day that Sir Robert Megarry had once told him the identity of the most important person in the courtroom – the party (whoever it may be) who was to lose. The clear, coherent, readable and, if possible, brief expression of why the state (through the court) is or

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<sup>6</sup> M Kirby in G Blank & H Selby (eds) *op cit* at 227; F Kitto 66 *ALJ* 787 at 789-790; C S C Sheller 4 *Judicial Review* 127 at 129 and 139-140; *Bainton v Rajski* (1992) 29 *NSWLR* 539. As to the nature of judicial power, see for example: *Huddart Parker & Co Pty Limited v Moorehead* [1909] *HCA* 36; 8 *CLR* 330 at 357 (Griffith CJ) and *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [1970] *HCA* 8; 123 *CLR* 361 at 390 (Windeyer J)

is not exercising its power for or against him or her is of the utmost importance. This applies as much to appellate courts as to trial courts.

- 13 This function of the appellate court may often require an attendance to reasons as close in form and structure to an oral delivery as possible. Lord Rodger of Earlsferry in, if I may say, both an entertaining and valuable article,<sup>7</sup> identified the movement away from oral judgments to the written “work” as central to the difficulty and complexity of many modern judgments.
- 14 At this level of the dispositive function a simple structure shorn of all unnecessary legal pretence may be desirable. If the loser of a case that threw up no question of contested principle cannot understand from a clear accessible judgment why he or she has lost, the dispositive function has miscarried, potentially leaving the loser confused, and thus doubly dissatisfied.
- 15 Also, if a party, in an otherwise simple case, receives elaborate and adorned reasons, he or she may be distrustful of a process that has hitherto appeared to be simple, but now has elaborate and complex legal discussion as an element of its disposition. A sense of grievance may arise. Further, in such a simple case, the lengthy restatement of what should be implicit foundational material implies that no case is simple, that all cases contain legal complexity, thereby undermining confidence in the practical workability of the system. Yet, it is fair to say, overly simple exposition may tempt a suspicious High Court that not all the authorities have been considered.
- 16 It may be a valid criticism that this kind of unnecessary restatement of well-known and otherwise unargued principle is far too common. Apart from the dangers above, it slows down disposition; it moves work to

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<sup>7</sup> The Rt Hon Lord Rodger of Earlsferry, “The Form and Language of Judicial Opinions” (2002) 118 *LQR* 226

colleagues to allow for the unnecessary task of restatement of uncontested principle to be undertaken; it litters the law reports and electronic databases with unnecessary citation; and it has the potential for the creation of doctrinal confusion by restating the primary source in different words.

17 When one turns to appellate judgments that do legitimately require some discussion or elaboration of principle, clarity is required for other and additional reasons: the proper expression of the law and the maintenance of the coherence of the fabric of the law.

18 In a common law system, the expression of principle by courts is the law (by declaration or development) – it is not just the terms or basis of the settlement or resolution of a particular dispute.<sup>8</sup>

19 To quote Chief Justice Marshall, though out of context (in that he was concerned with the supremacy of the courts over the legislature in declaring and interpreting the law):<sup>9</sup>

“It is, emphatically, the province and duty of the judicial department to say what the law is.”

20 Within that duty is the responsibility for clarity. The reason for this is simple: if the law is what the courts say it is; and if what the courts say is unclear or opaque; the law is unclear or opaque. As Lord Diplock said in *Merkur Island Shipping Corporation v Laughton*<sup>10</sup> (speaking of the law of industrial relations and of a statute):

“But what the law is ... ought to be plain. ... Absence of clarity is destructive of the rule of law; it is unfair to those who wish to

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<sup>8</sup> *Federal Commissioner of Taxation v Indoeroopilly Children Services (Qld) Pty Ltd* [2007] FCAFC 16; 158 FCR 325; *Jenkins v Robertson* (1966-69) LR 1 Sc 117; *Australian Broadcasting Tribunal v Saatchi and Saatchi Compton (Vic) Pty Ltd* (1985) 10 FCR 1

<sup>9</sup> *Marbury v Madison* 5 US 137 (1803) at 111

<sup>10</sup> [1983] 2 AC 570 at 612; see also C S C Sheller 4 *Jud Rev* 127 at 129-130

preserve the rule of law; it encourages those who wish to undermine it.”

### **The social and economic significance of clear reasons**

- 21 Not only is the clear expression of principle important to the integrity of the law itself, it has wider social and economic importance.
- 22 The time and uncertainty involved in the ascertainment of the legal position of the citizen, corporate or human, is a significant economic and social cost. Money spent on lawyers’ fees that need not be so spent is money that could have been invested in society in more productive ways. Regulation by complex and lengthy statutes is a modern burden – taxation, superannuation and securities regulation is of a linguistic complexity far beyond the age-old concepts involved (contract, property, debt, income, capital, duties and rights). At times, the impenetrability of the language in these statutes makes one ask oneself whether the Act in question is truly a law of the Parliament.
- 23 The courts bear their own responsibility in this regard. Life in 1970 was not so different to 2009. Technologies have changed and developed; society is, to a degree, more complex. However, doctrine (as a matter of policy choice) has grown more complex. For instance, in the 1970s and 1980s in most common law jurisdictions a choice was made to permit the recovery of economic loss beyond that immediately consequent upon physical loss. I do not question that doctrinal shift. What must be recognised, however, is that whatever social benefit has been derived from the wider compensation available to some plaintiffs, the change has led to an increase in uncertainty as to the nature and application of the operative



rule. This has diverted large sums of money away from productive investment and into legal advice and litigation.

- 24 The length and complexity of reasons also cost money. The longer a judgment takes to be understood and the more vague a judgment is multiplies exponentially the cost of “translation” into advice.
  
- 25 As an international trading and commercial nation heavily dependent upon, and integrated with, the rest of the world, Australian must ensure that its law has both clarity and a resonance with international standards and practice. This is not a call to follow or adopt slavishly whatever England, Europe or the United States does. Rather, it involves the proposition that as a participant in international commercial and social intercourse our legal rules and procedures should be such as to reflect the elements of common, or generally accepted, international standards or content. To do otherwise risks self-imposed provincial marginalisation. In the development of the general law, this requires clarity of exposition of doctrine, whether that doctrine be simple or complex. If Australian law is unclear or opaque, it will be less likely that it will act as a reference point for courts of other countries, thereby diminishing the standing of the jurisprudence of this country.
  
- 26 At the level of education, academics and students can be left to struggle if there is a lack of clearly expressed doctrinal leadership by the courts. Without such leadership, students may be trained in an environment of muddy or vague principles and with a sense that those principles are compromised and relative. This denies them a clear foundation or vision of the legal structure of society, or at least Australian society.
  
- 27 An examination of the Commonwealth Law Reports of the last 25 years undertaken in order to ascertain the relevant principles in the ascertainment of a duty of care, its scope and content, the place of foreseeability therein and breach of duty will yield a task for study of significant proportions. This is not said critically; the law has undergone

important policy and doctrinal shifts about which views of justices have varied. Accepting that, my only point is that such basic and fundamental principles must be accessible through clear exposition. Such has not always been the case in this body of cases. It has led to legislatures stepping in to make statutory codification of variable consistency and success. That statutory “reform” was undertaken, at least in part, because of a perception (correct or not) that the courts were unable to enunciate rules with a clarity and workability to allow society and important economic structures within it such as the insurance markets to operate satisfactorily. This was a failure of the common law.

- 28 On the other hand, causation is a topic capable of engaging the philosopher and the theorist for a lifetime’s work. Yet in one emphatic, clear and short judgment<sup>11</sup> the High Court settled a workable coherent framework of the law capable of being understood and implemented at all levels of judicial disposition.

### **Pressures and forces tending to complexity and obscure expression**

#### ***“Environmental” pressures***

- 29 Modern life and technology as they have affected the practice of the law, including the judicial task, have brought significant changes. In years past, the process of legal exposition and legal development was undertaken by reference to a relatively small proportion of judgments, hand-picked by editors of law reports for their place in understanding an existing taxonomical scheme, which was explained by well-known legal encyclopaedias: Blackstone in the 18<sup>th</sup> century and Halsbury in the 19<sup>th</sup> and 20<sup>th</sup> centuries. Being part of a vertical hierarchy with one imperial court at its apex also simplified the system.

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<sup>11</sup> *March v E & M H Stramare Pty Ltd* [1991] HCA 12; 171 CLR 506

- 30 The modern task is the development of an independent Australian common law in an era in which the electronic legal resources make available, without discrimination, the totality of legal expression by courts at first instance and on appeal, in Australia and in many sophisticated legal centres. The precedential value of reported over unreported decisions has all but disappeared. The challenges in this task should be recognised and not underestimated.
- 31 Thus, any intermediate appellate court, in the absence of a binding rule expressed by the High Court is faced with the immediate task of reconciling what has been said by it and by co-ordinate courts on the relevant topic.
- 32 It is also faced with the available welter of persuasive foreign authority also electronically available.
- 33 This has led to an exponential growth in citation of cases. The use of tools such as Casebase and like proprietary aids is now seriously compromised by the sheer number of citations.

### ***Imposed pressures***

- 34 The requirement for reasons has grown more stringent in the last 40 years.<sup>12</sup> The giving of reasons is an incident of the judicial process.<sup>13</sup> The essential requirement is to reveal the grounds and basis of the decision including, where necessary, factual findings out of contested evidence.
- 35 I am not, for one moment, questioning the desirability of courts giving full and adequate reasons to explain the acts of government that they perform.

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<sup>12</sup> *Pettitt v Dunkley* [1971] 1 NSWLR 376; *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378; *Soulezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247; *Public Service Board of New South Wales v Osmond* [1986] HCA 7; 159 CLR 656; and see generally Kirby 12 *Aust Bar Rev* 121; and Beaumont 73 *ALJ* 743

<sup>13</sup> *Tatmar* at 386

There may, however, be room for more thorough investigation as to the circumstances in which courts are able, with statutory authority, to provide shorter reasons in circumstances where the nature of the controversy does not call for more than summary expression. The modern approach to the case management of litigation has at its foundation the need appropriately to marshal public and private resources in the most efficient way having regard to the nature and demands of the controversy in question.

36 I am not suggesting that some litigants are entitled to a second class service. What I am suggesting is that with statutory backing court should be freer to provide summary form reasons in hearings where this is appropriate.

37 Under the *Supreme Court Act 1970* (NSW), s 45(4) and the *Uniform Civil Procedure Rules* Part 51 Rule 51.55 the Court of Appeal in dismissing an appeal may in accordance with the rules give reasons for its decision in short form if it is of the unanimous opinion that the appeal does not raise any question of general principle. I have rarely seen this used. A search has indicated 17 examples in the Court of Appeal since 1998. It should be used in appropriate cases. We may be being too timid. In *Collins v Tabart*<sup>14</sup> Kirby J, with whom Gleeson CJ, Hayne, Crennan and Kiefel JJ agreed, in a short judgment, revoked special leave in an appeal where there had been a complaint that the Court of Appeal had not conducted a rehearing. The Court of Appeal had given its reasons in short form. The High Court said the Court of Appeal had recognised its duty to conduct an appeal by way of rehearing under s 75A but was entitled to give its reasons in short form under s 45(4).

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<sup>14</sup> [2008] HCA 23; 246 ALR 460

- 38 The requirement for reasons in the above manner, and with the above detail, is compounded by the obligation in Australian intermediate courts to provide an appeal by way of rehearing.<sup>15</sup>
- 39 There has been much discussion at the level of the High Court and in the intermediate courts of appeal as to the meaning and content of an appeal by way of rehearing and the relationship between the court reaching its own view of the facts and the essential task of the appellate function in this respect of the correction of error.<sup>16</sup>
- 40 Not being courts of error, it is insufficient for intermediate appeal courts to examine first instance judgments at a level of generality requiring the clear demonstration of error before engaging the analysis of the facts. A full rehearing is required, nevertheless with the aim of the identification of error.
- 41 It is beyond this paper to discuss this process at any length and the fault lines at which the tension between a full rehearing and the correction of error manifests itself. For present purposes it need only be recognised that the responsibility for a full rehearing places on the appeal court a necessity, subject to submissions of the parties, to re-examine the record and within the confines of the notice of appeal, engage in a factual weighing analysis of a kind not dissimilar in extent of demands of time to

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<sup>15</sup> *Supreme Court 1970* (NSW), s 75A; *Supreme Court Act 1979* (NT), s 54; *Uniform Civil Procedure Rules 1999* (Qld), r 765; *Supreme Court Civil Rules 2006* (SA) r 292; *Supreme Court Civil Procedure Act* (Tas), s 46; *Supreme Court (Court of Appeal) Rules 2005* (WA), r 25. In Victoria, the *Supreme Court Act 1986* and *Supreme Court (General Civil Procedure) Rules 2005* (Vic) are silent as to whether an appeal to the Court of Appeal is by way of rehearing; however the power of the Court of Appeal to receive further evidence under O 64 r 22(3) contemplates rehearing: see *Freeman v Rabinov* [1981] VR 539 at 547-548

<sup>16</sup> See for example *Costa v Public Trustee of NSW* [2008] NSWCA 223; *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; 117 FCR 424; *CDJ v VAJ* [1998] HCA 67; 197 CLR 172 at 201-202 [111] (McHugh, Gummow and Callinan JJ); *Allesch v Maunz* [2000] HCA 40; 203 CLR 172 at 180 [22] (Gaudron, McHugh, Gummow and Hayne JJ); *Coal & Allied Operations Pty Limited v Australian Industrial Relations Commission* [2000] HCA 47; 203 CLR 194 at 203-204 [14] (Gleeson CJ, Gaudron and Hayne JJ); *Crompton v R* [2000] HCA 60; 206 CLR 161 at 213 [147] (Hayne J); *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* [1931] HCA 34; 46 CLR 73 at 109 (Dixon J)

that conducted by the primary judge. Of course, the primary judge may have a position of advantage from seeing witnesses and the like.<sup>17</sup>

- 42 This task of rehearing requires reasons which display a careful analysis of the facts. Clarity of expression in this task does not necessarily equate with brevity. The most demanding part of intermediate appellate practice is the analysis of factual material. The lean, clipped and brief expression of primary facts in a complex factual dispute may lead to the view by the parties that the intermediate appellate court has not fully engaged with the factual debate and issues in the same way as the primary judge may have done.
- 43 One can say immediately, of course, that brevity of expression does not reflect a lack of attention to detail. Only someone unfamiliar with the legal system might think that. Nevertheless, I had experience at the Bar of a thoroughly correct primary judgment expressed in the most elegant, lean and brief terms being overturned, quite wrongly, by an appeal court, in part, I was convinced at the time, because the appeal court did not have in the primary judge's reasons an exhaustive examination of the evidence. Such would have taken the judge significantly longer to draft; but it might have beaten off an appeal court which misunderstood the facts, and saved the cost of a High Court appeal that completely vindicated the primary judge. Trade-offs in cost and time are obviously involved.
- 44 Likewise on appeal, if an appeal court does not, in an organised and comprehensive manner, examine the evidence relevant to the dispute, an applicant may be given an unjustified advantage in an application for special leave to appeal; it may also sow a suspicion in the High Court that the facts have not been attended to with the requisite care, when in fact they have been, albeit briefly.

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<sup>17</sup> *Abalos v Australian Postal Commission* [1990] HCA 47; 171 CLR 167; *Devries v Australian National Railways Commission* (1993) 177 CLR 472; and *State Rail Authority (NSW) v Earthline Constructions Pty Ltd* [1999] HCA 3; 73 ALJR 306; 160 ALR 588

45 A further consideration in relation to the imposed requirements upon intermediate courts of appeal comes from cases in the High Court such as *Kuru v NSW*.<sup>18</sup> In *Kuru*, the High Court expressed the view that it was desirable for an intermediate appellate court to decide all matters in controversy on the appeal, not merely those that it thinks sufficient to dispose of the appeal. This concern first arose in a number of patent cases originating in the Federal Court.<sup>19</sup> These patent cases involved a dispute about a public register. The Court returned to the matter in the context of the criminal law in *Cornwell v The Queen* (2007) 231 CLR 260. In a civil damages suit in *Kuru*, the following was said at [12] by Gleeson CJ, Gummow, Kirby and Hayne JJ:

“This Court has said on a number of occasions, that although there can be no universal rule, it is important for intermediate courts of appeal to consider whether to deal with all grounds of appeal, not just with what is identified as the decisive ground. If the intermediate Court has dealt with all grounds argued and an appeal to this Court succeeds this Court will be able to consider all the issues between the parties and will not have to remit the matter to the intermediate court for consideration of grounds of appeal not dealt with below ...”

46 It is to be noted that the Court said that it was important for intermediate court of appeal to **consider whether to deal with all grounds of appeal**.

47 The Court of Appeal of New South Wales has expressed, on at least two occasions, considered views that it would not, in the interests of justice, deal with all the issues raised on the appeal.<sup>20</sup> In these cases, the Court indicated that it approached the matter by reference to considerations

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<sup>18</sup> [2008] HCA 26; 236 CLR 1; see the Hon Justice Ronald Sackville, “Intermediate Appellate Courts: The Multiple Issues Dilemma” (2008) 82 ALJ 650

<sup>19</sup> *Kimberly-Clark Australia Pty Limited v Arico Trading International Pty Limited* [2001] HCA 8; 207 CLR 1 at 19-20 [34], *Aktiebolaget Hässle v Alphapharm Pty Limited* [2002] HCA 59; 212 CLR 411 and *Lockwood Security Products Pty Limited v Doric Products Pty Limited* [2004] HCA 58; 217 CLR 274

<sup>20</sup> *Rebenta Pty Ltd v Wise* [2009] NSWCA 212 at [9]-[12] (Basten JA with whom Ipp JA and Sackville AJA agreed) and *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2008] NSWCA 206; 252 ALR 659 at 795-797 [824]-[833] (Ipp JA with whom Giles JA and Hodgson JA agreed)

such as the need to use judicial resources in a discriminating rather than indiscriminating fashion, the interests of the general administration of justice and the lack of desirability of flooding the legal system with unnecessary *obiter dicta*.

- 48 Applying *Kuru* can lead to the expression of *obiter dicta* that would not otherwise be expressed. This, of itself, can lead to judgments of greater length than need be written.

### **What can be done to promote clarity?**

#### ***Teaching: structure, approach and style***

- 49 It is beyond this paper to survey the material already on the record about judgment writing and its teaching. Prominent in the field in this respect all around the world, including in Australia, is Professor James Raymond. His work is known to many and he has conducted training courses for judges and magistrates at all levels in this country and overseas. This coming October there was to be a two day appellate judges' seminar and workshop in Melbourne at which he was to attend. Unfortunately, it will not be proceeding because of lack of sufficient appeal judges wishing to attend.
- 50 It is undoubted that all writers (appellate judges included) can profit from critical analysis of their style and approach. It is also undoubted that judges burdened with a heavy responsibility for writing and armed with dictaphones and word processors can sometimes be less precise than they might be.



- 51 It is also undoubted that a clear approach to structure and organisation is critical to the production of clearly expressed well ordered thoughts and reasons.
- 52 All of us are, however, individuals. We all express ourselves differently. It should also not be forgotten that the process of writing and composition has an essential place in thinking.<sup>21</sup> Reasons for judgment are not a literary work in the sense of a work of the imagination. They are the construction of a body of reasons explaining an act of government.
- 53 Some elementary procedures must of course be followed. There must be a logical organisation and structure. The reasons should not be merely a stream of consciousness without a logical framework. There should be a beginning, a middle and an end. That said people approach their work differently. Some think, write a structure and dictate. Some write and as they are writing think. Some dictate. Some type. The process of coming to terms with a problem which may be a sprawling factual debate laced with difficult legal questions to which complex, sometimes repetitive and overlapping arguments have been directed is not straightforward. Very often the very process of writing the judgment is a process of unravelling the complexity and thinking about the case towards a result.
- 54 Further, few judges have the luxury of the immediate availability of required time to write a complete judgment shortly after a hearing. To the extent that time is available immediately after the hearing it should be, and often is, used productively to sketch a structure. Nevertheless, the productive use of time in broken blocks over a period which may be weeks or months may require the progressive development and organisation of important aspects of the background material. One often sees the comment that it is preferable to distil pleadings and arguments rather than set them out. That may be true, but it may be far quicker and more

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<sup>21</sup> See the insightful discussion by F Kitto in 66 *ALJ* at 796

convenient to piece together elements of the structure of a judgment over time, rather than synthesise a product in one block of time.

- 55 The workman-like construction of a judgment also aids the writer upon return to the partly-built structure. As the edifice grows through the identification of the issues from the pleadings, the arguments of the parties and the primary fact the returning craftsman is able quickly to put himself or herself back in place to continue the work.
- 56 This process can lead to less than elegant structure and prose, but it may be the most efficient use of time in the formulation of the work, especially given other pressures of time.
- 57 Of course, upon completion the whole edifice can be reviewed, elements removed, elements synthesised and a considerable shortening process undertaken. In a perfect world that would always be done. It is not a perfect world. After the construction of any detailed judgment which has taken some days over a period of weeks the task of remodelling and editing of that kind can take up a day or the best part of a day. This is time that could be used for another hearing or to advance the reserved judgments of other waiting litigants. A value judgement must be made: is the expenditure of time worth it?
- 58 In any busy intermediate appellate court, these questions of time rationing become critical. Chief Justice Spigelman, when discussing with me my move to the Court of Appeal, evoked with his customary clarity this kind of time rationing and its effect on judgment writing when he said to me not to try to be too elegant, as elegance was difficult to maintain when drinking out of a fire hose. This has been my experience.
- 59 Nevertheless, in many cases it is essential and critical, as opposed to discretionary, to re-edit and re-evaluate a judgment once “finished”. For instance, in deciding a question of law or practice for a specialist tribunal reliant upon the intermediate court of appeal for clear expression of

principle, it is absolutely essential that clarity of thought, clarity of expression and brevity are the hallmarks of the judgments to guide such tribunals and their practitioners.

- 60 There are some practical aspects of approach which may assist intermediate appellate court judges in the production of judgments. First, there should be, at the outset, a rigorous consideration of what reasons are required in the appeal: is the appeal simply dispositive or is there required some declaration or discussion of principle? If this rigorous self-questioning is undertaken in each appeal, careful consideration can then be given to what aspects, if any, require detailed treatment of legal principle.
- 61 To the extent that principle is required to be expressed, there should be a rigorous consideration of what is not disputed (which need only be dealt with by, at most, the most authoritative case) and what is disputed (which may need to be analysed in detail).
- 62 To the extent that detailed analysis of High Court or intermediate appellate authority needs to be undertaken, an autodidactic approach should, if possible, be avoided and a clear analytical path for the reader should be chosen. This may require significant additional time after research and analysis is complete. For instance, it may well be that because of the requirement to discuss principle a chronological, case by case approach to the analysis of governing relevant authority is necessary to illuminate for the judge in his or her thought and decision-making processes how the law has developed and what its current state is. This very often requires the step by step, year by year, analysis of cases, the growth of principle and its current content. That does not mean that all this research should be set out in the reasons. Reasons are not a research bank or the explanation as to how the judge has come to master the subject. Once one has undertaken such a necessary, and often difficult and laborious, task the expression of reasons should be encapsulated in principled

structured expression in a “top down” fashion rather than left in a form reflecting the intellectual journey from “the bottom up”.

### **Collegiality, individuality and coherence**

- 63 I have had the good fortune to be a member of two superior courts. On the Federal Court of Australia I sat at both first instance and on appeal for seven years. On the Court of Appeal I have undertaken only appellate work for somewhat over a year. There are many points of similarity and comparison that may be worth discussing on an appropriate occasion in respect of the conduct of the two courts’ business. For present purposes, I wish to make some comments upon the operation of the NSW Court of Appeal insofar as such operation touches and concerns the subject of this paper.
- 64 The Court of Appeal is a busy court. It only sits as a civil court of appeal. It has, at present, 10 full-time members (including the President). In addition, the Chief Justice and the Chief Judges of the Common Law and Equity Divisions also sit, though not full-time. There are also, at present, two acting judges of appeal. From time to time divisional judges sit but this generally only occurs when the case is from a lower court or tribunal and there is a shortage of available judges.
- 65 Judges of Appeal also sit on criminal appeals up to 4 or 5 weeks a year. Criminal appeals in the Supreme Court are heard by the Court of Criminal Appeal which is under the control of the Chief Justice and Chief Judge at Common Law. In this Court, the Chief Justice, Chief Judge at Common Law or a Court of Appeal Judge will generally preside over a court otherwise comprised of Common Law Division judges who, as part of their daily work, preside over criminal trials.
- 66 The filings and disposals of the Court of Appeal are a matter of public record. They have varied over the years, but with the decline in common

law work the average level of filings and dispositions has been in the order of 400 per year.

- 67 The workload of the Court of Appeal is organised by the President. Historically judges sat four to five days a week. This was essential in an era where a large body of appeals, often damages appeals, meant that the Court was required to dispose of over 700 cases a year.
- 68 With the decline of the simple damages appeal, few appeals are easy and few amenable to *extempore* judgments. The proportion of *extempore* judgments is now in the order of 15%. This year I have sought to sit judges no more than three days per week, ensuring that the days they sit contain a full day hearing whether of one or more cases. The idea behind this was to provide as much uninterrupted judgment writing time as possible. Four days per week with broken time does not permit a partly written judgment to be revisited for any length of time.
- 69 It is no secret that the Court of Appeal operates by a star system, with primary first draft writing responsibilities given to one of the judges of the bench nominated to sit. In order that I have an understanding of the work distribution on the Court, the star is allocated by the President.
- 70 This means that each week a judge can expect at least one star and either two or three non-star appeals. The lengths of appeals vary. Most are a half-day to a day, but accompanied by full written submissions. The rule of thumb is the star judge generally receives time out of court immediately after the star appeal of equivalent of time to the case. Thus, if the case is up to one day the judge receives the next day out of court. If the star case is two days, two days out of court etc.
- 71 Judges invariably meet the morning of an appeal having pre-read written submissions, judgment and sometimes parts of the evidence. Detailed discussion will take place during and after the appeal in order to reach a

common consensus as to what ought to occur. The star judge then produces the first draft.

- 72 In my experience at the Court, the non-star judges put considerable effort into pre-reading and into the debate at the hearing, as much as the star judge. I think counsel (as I used to) often suspect that the heavy questioning is coming from the star judge. Indeed, it is often to the contrary, because the non-star judges wish to have clearly in their brain the detail and the architecture of the case, and their preferred view of the proper result before finishing it. This is so because they may have to wait a period of time to obtain a draft judgment from the star judge.
- 73 My experience is also that considerable effort and detailed attention is given to the draft when received by the non-star judges. On many occasions, I have experienced probing analysis by carefully thought out questions and comments which have led to significant revision of a judgment but without any request for a joint judgment. In my experience, the parties undoubtedly get three judges on appeal.
- 74 This process does produce single judgments in the Court with short concurrences. From time to time one will find joint judgments and judgments of the Court. One also finds, though reasonably rarely, full concurring judgments of some length. Once again, in my experience, the process of joint writing is a salutary one that inevitably improves both content and style. It is my personal view that when faced with the work on a busy court such as the Court of Appeal, if it is at all possible, and if it suits the temperament of the individual judges, writing in a team of two can be very productive.
- 75 Nevertheless, it is hard to marshal time in two chambers to work together in this way. Bearing in mind the reality of the press of business and the need to deal with one's own stars and promptly, but thoroughly, deal with drafts coming from colleagues, it is not always easy to find the time to reduce and polish judgments.

76 One aspect of the production of judgments for such a busy court is that one can find oneself writing for colleagues. By this I mean that the draft will be written in a way that most easily enables a judicial colleague to bring back and consider an appeal heard sometime previously. By this method it may be necessary to include in the draft significant amounts of primary factual material and significant aspects of discussion of case law which is by way of explanation of thought processes as much as giving reasons. This process is a very helpful one in the collegiate work of the court, but it may also lead to a certain unnecessary length in judgments. It may not be necessary in final reasons to set out at the same length all the background material that is helpful in bringing a colleague back to the problem. Once again, if this occurs reduction of the reasons to a briefer more succinct state requires the expenditure of time.

### **Conclusion**

77 There are many competing forces that promote judgment length and judgment complexity.

78 It is essential, however, to recall at all times that the governmental act undertaken both by trial courts and appeal courts is one that is both the exercise of power and the explanation for that exercise of power. Part of that responsibility is the clear communication of the reasons for the exercise of power.

79 In an age of the electronic dissemination of all judicial utterances it has become imperative to exercise restraint in relation to the expression of view as to principle. How such restraint fits with the injunction of the High Court in *Kuru* is a matter for careful consideration by the court on each occasion.

80 Notwithstanding the pressures of time, care and effort should be taken to examine rigorously what should be expressed and to enunciate with clarity

what is expressed. In an era of undifferentiated electronic resources, it is not an exaggeration to say that the cohesion of the common law system depends on the clarity of organisation and expression of appellate reasoning and a degree of moderation in what is expressed.

Perth

19 September 2009



**Q150 Constitutional Conference 2009**

**150<sup>th</sup> Anniversary of establishment of the Colony of  
Queensland**

**Queensland Constitution at 150: Origins and Evolution**

**Queensland Parliament House  
Brisbane**

**29 May 2009**

**Queensland's Constitutional Inheritance  
from New South Wales**

**James Allsop\***

**ABSTRACT**

The paper will examine the Constitutional development of the Colony of New South Wales, with particular emphasis on the movement from autocratic power to civil colonial government in 1823, to the first representative government in 1842 and, through the social and political forces of the 1840s and 1850s, to responsible government in 1855. The paper will examine how these developments also led to the political movement for separation of northern New South Wales and the creation of responsible government for not only New South Wales, but the other colonies on the continent, including Queensland in 1859.

I am honoured to be asked by the organising committee to speak at this important conference and to contribute to this important occasion celebrating the 150<sup>th</sup> anniversary of the formation of Queensland and of its receipt, at formation, of responsible government. I am doubly honoured to share the first session with the Hon Dr Bruce McPherson. When Dr Michael White told me of this, I felt (after 37 years) the same concern as having an essay or tutorial paper submitted to

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\* President of the New South Wales Court of Appeal

Professor John Ward at Sydney University. I was privileged to be taught history by Professor Ward; I am privileged to share this session and participation in this conference with Dr McPherson.

I have been asked to address the New South Wales Constitution of 1855. This is a necessary task for anyone seeking to understand the Constitutional structure of Queensland, because the New South Wales Constitution of 1855 was the foundation of Queensland's constitutional arrangements at the time of its creation on 10 December 1859.

To understand the constitutional structures given to New South Wales in 1855 and to Queensland in 1859 two tasks are necessary, in addition to gaining an appreciation of the text of the relevant instruments of 1855. First, one needs to appreciate the governmental and constitutional steps leading up to 1855. Secondly, and very much bound up with that first task, one needs to appreciate the historical forces and pressures (local, Imperial, European and international) that brought the politicians, businessmen, pastoralists, artisans, labourers and bureaucrats, in Australia and in England, to the position they found themselves in 1855. To a significant extent, the task is historical as well as legal. The historical aspect of the task is not merely an exercise in giving proper context to the written text of the statutes in question, it is also part of understanding the legal and constitutional step that occurred by the coming into force of the statutes embodying the Constitution. This is so because so much was not written into the relevant texts, but left to convention and contemporary understanding, and thus, now, historical understanding.

The necessary confines of the paper have required me to focus upon the development of the structures of government in New South Wales in respect of executive and legislative power. I have not sought to survey the development of an independent judiciary, though, of course, such development is fundamental to the developing civil societies of all the colonies. My review of the historical forces is not original and owes much to the true scholars in the field.<sup>1</sup> What I have

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<sup>1</sup> E Sweetman *Australian Constitutional Development* (Melbourne University Press 1925); A C V Melbourne and R B Joyce *Early Constitutional Development in Australia* (UQP 1963); E Jenks *A*

sought to do is to give content to so much that was unstated, yet present, in the 1855 New South Wales Constitution, when responsible government was wrested from London. It is not possible to appreciate the contemporary constitutional reality of what was effected in 1855 without appreciating the struggle, conflicts and tensions between colonials and London over self-government. People at the time understood that struggle, which was about power – Imperial and colonial, and how, if they could, the two types of power could co-exist within the Empire.

I should also say at the outset that this is a white man's story. It should not be forgotten that the history of New South Wales, Queensland and Australian Aboriginal history of the 19<sup>th</sup> century remains to be told fully. The absence of the indigenous inhabitants from what I am about to say, otherwise that as an aspect of background (though, at times, mentioned in instructions and despatches from London seeking their protection) speaks volumes as to their exclusion from the constitutional and political developments of the day. Reading of the heated political debates over “waste lands” and unalienated “empty” Crown land one conjures up a silent scream. This is not said by way of historical judgement on others of another age, or by way of contemporary political comment. Rather, the absence of indigenous participation in the political and constitutional development of the 19<sup>th</sup> century is itself a constitutional fact and a feature of our respective States' and our nation's constitutional, political and social history, which we inherit, and with which we must deal.

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*History of the Australasian Colonies* (Cambridge 1896); K R Cramp *The State and Federal Constitutions of Australia* (Sydney 1914); C M H Clark *History of Australia* (Melbourne University Press) Vols 3 and 4; P Cochrane *Colonial Ambition: Foundations of Australian Democracy* (Melbourne University Press 2006); J Quick and R Garran *The Annotated Constitution of the Australian Commonwealth* (Sydney 1901); A Castles *An Australian Legal History* (LBC 1982); J M Ward *Earl Grey and the Australian Colonies 1846-1857* (Melbourne University Press 1958) (“Ward Earl Grey”); J M Ward *Colonial Self-Government: The British Experience 1759-1856* (CUP 1976) (“Ward Colonial Self-Government”); W G McMinn *A Constitutional History of Australia* (OUP 1979); G Carney *The Constitutional Systems of the Australian States and Territories* (Cambridge 2006)

## Early autocratic rule

The early governmental structure from 1788 to 1823 was essentially autocratic rule of the Governor. This conformed with the penal aims and purposes of the first occupation; though as time passed, the political pressures of a growing civil society brought change.<sup>2</sup>

In 1770, Cook took possession of the eastern coast on behalf of the Crown.<sup>3</sup> The loss of the American colonies sparked an idea that colonisation of New South Wales might give an asylum to British loyalists from the lost colonies.<sup>4</sup> When Lord Sydney took over the Home Office in a new government in 1786, New South Wales was decided upon for transportation.<sup>5</sup> By Imperial Act of 1784<sup>6</sup>, the King in Council had been given power to declare places to which convicts might be transported. New South Wales was so declared in 1786.<sup>7</sup>

Captain Phillip's first commission (a military one) by letters patent dated 12 October 1786 appointed him Governor of the territory of New South Wales from latitudes 10° 37' S to 43° 39' S and west as far as longitude 135° E, including all adjacent islands.<sup>8</sup>

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<sup>2</sup> See generally, McMinn *op cit* ch 1

<sup>3</sup> This was an act of state not open to municipal judicial challenge: *Coe v Commonwealth* [1979] HCA 68; 53 ALJR 403 and *Mabo v State of Queensland (No 2)* [1992] HCA 23; 175 CLR 1 at 31, 32, 69, 78, 81, 95 and 121.

<sup>4</sup> Suggestion of James Matra to the Fox-North government in 1783: Evatt "The Legal Foundations of New South Wales" (1939) 11 *ALJ* 409.

<sup>5</sup> Evatt *op cit* p 409

<sup>6</sup> 24 Geo III c 56

<sup>7</sup> McMinn *op cit* p 1

<sup>8</sup> Historical Records of Australia, Series 1 Vol 1 p 1; The phrase "adjacent islands" was one of considerable breadth in the 19<sup>th</sup> century including Norfolk Island, New Zealand, Tasmania and other: *Wacando v Commonwealth* [1981] HCA 60; 148 CLR 1 at 8 (Gibbs CJ), though compare Cramp *op cit* note 2 above p 4; Carney *op cit* p 37.

Phillip's second commission (a civil one) by letters patent dated 2 April 1787 (the First Charter of Justice) appointed him "Captain-General and Governor in Chief" and dealt more fully with such matters as a public seal, establishing courts of civil and criminal jurisdiction, appointing justices and officers of the law, pardon and reprieve, levying armed forces and the proclamation of martial law, controlling finances, the granting of land and controlling of commerce.<sup>9</sup>

In 1787, an Act of Parliament was passed<sup>10</sup> providing some statutory authority for the foundation of civil government in New South Wales, the recitals of which included reference to the establishment of a "colony and a civil government" and a court of criminal jurisdiction with authority to proceed in a summary way.

Phillip also received instructions from the King-in-Council on 25 April 1789. These concerned emancipation and land grants.

These constituting instruments provided for the autocratic rule of the Governor.<sup>11</sup> It was, after all, a penal settlement – an open prison. Phillip, according to his first commission, was to be obeyed "according to the rules and discipline of war."<sup>12</sup> Relying on royal prerogative and Imperial law, the Governor legislated, governed and adjudicated: issuing proclamations, appointing civil servants, handing out land, maintaining an armed force and taking appeals from the Judge Advocate and after 1814, the Supreme Court. It has been described as "despotic government", and, as such, to be distinguished from a colony.<sup>13</sup> It is unnecessary here to discuss some of the constitutional doubts and difficulties of the early colonial administration.<sup>14</sup> It is also well to recall that although it is

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<sup>9</sup> Carney *op cit* p 37

<sup>10</sup> 27 Geo III c 2

<sup>11</sup> Quick and Garran *op cit* p 36; W J V Windeyer *Lectures on Legal History* (2<sup>nd</sup> Ed Sydney 1957) p 305; Cramp *op cit* note pp 6-8; McMinn *op cit* ch 1

<sup>12</sup> See Phillip's first Commission: Historical Records of Australia Series 1 Vol 1 p 1

<sup>13</sup> E Jenks *The Government of Victoria* (London 1891) p 11; and Evatt *op cit*; Quick and Garran *op cit* p 36

<sup>14</sup> See generally, W J V Windeyer "A Birthright and Inheritance: the Establishment of the Rule of Law in Australia" (1962) 1 *Tas ULR* 635; Evatt *op cit*; R E Else-Mitchell "The Foundation of New

legitimate to emphasise the personal or autocratic authority of the Governor, the essential rule of law persisted, though without contemporary or modern day constitutional safeguards for sophisticated civil societies. English governors were held responsible for unlawful acts.<sup>15</sup>

During much of this period (up to 1815) Britain was engaged in the worldwide struggle with Revolutionary and Napoleonic France. British rule in Ireland was also a focus of discontent and a source of many convicts. These considerations, as well as the running of a young, and at times brutal, penal settlement, justified such autocratic power.

Thereafter, in times of peace, tension with autocratic rule began to grow as the society in New South Wales began to expand and as its free and emancipist population grew. The establishment in 1814, under the Second Charter of Justice, of a Supreme Court, led to some tension, from time to time, between the judges and the Governor as to the latter's will being law.<sup>16</sup> As early as 1818, debate existed as to the continued legitimacy of the authority of the Governor without some form of representative assembly.<sup>17</sup>

William Charles Wentworth, the illegitimate son of a convict woman and the surgeon to the Second Fleet, D'Arcy Wentworth, was to play a central role in the political developments culminating in the New South Wales Constitution of 1855. As early as 1819, while in London reading for the Bar, Wentworth published a

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South Wales and the Inheritance of the Common Law" (1963) 49 *RAHSJ* 5; E Campbell "Prerogative Rule in New South Wales 1788-1823" (1964) 50 *RAHSJ* 181; E Campbell "The Royal Prerogative to Create Colonial Courts" (1964) 4 *Syd LR* 343; Carney *op cit* p 38; McMinn *op cit* ch 1; Ward *Colonial Self Government* pp 130-136

<sup>15</sup> W J V Windeyer "Responsible Government – Highlights, Sidelights and Reflections" (1957) 42 *RAHSJ* 257 at 263-266 and footnote 6 p 309

<sup>16</sup> Charters of Justice created courts in 1787 and 1814, in the latter year a "Supreme Court". The legal status of these charters was doubtful in the absence of legislation: J M Bennett *A History of the Supreme Court of New South Wales* (LBC 1974); Castles *op cit* chs 6 and 7; and see Cramp *op cit* note pp 9-10

<sup>17</sup> R D Lumb *The Constitutions of the Australian States* (UQP) 4<sup>th</sup> Ed pp 9-10

pamphlet of 100,000 words about the colony<sup>18</sup> which revealed an ambitious and energetic political zeal.<sup>19</sup> The theme of his pamphlet was a desire to push for political rights for the colony. He advocated a bicameral legislature with an elected assembly.<sup>20</sup> The pamphlet can be seen as the commencement of Wentworth's personal political ambition and life-long campaign for rights of self-government for the Colony within the Empire. Such ambition and vision was not (especially in later years) necessarily fully democratic, nor was it secessionary; rather, it was very much based on the views of Edmund Burke, who, speaking of the American colonists, referred to "ties which, though light as air, are as strong as iron".<sup>21</sup> This reflected a contemporary view of many colonial expatriates that self-government by a representative assembly was a right but could take place within the structure of the Empire.<sup>22</sup>

It is also to be recognised that during the political debates in the 19<sup>th</sup> century the historical and contemporary colonial development elsewhere in the Empire was known in New South Wales. In 1783, Nova Scotia and New Brunswick had received representative assemblies, as had various slave based colonies in the Caribbean in the 18<sup>th</sup> century; in 1791, Upper and Lower Canada had received the same. The Colonial Office, however, saw its disparate colonies, often dominated by powerful cliques, as necessarily ultimately subject to control by London for the good of the whole Empire.<sup>23</sup>

### **The end of autocracy**

By the early 1820s, the growing number of free and emancipated citizens in New South Wales, and their calls for some local legislature, led to an enquiry into the

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<sup>18</sup> *A Statistical, Historical and Political Description of The Colony of New South Wales and its Dependent Settlements in Van Dieman's Land*

<sup>19</sup> Cochrane *op cit* p 6 ff

<sup>20</sup> Carney *op cit* p 39

<sup>21</sup> Cochrane *op cit* pp 8-11

<sup>22</sup> Windeyer *op cit* note 15 pp 266-267

<sup>23</sup> Cochrane *op cit* pp 21-22

state of the Colony under John Bigge (a former Chief Justice of Trinidad)<sup>24</sup> whose recommendations influenced into the Act of 1823<sup>25</sup>, whereby New South Wales attained the status of a full colony.<sup>26</sup>

Under the Act of 1823, no assembly or representative body was established, but a Council was. It was to be comprised of between five and seven appointees. The Governor, acting on the advice of the Council, was to make laws for the “peace, welfare and good government” of the Colony, provided such were not repugnant to the 1823 Act, Charters, Letters Patent, Orders in Council or the laws of England “consistent with such Laws, so far as the circumstances of the said Colony will admit”.<sup>27</sup> Only the Governor could initiate bills. A majority of the Council could defeat a bill, unless the Governor was convinced that the law was essential and extreme injury would be caused to the Colony if rejected, in which case the support of only one member was required.<sup>28</sup> A form of judicial review was introduced, with the requirement for each bill or ordinance to be laid before the Chief Justice of the newly formed Supreme Court for an opinion as to lack of repugnancy to the laws of England.<sup>29</sup> Pursuant to the 1823 Act, Letters Patent (the Third Charter of Justice) established the Supreme Court of New South Wales and of Van Diemen’s Land. Overall supervision by London was ensured by provisions relating to disallowance and laying of laws and ordinances before the Parliament at Westminster.<sup>30</sup>

The first Executive Council was created by a new Commission and Instructions issued to Governor Darling on 17 July 1825, in which the Lieutenant–Governor

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<sup>24</sup> Carney *op cit* p 38; Melbourne and Joyce *op cit* pp 74-87; McMinn *op cit* pp 11-18

<sup>25</sup> 4 Geo IV c 96

<sup>26</sup> The 1823 Act had a conformity with the Quebec Act of 1774: see Cramp *op cit* note 1 p 11; see also McMinn *op cit* ch 2; and Ward *Colonial Self-Government* pp 136-139.

<sup>27</sup> 4 Geo IV c 96, s 24

<sup>28</sup> 4 Geo IV c 96, s 24

<sup>29</sup> 4 Geo IV c 96, s 29

<sup>30</sup> 4 Geo IV c 96, ss 30 and 31



(the senior military officer), the Chief Justice, the Archdeacon and the Colonial Secretary were appointed as founding members. The Governor sat with the Council.<sup>31</sup>

The 1823 Act was temporary, an experiment.<sup>32</sup> It lasted in terms until the end of the next session of Parliament after 1827.<sup>33</sup> It removed autocratic power, but was not representative, let alone responsible, government. Nevertheless, the changes brought about by and under the 1823 Act were of great significance. The Supreme Court (as presently existing) was established under it. The Act ended autocratic and doubtfully founded governmental authority, replacing it with non-autocratic (though non-representative) law making.<sup>34</sup>

Under the authority of the 1823 Act<sup>35</sup> the Commission to Darling also withdrew Van Diemen's Land from the jurisdiction of the Governor of New South Wales creating a new colony with a similar constitutional system.<sup>36</sup>

At the expiry of the 1823 Act, the Imperial Parliament passed an Act of 1828,<sup>37</sup> which later became known as the Australian Courts Act. The Bill was drafted by the first Chief Justice, Sir Frances Forbes, with amendments being made by Imperial authorities.<sup>38</sup> No representative assembly was created, but important changes were made to the operation of the courts and the judiciary and also to

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<sup>31</sup> Lumb *op cit* p 12; for the distinction between the Executive Council set up by the Commission and Instructions and the Council (or Legislative Council) set up under the 1823 Act see Cramp *op cit* note 1 pp 14-15.

<sup>32</sup> It was kept in operation by successive enactments. See for example the Act of 1839, 2 & 3 Vict c 70; and see Sweetman *op cit* p 74; Lumb *op cit* pp 13-14.

<sup>33</sup> 4 Geo IV c 96, s 45; see Melbourne and Joyce *op cit* 140-151 regarding the political discussion that followed its passing, especially as to the need for a representative body; and see Ward *Colonial Self-Government* pp 139-145.

<sup>34</sup> McMinn *op cit* p 22; Quick and Garran *op cit* pp 36-41

<sup>35</sup> 4 Geo IV c 96, s 44

<sup>36</sup> Melbourne and Joyce *op cit* pp 107-108 and Carney *op cit* p 48. The colony was renamed Tasmania on 1 January 1856.

<sup>37</sup> 9 Geo IV c 83; see Ward *Colonial Self-Government* pp 146-148

<sup>38</sup> Else-Mitchell *op cit* p 20; Lumb *op cit* p 12

the Council and its authority. First, the Council was expanded in number: between 10 and 15 (rather than five to seven), to be appointed by the Crown.<sup>39</sup> A quorum was two thirds of the members.<sup>40</sup> The Governor and Council were given power to legislate for the peace, welfare and good government of the colonies such laws and ordinances not being repugnant to the 1828 Act, or to any Charters or Letters Patent or to the laws of England.<sup>41</sup> The Governor required a majority of members to support his proposals; his residual power in extreme need under the 1823 Act was abolished.<sup>42</sup> Members were permitted to suggest bills. If the Governor refused to put such a law to the Council for consideration, he was required to table his reasons and any objections of members were noted.<sup>43</sup> The supervisory judicial power was modified: every law or ordinance was to be enrolled in the Supreme Court within seven days of enactment. The judges of the Court could declare the law repugnant to the 1828 Act or to the laws of England. This would suspend the law requiring its resubmittal to the Council. If passed again, it was law until the pleasure of the Crown was known.<sup>44</sup>

By 1823 and 1828, the nature of New South Wales as a colony, rather than as a penal settlement, was important for the extent of reception of English law. The 1828 Act provided that the laws of England (statute and common law) in force in England in 1828 **so far as they were applicable** were to be in force in New South Wales.<sup>45</sup> As Sir Harry Gibbs said in *Dugan v Mirror Newspapers Limited*<sup>46</sup>:

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<sup>39</sup> 9 Geo IV c 83, s 20

<sup>40</sup> 9 Geo IV c 83, s 21

<sup>41</sup> *ibid*

<sup>42</sup> *ibid*

<sup>43</sup> *ibid*

<sup>44</sup> 9 Geo IV c 83, s 22

<sup>45</sup> 9 Geo IV c 83, s 24. See generally E Campbell “Colonial Legislation and the Laws of England” (1965) 2 *Tas ULR* 148; Windeyer *op cit* note 14 pp 667-669; Windeyer *op cit* note 11 ch 37; G A Castles “The Reception and Status of English Law in Australia” (1963) 2 *Adel L R* 1

<sup>46</sup> [1978] HCA 54; 142 CLR 583 at 590

“It would indeed be a poor birthright if the common law inherited by the settlers of New South Wales was only that applicable to the conditions of persons living in an open penitentiary.”

### **The development of representative government**

In 1829, the Swan River Colony (renamed Western Australia on 6 February 1832) was proclaimed.<sup>47</sup> The eastern boundary of Western Australia was longitude 129° E, which was the revised western boundary of New South Wales after it had been extended by 6° of longitude in the Commission of Governor Darling in order to incorporate into the colony a military and trading post set up on the north coast of Australia on Melville Island, called Fort Dundas (just north of present day Darwin).<sup>48</sup>

Overshadowing and inhibiting any move to representative government was the continuation of transportation. Transportation was vital to the early economic development of the colony by the provision of cheap labour. Its continuation and its social and economic costs and benefits became central to the politics of the 1840s. The perceived need by pastoralists for the benefit of cheap labour was one reason for the push for separation of a northern colony, which became Queensland.

One early manifestation of the desire of removal from the effects of transportation and convict labour was the practical expression of the colonisation theories of Edward Gibbon Wakefield and the establishment of the province of South Australia in 1836.<sup>49</sup> By the late 1830s, free immigration was bringing many to the colony of New South Wales as the ideas of Wakefield and other proponents of systematic colonisation became influential.<sup>50</sup> Industrialisation in England was giving rise to surplus labour and to the political forces of democracy and

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<sup>47</sup> Sweetman *op cit* pp 78 and 337

<sup>48</sup> Melbourne and Joyce *op cit* p 107

<sup>49</sup> Pursuant to 4 & 5 Wm IV c 95, and proclaimed on 28 December 1836; Sweetman *op cit* pp 306 ff; Clark *op cit* vol 3 ch 3; Ward *Colonial Self-Government* pp 225-241.

<sup>50</sup> Cochrane *op cit* p 20; Melbourne and Joyce *op cit* pp 222 ff

Chartism.<sup>51</sup> Emigration and colonial settlement were seen as essential safety valves.<sup>52</sup> These emigrants were bringing with them some of the political baggage from England: ideas of Catholic emancipation, parliamentary reform, franchise extension and Chartism.<sup>53</sup> These emigrants came primarily to Sydney, where, by the late 1830s, there was a radical press.<sup>54</sup>

In August 1838, a committee of the House of Commons, chaired by Sir William Molesworth, influenced by Wakefield's ideas recommended the end of transportation and the replacement of convicts by free emigrants.<sup>55</sup> The intention to end transportation was announced in the Colony in 1839. The Order in Council of 22 May 1840 effected its end.<sup>56</sup> This marked the treatment of New South Wales as a settlement, rather than a convict station.<sup>57</sup>

Meanwhile, in 1837, French-speaking Quebecois in Lower Canada and pro-Americans in Upper Canada revolted.<sup>58</sup> Their complaint was that their Assembly was merely advisory and could be ignored by the Governor and London. This political agitation in Canada caused fear in London that Canada too might be lost like the American colonies had been only half a century before. The Earl of Durham was sent to Canada to investigate and report. He spent 6 months there. His report recommended responsible government, that is an executive responsible to a local legislature.<sup>59</sup> It was an unwelcome message to an Imperial government intent on central control.<sup>60</sup> Nevertheless, the Durham Report

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<sup>51</sup> D Thomson, *England in the Nineteenth Century* (Pelican 1950 Reprint 1975) pp 83 ff

<sup>52</sup> Cochrane *op cit* p 21

<sup>53</sup> Cochrane *op cit* p 25

<sup>54</sup> Cochrane *op cit* p 29

<sup>55</sup> Melbourne and Joyce *op cit* p 245; Carney *op cit* p 40

<sup>56</sup> Clark *op cit* vol 3 p 179

<sup>57</sup> Melbourne and Joyce *op cit* p 246

<sup>58</sup> Ward *Colonial Self-Government* ch 3

<sup>59</sup> Cochrane *op cit* p 19; Ward *Colonial Self-Government* pp 75 ff

<sup>60</sup> The two views of Empire reflected the immanent centrifugal and centripetal political forces of "Imperium et Libertas": Cramp *op cit* note 1 above pp 1 ff. See also Windeyer *op cit* note 15 pp

became well-known, not only in English political circles, but also in the colonies, including New South Wales. It typified an important strand of the thinking of one group of politicians and bureaucrats in England as to the necessary treatment of colonies within the Empire. It was thinking later reflected in the actions of the Colonial Office in the 1850s under Sir John Pakington and the Duke of Newcastle.

In 1840, the Colonial Land and Emigration Board was established to oversee the sale of Crown land in New South Wales to subsidise mass migration.<sup>61</sup> This policy saw the land of the colonies as held in trust for Imperial policies, rather than solely for the benefit of the local colonists. This conflicted with the New South Wales landed gentry's interests of land grants, control of the land and cheap convict labour. The representatives of this group, such as Wentworth and the Macarthurs had a vision of pastoral holdings, landed conservative political control (including control of the land and its benefits) and responsible government (with political power firmly held by landed interests) in an equal constituent polity of the Empire.

By 1840, the Colonial Secretary, Lord John Russell, had numerous colonial concerns, including immigrant and pastoralist expectations in New South Wales, troubles in Ireland, Jamaica and Canada, the question of what to do with New Zealand and the ending of transportation to New South Wales.<sup>62</sup>

Further, by the late 1830s, another important element emerged that was relevant to the politics in New South Wales in the coming two decades. There was a recognition in the Imperial Government that the development of European settlement over the large areas of the Australia (by now completely claimed as a continent by Great Britain) required the sub-division of the vast settled colony of New South Wales, which stretched from Port Phillip to Cape York and across

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267-271 for a discussion of these two themes in British policy; and see generally Ward *Colonial Self-Government*.

<sup>61</sup> Ward *Colonial Self-Government* p 240

<sup>62</sup> Cochrane *op cit* p 30

what is now the Northern Territory to the colony of Western Australia. The instructions to Governor Gipps on 22 May 1839 informed him that New South Wales was to be divided into 3 districts: Northern, Central and Southern. Lord John Russell's despatch to him 9 days later (31 May 1839) gave more detail, including the border of the Central and Southern Districts along the Murray and Murrumbidgee Rivers.<sup>63</sup>

An Act of 1840<sup>64</sup> renewed the 1828 Act and made provision for detachment of dependent islands (directed at New Zealand).<sup>65</sup> In the original Bills for the 1840 Act,<sup>66</sup> however, provision was made<sup>67</sup> for the division of New South Wales and the detachment of territory for one or more colonies, though not detaching any of the 19 counties proclaimed in 1829.<sup>68</sup> These provisions were objected to by the Macarthurs, and Sir Robert Peel agreed to oppose them.<sup>69</sup> The offending clauses were removed and replaced with the clause referred to above.

Once known in the Colony, the proposals for division of the Colony which appeared in the Bills for the Act of 1840, were the subject of opposition, including by the Legislative Council.<sup>70</sup> A petition was sent to London.<sup>71</sup> Politically, this opposition united the landed conservatives such as Wentworth and the Macarthurs, and the emancipists.<sup>72</sup> In 1841, counter petitions were raised both in the north and the south of the Colony on the question of separation.<sup>73</sup> The

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<sup>63</sup> Sweetman *op cit* pp 162-163

<sup>64</sup> 3 & 4 Vict c 62

<sup>65</sup> Sweetman *op cit* p 166. By letters patent of 1840, the colony of New Zealand was proclaimed.

<sup>66</sup> The 1828 Act requiring continuation.

<sup>67</sup> In cll 30 and 31 and cll 51 and 52 of the two continuance bills, respectively

<sup>68</sup> Sweetman *op cit* p 165

<sup>69</sup> *ibid*

<sup>70</sup> Melbourne and Joyce *op cit* p 259; Sweetman *op cit* pp 166-168

<sup>71</sup> Sweetman *op cit* pp 168-169

<sup>72</sup> Sweetman *op cit* p 170

<sup>73</sup> Melbourne and Joyce *op cit* p 260

opposition from the Legislative Council appeared to be successful, with the withdrawal of the dismemberment scheme on 21 August 1841.<sup>74</sup>

Nevertheless, two years later, when the 1842 Act was passed, s 51 provided for the power in Her Majesty by letters patent, to erect new colonies or territories within the limits of New South Wales, provided that no territory south of latitude 26° South (about Gympie's latitude) could be detached.

### **Representative government: the Act of 1842**

In 1842, the Imperial Parliament enacted "An Act for the Government of New South Wales and Van Diemen's Land".<sup>75</sup> The Act became known as the Australian Constitutions Act (No 1). It introduced the first representative government in New South Wales. A Legislative Council was established, consisting of 36 members holding office for 5 years, 24 were elected and 12 were appointed by the Crown.<sup>76</sup> The property qualifications for election was freehold of £2000 or an annual value of £100.<sup>77</sup> The franchise for electors was freehold of £200 or annual value of £20.<sup>78</sup> There was power in the Governor and Council to increase the size of the Council, but only by keeping the same proportions of elected and appointed members: that being 2:1.<sup>79</sup> Importantly, the Governor was not part of the Council. He could only transmit Bills for consideration. Both the Governor and the Council could initiate bills.<sup>80</sup> Bills were presented to the Governor for assent. Certain classes of bills were reserved for Royal assent.<sup>81</sup> Bills assented to by the Governor could be annulled by the Crown within 2

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<sup>74</sup> *ibid*

<sup>75</sup> 5 & 6 Vict, c 76. The Act in fact applied only in New South Wales, see 7 & 8 Vict c 74 s 6.

<sup>76</sup> 5 & 6 Vict c 76, s 1; appointment was by the Governor, subject to Royal assent.

<sup>77</sup> 5 & 6 Vict c 76, s 8

<sup>78</sup> 5 & 6 Vict c 76, s 5

<sup>79</sup> 5 & 6 Vict c 76, s 4

<sup>80</sup> 5 & 6 Vict c 76, s 30

<sup>81</sup> 5 & 6 Vict c 76, s 31

years.<sup>82</sup> The power of the Council to control the revenue of the colony was subject to severe limitations.<sup>83</sup> Revenue derived from rates and taxes on the inhabitants was subject to legislative appropriation, but only after a recommendation of the Governor.<sup>84</sup> Other revenue (most importantly, that derived from Crown land) was not within the power of the Council.<sup>85</sup> Provisions were made for a Civil List<sup>86</sup>. The Governor appointed all officials in accordance with instructions from London.<sup>87</sup> District Councils with local government powers were created.<sup>88</sup> The local raising of revenue (unassisted by revenue from land) was expected to support police and gaols.<sup>89</sup> The 1828 Act was made permanent.<sup>90</sup> Provision was also made for the creation of new colonies north of latitude 26° S.<sup>91</sup>

The Governor was not responsible to the Council. Salaried officers of the executive were debarred from accepting elective seats in the Council. The Governor held significant financial power and assent to legislation was discretionary and ultimately under the control of London. Thus, the 1842 Act can be seen as the commencement of representative government in the colony, but not responsible government.<sup>92</sup>

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<sup>82</sup> 5 & 6 Vict c 76, s 32

<sup>83</sup> Lumb *op cit* p 15; Melbourne and Joyce *op cit* pp 269-271

<sup>84</sup> 5 & 6 Vict c 76, s 34

<sup>85</sup> Melbourne and Joyce *op cit* p 271

<sup>86</sup> 5 & 6 Vict c 76, s 37

<sup>87</sup> Carney *op cit* p 41

<sup>88</sup> 5 & 6 Vict c 76, s 41

<sup>89</sup> Carney *op cit* p 41

<sup>90</sup> 5 & 6 Vict c 76, s 53

<sup>91</sup> 5 & 6 Vict c 76, ss 51 and 52

<sup>92</sup> Lumb *op cit* p 15



The first elections in the colony took place in 1843 when the 1842 Act was proclaimed. The existing Council, in a special session after the arrival of a copy of the Act, ensured that representation in the new Council was apportioned on the basis of one quarter elected representatives from towns and the rest from country districts.<sup>93</sup> The elections then returned members drawn largely from the upper ranks of colonial society: the land, professions and merchants.<sup>94</sup>

There was considerable tension in the operation of the constitutional structure under the 1842 Act. It disappointed radicals, liberals and conservatives alike, though for different reasons.<sup>95</sup> The Waste Lands Act of 1842<sup>96</sup>, being complementary legislation to the 1842 Act<sup>97</sup>, put the sale and disposition of Crown land in the control of the Governor, with this source of revenue unavailable to support the high cost of the Civil List, police and gaols which was to be borne by local taxation. Endless controversy and acrimony flowed from disputes over the Civil List and appropriations.<sup>98</sup> Attempts were made to reduce salaries of government officials, in bitter, often petty, examination of expenditures.<sup>99</sup> The Council tried to pass bills seeking to limit those who could sit in the Council and to audit the colony's accounts. The District Councils (which turned out to be a failure) were intended to have taxing powers to cover police and gaols. This was resented as an attempt to undermine the financial responsibility of the Legislative Council.<sup>100</sup>

The Legislative Council was often bitterly opposed to the stiff and prickly Governor Gipps, such conflict being driven by the cost of the Civil List and the

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<sup>93</sup> Melbourne and Joyce *op cit* p 282

<sup>94</sup> Cochrane *op cit* p 35

<sup>95</sup> Cochrane *op cit* p 31

<sup>96</sup> 5 & 6 Vict c 36

<sup>97</sup> Melbourne and Joyce *op cit* p 273

<sup>98</sup> Melbourne and Joyce *op cit* pp 290 ff

<sup>99</sup> Cochrane *op cit* pp 39 ff

<sup>100</sup> Cochrane *op cit* p 32; K R Cramp *A Struggle for a Constitution: New South Wales 1848-1853* pp 3-4

growing economic depression in the colony in the 1840s.<sup>101</sup> Whilst often not constructive, this concerted political opposition created a sense of political direction and entitlement focussed on colonial, against Imperial, interests. The Council was asserting its political will in an attempt to influence or control the Governor. The conflict saw the rise of a number of significant political figures: Wentworth, Richard Windeyer, the Rev John Dunmore Lang and Robert Lowe amongst them.<sup>102</sup>

Other political forces were developing. Radical shopkeepers and artisans such as William Duncan and the young toymaker Henry Parkes looked to responsible government with a popular franchise.<sup>103</sup>

For Wentworth and many in the colony, the struggle for control of the land was central and vital. The agitation for it was public and outspoken.<sup>104</sup> It has been said that the period of the 1840s and 1850s was the struggle for independence which could have led to secession or revolt.<sup>105</sup> The vehemence of the politics in New South Wales that began in these struggles with Gipps in the 1840s and the stridency of the expression of opposition to a stubborn Earl Grey a decade or so later in the 1850s justify that view.

The question of control of land had been an issue since the 1820s. In 1829, the “limits of location” were proclaimed, beyond which an occupier had no rights.<sup>106</sup> This did not prevent the existence of squatters going beyond these limits. A local Act was passed in 1836<sup>107</sup> that recognised the squatters and sought to bring

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<sup>101</sup> Cochrane *op cit* p 35 Melbourne and Joyce *op cit* p 263

<sup>102</sup> Cochrane *op cit* p 41

<sup>103</sup> Cochrane *op cit* 54-57; as to the elements in local opinion, see Windeyer *op cit* note 15 pp 275-278

<sup>104</sup> Cochrane *op cit* 81-83

<sup>105</sup> A Twomey *The Constitution of New South Wales* (Federation Press 2004) p 4

<sup>106</sup> Melbourne and Joyce *op cit* p 296

<sup>107</sup> 7 Wm 1V, No 4

them under control by the issuing of licences.<sup>108</sup> In 1844 Gipps attempted a permanent settlement of the problem by opposing their claims for tenure and issuing regulations requiring licence fees for every 20 square miles of run. This met great opposition, especially in the Legislative Council.<sup>109</sup>

These grievances and resentments led, in 1844, to a petition being sent by a Select Committee of the Council to London seeking local control of Crown lands and revenue. It was dismissed by London in a manner<sup>110</sup> that caused significant resentment. A second Select Committee of the Council reported to London in late 1844 seeking, amongst other things, local control of revenue and taxation and **responsible** government. Again these requests were rejected.<sup>111</sup>

Meanwhile, residents of the Port Phillip District advocated separate government for the District. In 1840, the District had been placed under the administration of a Superintendent. Under the 1842 Act, it was to return five members, plus one from the town of Melbourne.<sup>112</sup>

At this point, it is necessary to return to the issue of transportation and to identify its place in the politics of the day, including the movement for a separation of territory from northern New South Wales for the creation of a separate colony. The issue of transportation and the interests of many pastoralists in its continuation in some form played an important part in New South Wales politics of the 1840s and in the background to the creation of Queensland. New South Wales was closed to convicts in 1840. The continuation of transportation to Van Diemen's land stopped the parallel constitutional development of Van Diemen's Land with New South Wales that had occurred since 1825, with the 1842 Act

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<sup>108</sup> Melbourne and Joyce *op cit* p 296

<sup>109</sup> Melbourne and Joyce *op cit* pp 297-302

<sup>110</sup> "so improbable a contingency" Lord Stanley said in his reply in 1845: see Sweetman *op cit* p 187.

<sup>111</sup> Sweetman *op cit* pp 187 ff

<sup>112</sup> Though because of distance, their representatives were generally residents of Sydney: G Taylor *The Constitution of Victoria* (Federation Press 2006) p 24

applying only to New South Wales.<sup>113</sup> It became clear, in a short time after 1840, that Van Diemen's Land could not absorb all the supply of English criminals. Lord Stanley considered re-opening New South Wales to transportation, at least of the "better class" of "exile", using Launceston as a clearing house.<sup>114</sup>

Gladstone succeeded to the Colonial Office in December 1845 and in his short time there (seven months)<sup>115</sup> he revived the controversy about renewed transportation and detachment of a new colony. In February 1846, he separated the territory north of latitude 26° S proclaiming the colony of "North Australia", which was intended to be a new convict settlement.<sup>116</sup> This was accompanied by a despatch suggesting the renewal of transportation. The establishment of the new colony was revoked by Earl Grey in April 1847 and the territory was reincorporated into New South Wales.<sup>117</sup> The reversal of the creation of the new colony saw the return to England of its Lieutenant-Governor Colonel Barney and his staff. What could not be reversed, however, was the movement in the north for separation. By July 1850, a committee was formed in Brisbane to secure separation.<sup>118</sup>

The exclusive landed conservatives who controlled the Legislative Council, had, in 1839 and 1840, opposed the ending of transportation (and thus the supply of cheap labour). Petitions of Macarthur and others in the Council had sought its renewal, or, in its place, labour from India.<sup>119</sup> Gipps had not sent these on to London, because there were also petitions from others in the colony, wage

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<sup>113</sup> Carney *op cit* p 48

<sup>114</sup> Melbourne and Joyce *op cit* p 357

<sup>115</sup> Melbourne and Joyce *op cit* p 357

<sup>116</sup> Melbourne and Joyce *op cit* pp 357-358

<sup>117</sup> Sweetman *op cit* p 331

<sup>118</sup> Sweetman *op cit* pp 331-332

<sup>119</sup> Melbourne and Joyce *op cit* pp 357-358

earners and emancipists, strongly opposed to both.<sup>120</sup> Transportation was dividing the politics of the colony sharply.

The suggestion of Gladstone for renewed transportation won the qualified support of a Select Committee of the Legislative Council in 1846.<sup>121</sup> It failed, however, to win the support of the Legislative Council as a whole in 1847.<sup>122</sup>

In this period of anti-transportation ferment, Earl Grey in 1847 came to the Colonial Office in the new Whig government. Earl Grey, having received the Select Committee's views in favour of renewal of transportation, went ahead with his deliberations and then announced in a despatch<sup>123</sup> his intentions to renew transportation. Opposition in the colony was immediate, public and intense.<sup>124</sup> This debate reflected the growing sense of political will in the colonial community as a whole. There was a self-perception of a civil society, a desire for responsible government and a belief that it was possible. These views were shared by many in the community. The presence of convicts and the use of the society as a penal settlement was anathema to such ambitions.<sup>125</sup>

One of the fears of the elected members of the Legislative Council was that Earl Grey would impose more general constitutional change on the colony in an unsatisfactory manner, without consultation. This manifested itself in December 1847 with the arrival of a despatch from Earl Grey. He proposed the separation of Victoria; a new bicameral Parliament and enhanced local government, the lower house of the Parliament being made up of representatives of the local governments, indirectly elected; and the creation of a national or central authority

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<sup>120</sup> Melbourne and Joyce *op cit* pp 358-359

<sup>121</sup> Melbourne and Joyce *op cit* p 359

<sup>122</sup> Melbourne and Joyce *op cit* p 360

<sup>123</sup> Melbourne and Joyce *op cit* pp 360-361

<sup>124</sup> Cochrane *op cit* pp 203-207

<sup>125</sup> Cochrane *op cit* ch 7

to deal with matters of common interest.<sup>126</sup> The indirect election of assembly members was avowedly done to curb the perceived power of the Legislative Council.<sup>127</sup>

The despatch of Earl Grey provoked passionate outrage in public meetings across the colony.<sup>128</sup> Robert Lowe, a Legislative Councillor, called it “damning proof of Colonial Office tyranny”.<sup>129</sup> Wentworth, also rejected the proposal in harsh terms. The proposal was seen as a retreat from any development of responsibility of the executive to the Legislative Council. The language of the political debate was becoming strident. Mass meetings such as at Royal Victoria Theatre on 19 January 1848 saw Earl Grey denounced in the strongest terms.<sup>130</sup> The resolutions contained in the petitions from these meetings included calls for responsible government.<sup>131</sup>

Elections took place in New South Wales in 1848, which saw a maturing polity contesting three main issues – (i) transportation, (ii) responsible government and franchise and (iii) land.<sup>132</sup> The three issues being related and part of a larger question of the type of society to be forged: a pastoral economy with convict labour and entrenched landed power or a liberal society with an urban focus with a wide franchise. The transportation issue drove a clear wedge between exclusive landed and pastoralist interests and radical, liberal, wage earner and town interests.<sup>133</sup> The divide between town and country was becoming clearer. Free immigration was bringing thousands to the colony who regarded transportation as a direct threat to their prosperity and wages. By 1848, the town

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<sup>126</sup> Sweetman *op cit* pp 217-218

<sup>127</sup> Cramp *op cit* note 100 p 4

<sup>128</sup> Cramp *op cit* note 100 p 5; Sweetman *op cit* pp 218-219

<sup>129</sup> Sweetman *op cit* p 219; Twomey *op cit* p 5

<sup>130</sup> Cochrane *op cit* p 162-166; Cramp *op cit* note 100 pp 8 ff.

<sup>131</sup> Sweetman *op cit* pp 219-220

<sup>132</sup> Cochrane *op cit* p 172

<sup>133</sup> Melbourne and Joyce *op cit* pp 361-362

and wage earners' influence was sufficient in the Legislative Council to see the opposition to transportation expressed by it. This was not just occurring in Sydney, but also in Melbourne and in small towns throughout the colony.<sup>134</sup>

Views in Brisbane were different, though not completely divergent. In June 1849, a meeting of magistrates and stockholders of Moreton Bay, the Darling Downs and Burnett Districts asked for ticket of leave men, not convicts. The pastoralists, including, and perhaps especially, those in the north were in favour of convicts. They needed labour.<sup>135</sup>

It is to be recalled that 1848 was a year of revolution across Europe in which issues of franchise, privilege and democracy were being addressed.<sup>136</sup> The ferment of Europe in 1848 was not lost on those in colonial New South Wales (nor, one suspects, the Colonial Office).<sup>137</sup> To a significant degree, the election of 1848 saw the victory of liberals and radicals in the electorates of Sydney.<sup>138</sup>

This political self-assertion rose again in the opposition to the announcement in 1848 by Grey of the renewal of transportation and in early 1849 after the arrival of the transportation ship, "Hashemy".<sup>139</sup> The intense opposition to transportation in Sydney and Melbourne, especially, saw Earl Grey, by November 1849, succumb to the will of the Colony with an expression of intention to send no more convicts.<sup>140</sup>

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<sup>134</sup> Melbourne and Joyce *op cit* p 363

<sup>135</sup> Melbourne and Joyce *op cit* p 363

<sup>136</sup> Cochrane *op cit* ch 10

<sup>137</sup> *ibid*

<sup>138</sup> *ibid*

<sup>139</sup> Cochrane *op cit* ch 11

<sup>140</sup> Melbourne and Joyce *op cit* p 364

## **Representative government and an Australia-wide colonial settlement: the Act of 1850**

In a despatch of July 1848, Earl Grey had indicated a willingness for the colonies to draw up their own constitutions, subject to Imperial approval.<sup>141</sup> In 1849, he sought the advice of a committee of the Privy Council dealing with Trade and Plantations (over which he presided). In May 1849, this committee reported on the Australian colonies and their constitutional position. Their report was the basis of the Act of 1850 which became known as the Australian Constitutions Act (No 2).<sup>142</sup> The committee recommended the separation of southern colony to be named Victoria and a general constitutional arrangement for the whole of Australia with a common form of government. Initial uniformity was to be achieved by conferring the New South Wales Constitution on the other colonies, and then granting each colony power to amend its own constitution. This would leave it to each colony to decide upon the form of any changes. The Committee also suggested a central authority dealing with matters of intercolonial interest, with one Governor to be a Governor-General who would have power to convene a General Assembly which would have power to legislate on topics of general interest to the Australian colonies.<sup>143</sup> A “General Supreme Court” was also envisaged. At the level of local government the committee recommended voluntary local councils at the request of inhabitants in place of the unpopular and compulsory system of 1842.<sup>144</sup>

The Bill introduced into the House of Commons was along the lines of the committee’s report and provided for separation of Port Phillip district and the creation of a colony of Victoria, with a form of government similar to New South Wales. Provision was made for similar constitutional change in South Australia,

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<sup>141</sup> Melbourne and Joyce *op cit* pp 344 and 353; Carney *op cit* p 42

<sup>142</sup> 13 & 14 Vict c 59

<sup>143</sup> post; roads, canals and railways; beacons and lighthouses; shipping dues; a General Supreme Court and its details; weights and measures; laws of common interest requested by the legislatures; appropriation of money for the above.

<sup>144</sup> Sweetman *op cit* pp 222-223



Van Diemen's Land and Western Australia. All new legislatures were to have power to change the franchise, electoral boundaries and create bicameral legislatures. The Bill included provision for a "General Assembly of Australia", a Governor-General and House of Delegates comprised of persons elected from the Legislative Councils. The House was to have defined powers capable of overriding colonial legislatures. These provisions had been subjected to criticism in New South Wales and in particular strong opposition from South Australia and Van Diemen's Land when the Privy Council Committee's Report was discussed in the Colonies.<sup>145</sup>

The Bill was before the Parliament from June 1849 to 30 July 1850 when it passed both Houses. It was the subject of criticism by former prominent barrister and politician in Sydney, Robert Lowe (now a member of the Commons) for its failure to advance responsible government.<sup>146</sup> The debate involved the foremost statesmen of the day: Stanley, Russell, Grey, Molesworth, Gladstone, Disraeli and Adderley.<sup>147</sup> The questions in debate as to the nature of the colonial parliaments and their possible federal union were seen as matters of important Imperial interest. There was strong opposition in the House of Lords to the idea of a federal union. This, together with local opposition, saw these aspects dropped from the Bill before it was passed.<sup>148</sup>

The supporters of New South Wales' interests in the Parliament, especially Sir William Molesworth and Robert Lowe argued strongly for independence through responsible government on all local matters, leaving Westminster responsible only for matters of Imperial interest. These suggestions were rejected.<sup>149</sup> The Act made no real change for New South Wales, other than making the failed local government system of the 1842 Act non-compulsory.

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<sup>145</sup> Sweetman *op cit* pp 225-227; Twomey *op cit* p 7; Melbourne and Joyce *op cit* p 374-375

<sup>146</sup> Sweetman *op cit* p 231

<sup>147</sup> Sweetman *op cit* p 232

<sup>148</sup> Sweetman *op cit* p 234

<sup>149</sup> Twomey *op cit* p 7

Pressure from the northern districts saw the inclusion in the Act<sup>150</sup> of a provision for detachment of territory of New South Wales north of latitude 30°S (between Coffs Harbour and Yamba) upon petition of the inhabitants.<sup>151</sup> Those in the north had always complained about the unrepresentative Legislative Council with the dominance of Sydney and the central landholders.<sup>152</sup> New England and the north coast of present day New South Wales supported northern squatter claims for convicts and put themselves forward as more closely related to Moreton Bay than Sydney, with Brisbane seen as likely to become a great commercial centre.<sup>153</sup>

The 1850 Act disappointed political forces in the Legislative Council and Sydney. It did not modify the relationship between the legislature and the executive; fixed civil service appropriations continued; and, most importantly, land revenue continued to be excluded from legislative appropriation. The franchise was reduced to freehold of £100 or occupancy of a dwelling house of £10, which pleased liberals, but not conservatives. Uncontroversially by now, the 1850 Act separated Port Phillip District from New South Wales, the new colony of Victoria being proclaimed on 1 July 1851. The 1850 Act empowered the existing legislatures of South Australia and Van Diemen's Land to admit elected members at the same ratio as New South Wales and Victoria (2:1, elected to non-elected). Provision was also made for the establishment of a legislature in Western Australia. The franchises of all parliaments were brought into line with that of New South Wales.

### **The reaction in New South Wales to the Act of 1850**

Those in the other colonies were pleased – a mechanism for constitutional reform had been given to them. Those in northern New South Wales were pleased – separation was recognised again and possibly at a border taking some of the

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<sup>150</sup> 13 & 14 Vict c 59

<sup>151</sup> 13 & 14 Vict c 59, s 34

<sup>152</sup> Melbourne and Joyce *op cit* p 372

<sup>153</sup> Melbourne and Joyce *op cit* pp 372-373

richest land in the country, in New England and the northern rivers into the new colony. Some in Sydney, such as Parkes, saw it as a step along the way to responsible government.<sup>154</sup> The dissatisfaction of others in New South Wales, such as Wentworth, was strong. The local interests had failed in respect of control of land, revenue, patronage and local legislative authority. Further, local landed interests saw the franchise widened. The power of responsible government had not been given and the politically enfranchised classes were widening. Further, the potential for northern separation was real.

On May 1851, the Legislative Council, expressing the views of the landed conservatives, especially Wentworth, issued a “declaration, protest and remonstrance” which pressed its political claims disappointed by the 1850 Act. It sought amongst other things:<sup>155</sup>

“plenary powers of Legislation ... and no Bills should be reserved for the signification of Her Majesty’s Pleasure, unless they affect the prerogatives of the Crown or the general interests of the Empire.”

The Council was then dissolved and fresh elections took place under a new Electoral Act 1851 that had been passed shortly after the 1850 Act took effect and that had skewed boundaries in favour of rural electorates,<sup>156</sup> although in Sydney the new franchise saw Wentworth almost defeated.<sup>157</sup> A further petition was sent by the new Legislative Council supporting the Remonstrance. Speakers in support, especially Wentworth, laid bare the threat of revolt.<sup>158</sup> Governor Fitzroy sent the petition on explaining clearly that these were the views of the most “loyal, respectable and influential” members of the community.

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<sup>154</sup> Cochrane *op cit* p 257

<sup>155</sup> Twomey *op cit* p 8; Sweetman *op cit* pp 256-257; McMinn *op cit* pp 48 ff

<sup>156</sup> Cochrane *op cit* ch 15

<sup>157</sup> Melbourne and Joyce *op cit* p 381

<sup>158</sup> Twomey *op cit* p 8; Sweetman *op cit* pp 259-260

Earl Grey rejected the Remonstrance in a long and argumentative despatch.<sup>159</sup> This rejection did not dampen the enthusiasm of the newly elected Legislative Council. On 10 August 1852, it reiterated its views in stronger terms in another resolution, this time addressed to the new Colonial Secretary, Sir John Pakington. The disallowance of many Acts was described as “an intolerable grievance”.<sup>160</sup> The resolution contained reference to the development of colonies in America and the “mischievous principle of intermeddling” which had caused the loss of those colonies.<sup>161</sup> A further demand for plenary legislative power was made. There was even a proposal (defeated in the Legislative Council) to refuse to consider estimates for the following year, that is, to stop supply.<sup>162</sup> There was agreement, however, to prepare a new Constitution given the invitation for change in the 1850 Act.

Meanwhile, other forces were operating – the discovery of gold in early 1851 and the subsequent influx of people, and the development of steam maritime navigation bringing the colony closer to the outside world and its politics, began to change the colony’s economic and social foundations.<sup>163</sup>

The push for the renewal of transportation was continuing to play its part in pastoralist and northern politics. The succumbing of Earl Grey to the southern town anti-transportation interests after the “Hashemy” incident in 1849, spurred talk of separation in the northern districts. The squatters of the Darling Downs told Fitzroy in 1850 that they could take 15,000 “exiles” per year.<sup>164</sup> This had encouraged the placement in the 1850 Act of the section dealing with the possible detachment of New England north of latitude 30° S. The northern

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<sup>159</sup> Cramp *op cit* note 100 p 8; Sweetman *op cit* p 261

<sup>160</sup> Twomey *op cit* p 9; Cramp *op cit* note 100 p 19

<sup>161</sup> Twomey *op cit* p 9

<sup>162</sup> Melbourne and Joyce *op cit* pp 381-391

<sup>163</sup> Cochrane *op cit* ch 17

<sup>164</sup> Melbourne and Joyce *op cit* p 364

pastoralist enthusiasm for the renewal of transportation spurred Grey to suggest in 1851 to Fitzroy that:<sup>165</sup>

“the northern districts should avail themselves of their power of asking to be separated from New South Wales, for the purpose of being formed into a district colony in which the colonists would enjoy a supply of cheap labour by means of convicts and free settlers sent out by means of funds voted by Parliament for free emigration to the colonies which receive convicts.”

This equivocation by Grey – ending transportation to New South Wales, but suggesting northern detachment to facilitate its renewal – led to resentment in Sydney.<sup>166</sup>

Public opposition to transportation was evident in Sydney, Melbourne, Van Diemen’s Land and many towns. This bolstered support for democratic candidates and those promoting republican principles in the 1851 elections.<sup>167</sup> An Anti-Transportation Association was formed. The Legislative Council, even with its heavy influence of landed representation, recognised the strength of the opinion and opposed transportation.

A different view was, however, held by many in the north. The expansion of the pastoral industry into what was to become Queensland gave rise to a demand for cheap labour. The discovery of gold put further pressure on this labour market. Some brought in Chinese labour; others wanted exiles or convicts. Separation to obtain the renewal of transportation was the obvious answer for many.<sup>168</sup> A petition from pastoralists in the Darling Downs in 1850 complained of scarcity of labour, the need for convicts or Indian or Chinese labour and the lack of representation of their interests in the Legislative Council. They suggested separation at latitude 32° S, which would take in New England.<sup>169</sup> This gained

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<sup>165</sup> Melbourne and Joyce *op cit* p 365

<sup>166</sup> Melbourne and Joyce *op cit* p 400

<sup>167</sup> *ibid*

<sup>168</sup> Melbourne and Joyce *op cit* p 407

<sup>169</sup> *ibid*

the support of squatters in Moreton Bay and New England.<sup>170</sup> This petition, which was submitted to Grey, brought strong opposing representations from the Legislative Council.<sup>171</sup>

News of the passing of the 1850 Act and the contents of s 34 dealing with the possibility of separation above latitude 30° S inspired further agitation in the north for separation. The supporters of separation were in two groups: the pastoralists who favoured a modified form of transportation, and those in towns, in particular Brisbane who strenuously opposed it. They were, however, agreed on separation.<sup>172</sup> Meetings were held and the Crown was petitioned in support of separation.<sup>173</sup> Counter pressure, however, came from the Legislative Council in Sydney and Governor Fitzroy.<sup>174</sup> This opposition was sufficient to cause Earl Grey in December 1851 to shelve the questions of separation and transportation. There they lay when Pakington took over the Colonial Office.<sup>175</sup> Pakington had no stomach for transportation, whether to New South Wales, Victoria or any new colony in the north. Further he expressed a disinclination to separate out a northern colony.<sup>176</sup>

### **Pakington and the “Great Crisis”**

The complaints of the Legislative Council, on the other hand, fared better. The petition of complaint over the 1850 Act was presented to the Commons in June 1852. It was viewed as a matter of the utmost importance. In Parliament, Earl Grey warned of an “utterly unbalanced democracy”; others warned of the loss of

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<sup>170</sup> Melbourne and Joyce *op cit* p 408

<sup>171</sup> *ibid*

<sup>172</sup> Sweetman *op cit* p 332; Melbourne and Joyce *op cit* pp 408-409

<sup>173</sup> *ibid*

<sup>174</sup> *ibid*

<sup>175</sup> Cramp *op cit* note 100 pp 19-20

<sup>176</sup> Melbourne and Joyce *op cit* p 410

the colony unless a measure of colonial self-rule was ceded.<sup>177</sup> For instance, “The Times” referred to the management of colonial lands and revenues being “wrested from us by tumult and violence” unless gracefully conceded.<sup>178</sup> Pakington called it a “great crisis”. By now, gold was bringing miners from all round the world, including the United States, and it was providing a financial basis to make very real the threats of independence.<sup>179</sup> In December 1852, Pakington responded to the petition of December 1851 by conceding much to the Legislative Council in respect of its demands for independence. His despatch to Fitzroy of 15 December 1852 admitted the urgency of “placing full powers of self government in the hands of a people thus advanced in wealth and prosperity”.<sup>180</sup> He agreed to transfer Crown land administration to the colonies.

Pakington agreed to a new constitution of an elected Assembly and nominated Council and he tactfully agreed to consider any practical proposal of restricting disallowance.<sup>181</sup> His reply was an invitation to the Legislative Council to draw up a constitution.<sup>182</sup> This was the turning point in the coming of responsible government to the Australian colonies. The views of Lord Durham, as to the best way to manage an Empire, had prevailed.

By late 1852, the extent of gold mining in New South Wales and Victoria persuaded the Colonial Office that transportation should end – convicts should not be transported to a place of such potential for the gaining of wealth by the criminal and unskilled.<sup>183</sup> In early 1853, Pakington was replaced by the Duke of Newcastle, who supported Pakington’s position.<sup>184</sup> The way then lay ahead for

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<sup>177</sup> Sweetman *op cit* p 267

<sup>178</sup> Sweetman *op cit* p 267

<sup>179</sup> To which Pakington referred as “new and unforeseen features to their political and social condition”: Clark *op cit* vol 4 p 34

<sup>180</sup> Cramp *op cit* note 100 p 20; Sweetman *op cit* pp 268-270

<sup>181</sup> Twomey *op cit* pp 10-11

<sup>182</sup> Cochrane *op cit* ch 20; Cramp *op cit* note 100 p 20

<sup>183</sup> Clark *op cit* vol 4 pp 31-32

<sup>184</sup> *ibid*

the Legislative Council to engage in the task of constitutional change envisaged by the 1850 Act.

### **Constitution drafting in New South Wales**

The first body of work of constitution drafting had already been done by a Select Committee from June to September 1852 after Earl Grey's response to the Council's Remonstrance was received. One aspect that concerned the Committee was the drafting of a document which kept the "democratic element" in check. The various views as to the composition of an upper house reflected this: Justice Dickinson suggested a baronetage from which members would be selected; and Chief Justice Stephen suggested a mixture of nominated, ex officio and elected members. Others, to varying degrees, wished to see the upper house elected. The issue divided the Council. The proposal adopted was a chamber with two thirds nominated for life from persons who had previously been elected members and one third nominated and holding office at the pleasure of the Crown.<sup>185</sup> The Committee's aim was responsible government equivalent to that enjoyed in the United Kingdom.<sup>186</sup> It recognised that the mechanism provided by the 1850 Act was inadequate to achieve this and a separate Imperial Act was sought. The Constitution Bill drafted by the 1852 Committee drew a central distinction between Imperial and local issues, the former being defined as concerning allegiance, naturalisation of aliens, treaties, political relations with foreign powers, defence and high treason.<sup>187</sup> In local matters, it gave complete legislative independence to the local legislature, the Governor being a constitutional ruler regulated by advice from his responsible ministers in the Colony.<sup>188</sup>

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<sup>185</sup> Twomey *op cit* p 12; Cochrane *op cit* pp 332 ff

<sup>186</sup> Something not achieved until the Balfour declaration, and the Australia Acts 1986.

<sup>187</sup> Twomey *op cit* p 12

<sup>188</sup> Melbourne and Joyce *op cit* p 395



The tabling in the Legislative Council on 10 May 1853 of Pakington's despatches with their conciliatory attitude and those from his successor, the Duke of Newcastle, revived interest in drafting a Constitution. Another Select Committee was appointed on 20 May 1853, which reported on 28 July 1853.<sup>189</sup>

The 1853 draft constitution was brought forward in July 1853 and was similar to the former draft bill, with an important exception: the upper house. This was to be modelled on that in Canada – an appointed house. The Committee's view was avowedly one to dampen any "future democracy".<sup>190</sup> There was a recommendation for the creation of local hereditary titles (labelled the Bunyip Aristocracy in later public debate) forming the basis of the upper house and an electoral college to choose the balance. The Committee suggested, however, a large extension to the franchise for electing the lower house: salary of £100 per year, or the payment of £40 per annum board and lodging, or £10 for lodging only, which the Committee viewed as a close approximation to universal suffrage.<sup>191</sup> This widening of the franchise was balanced by the constitution of the upper house, and the entrenching provisions of special majorities. This reflected Wentworth's views of a balance of interests in society.<sup>192</sup>

Both drafts had a two thirds entrenching provision for changes to electoral boundaries and electoral laws. As to a change to the Constitution itself, the 1852 Bill saw such referred to the Royal Assent and the United Kingdom Parliament. The 1853 Bill retained that, but required also a two thirds majority in the local Parliament.<sup>193</sup>

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<sup>189</sup> Cochrane *op cit* ch 21; Sweetman *op cit* pp 273-274

<sup>190</sup> Twomey *op cit* p 13; Sweetman *op cit* p 275; Melbourne and Joyce *op cit* p 401

<sup>191</sup> Melbourne and Joyce *op cit* p 402

<sup>192</sup> Clark *op cit* vol 4 pp 36-37

<sup>193</sup> Twomey *op cit* p 14

The 1853 Committee supported a General Assembly for the making of laws in relation to inter-colonial subjects and the creation of a Court of Appeal from colonial courts.<sup>194</sup>

The drafters also sought to block the separation movement by including in the drafts of 1852 and 1853 provisions designed to prevent detachment from the colony of any territory lying to the south of latitude 26° S (thus keeping New England and Moreton Bay in New South Wales). By this stage, even the landed elements of New South Wales recognised that agitation for renewal of transportation would only cause a separation of northern land and a weakening of New South Wales and its revenue base.<sup>195</sup> Thus the Legislative Council (including its landed elements) by this time was firmly against transportation.

The 1853 draft Constitution as drawn up by the Select Committee was debated before the Legislative Council from August to September.<sup>196</sup> The debates reflected a struggle between landed conservatism and mercantile interests, on the one hand and radical democracy, on the other.<sup>197</sup> Wentworth said (to loud and prolonged cheers)<sup>198</sup>

“a constitution that will be a lasting one – a conservative one - a British, not a Yankee constitution.”

This embodied his two aims – a British constitution and a conservative one to keep the dangers of democratic control at bay.<sup>199</sup>

Others were of more radical hue. They had a fear of a landed oligarchy.<sup>200</sup>

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<sup>194</sup> *ibid*

<sup>195</sup> Melbourne and Joyce *op cit* p 410

<sup>196</sup> See the speeches in Silvester *The Speeches of the Legislative Council of New South Wales on the Second Reading of The Bill for Framing a new Constitution For the Colony* (Sydney 1853)

<sup>197</sup> Cochrane *op cit* ch 21

<sup>198</sup> Silvester *op cit* p 34

<sup>199</sup> Clark *op cit* vol 4 p 36

<sup>200</sup> Cramp *op cit* note 100 p 23; Clark *op cit* vol 4 pp 36-39

Public debate then took place. Some provisions provoked intense opposition. Petitions and newspaper articles carried alternative proposals.<sup>201</sup> Most objectionable and the source of much public mockery was the proposal for hereditary titles; objection was also taken, to the entrenchment provisions concerning constitutional amendment and the manner in which seats were to be distributed favouring country over city.<sup>202</sup>

The apparent abandonment of separation by Pakington along with the rejection of the renewal of transportation was resented in the north. In Brisbane an additional complaint was that the two issues were linked. Brisbane wanted separation, but not transportation. Those in the north also deeply resented the Legislative Council's attempts to block separation in the 1852 and 1853 Bills. The Legislative Council was petitioned accordingly.<sup>203</sup> Public meetings were held reflecting a democratic (non-squatter) movement for separation, based in Brisbane in particular.

The Constitution Bill went to a Legislative Council Committee in December 1853. The proposal for hereditary titles was dropped. The upper house was to be fully nominated, at first for five years (to permit assessment of the system) and then the government would nominate members for life. The Bill was then passed in the Legislative Council over liberal and more democratic opposition.<sup>204</sup>

The Constitution Bill was reserved for Royal assent and was sent to London, where it was received on 31 May 1854, shortly after other bills from Victoria and South Australia.<sup>205</sup>

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<sup>201</sup> Twomey *op cit* p 15

<sup>202</sup> Twomey *op cit* p 15

<sup>203</sup> Melbourne and Joyce *op cit* p 411

<sup>204</sup> Cochrane *op cit* ch 23 & 24

<sup>205</sup> Melbourne and Joyce *op cit* p 417

## **The amendment of the New South Wales Constitution Bill by the Colonial Office**

Important changes were made to the Constitution Bill by Crown Law Officers before it was laid before Parliament in the form of a schedule to a Bill in the Parliament. Imperial interests were not to be sacrificed. Balance was important – not radical political democracy and not a colony in the thrall of landed interests. Most of all, Imperial control was necessary.<sup>206</sup> The Colonial Office viewed responsible government as government administered by officers commanding the support of the legislature, thus meaning that executive officers would henceforth be appointed in accordance with the wishes of the local legislature. They did not view it as meaning independence from London's authority on so-called local issues. Thus, provisions giving plenary power to the colony over local matters were removed. These were seen as a virtual declaration of independence.<sup>207</sup> The provisions dealing with assent, reservation and disallowance were removed, leaving full power to the Crown to disallow colonial Acts. Also, the provision requiring the consent of the colonial legislature for the loss of any part of its territory was removed.<sup>208</sup>

### **The amended reserved Bill in Parliament**

The Bill introduced into the House of Commons on 17 May 1855 comprised an enabling Bill containing the various changes required by the Colonial Office, with the amended reserved Bill placed as an annexed schedule. Robert Lowe spoke strongly against the Colonial Office's changes, against the nominated upper house and against the two thirds entrenching clauses.<sup>209</sup> A power to amend the Constitution in the amended reserved Bill was placed in the enabling Bill. This was a mechanism with the effect of overcoming the entrenching provisions.

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<sup>206</sup> Cochrane *op cit* p 400

<sup>207</sup> Melbourne and Joyce *op cit* pp 418-419; Twomey *op cit* p 17

<sup>208</sup> Twomey *op cit* p 18

<sup>209</sup> Melbourne and Joyce *op cit* pp 420-421; Clark *op cit* Vol 4 p 44

Wentworth, in England to assist the passage of the Bill, denounced the changes by the Colonial Office. The removal of local autonomy represented a withdrawal from the position earlier promised by Pakington.<sup>210</sup> Wentworth also recognised that the power of amendment in the enabling Bill would be available to repeal the two thirds entrenching provisions in the scheduled amended reserved Bill. Wentworth saw this as the removal of the method of forestalling democratic constitutional change.<sup>211</sup>

Meanwhile, the shelving by Earl Grey of the issue of separation and Pakington's lack of enthusiasm in late 1852 and early 1853 had not halted the separation movement in the north.<sup>212</sup> Petitions continued to be sent to the Colonial Office.<sup>213</sup> By 1853, the petitions from the north no longer pressed for transportation. The main arguments pressed were a lack of community feeling between the northern and southern parts of New South Wales, the financial sufficiency of the north to support a government and inadequate representation 500 miles away in Sydney (one petition said, "a mockery and a delusion").<sup>214</sup>

By May 1855, the Colonial Office and Parliament were faced with a Constitutional Bill and powerful agitation for northern separation from northern pastoralists and from Brisbane. It was recognised by the Colonial Office that the essential problem was one that had been recognised in the 1830s – the colony was too big to be governed from Sydney. Merivale recognised the injustice felt by those in the northern districts being, as he said (in terms to warm a Queenslander's heart today):<sup>215</sup>

"governed by a knot of townfolk living 600 or 700 miles off."

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<sup>210</sup> Cochrane *op cit* pp 409-410

<sup>211</sup> Cochrane *op cit* pp 411-412

<sup>212</sup> Sweetman *op cit* p 333

<sup>213</sup> By August 1853, six had been sent: Sweetman *op cit* p 333

<sup>214</sup> Sweetman *op cit* p 333

<sup>215</sup> Melbourne and Joyce *op cit* p 412

When the Constitution Bill was brought to the House of Commons the petitions and counter petitions about separation were so strong and conflicting that Lord John Russell, now Colonial Secretary again, called for a report from Governor-General Denison. The separation issue was recognised as real and necessary to be dealt with, but because of the need for a report, this was not possible in the consideration of the 1855 Bill in Parliament.

### **The Imperial Constitution Statute 1855 and the Constitution Act 1855**

The Constitution Statute 1855 (UK)<sup>216</sup> was described as an Act to enable Her Majesty to assent to a Bill, as amended, of the Legislature of New South Wales, which was annexed thereto “to confer a constitution on New South Wales, and to grant a Civil List to Her Majesty”. Before saying something about the provisions of the Constitution Statute 1855 and its schedules, something should be said about its structure.<sup>217</sup> The 1853 Bill, passed by the Legislative Council<sup>218</sup>, was reserved for Royal Assent. In the 1855 Imperial Act, it was referred to as a “reserved Bill”, not an “Act”. The Bill approved by the Legislative Council and sent to London was different to the Bill assented to by the Queen and recorded as a Schedule to the Constitution Statute 1855.<sup>219</sup> There had been removed the provisions that had offended the Colonial Office. Also, the Imperial Parliament did not enact the New South Wales Constitution Bill, but recorded its form, as amended, in a schedule, and gave legislative approval for Her Majesty to sign it.<sup>220</sup>

In the Commons debate, Robert Lowe said that the mechanism being used might create a nullity, because, he said, the New South Wales Bill was repugnant to

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<sup>216</sup> 18 & 19 Vict c 54 (the equivalent statute for Victoria was 18 & 19 Vict c 55)

<sup>217</sup> I am indebted as to the analysis which follows to the scholarly work of Twomey *op cit* pp 18-23.

<sup>218</sup> 17 Vict No 41

<sup>219</sup> 18 & 19 Vict c 54

<sup>220</sup> See Priestley JA in *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 690-692 and see also *Armstrong v Budd* (1969) 71 SR (NSW) 386.

earlier Imperial legislation<sup>221</sup>, and, he said, the permission of Parliament to the Queen to assent to a variation did not cure that. This was sought to be cured by the insertion, into what became s 8 of the Imperial Act of the words “the reserved bill ... shall take effect in the said Colony from the Day of such Proclamation [by the Governor of New South Wales].”

Apart from anything else, this structure leads to difficulty with citation.<sup>222</sup> I will refer to the Imperial Act as the Constitution Statute 1855 and the attached reserved Bill, as amended, to which Royal assent was given under the authority of the Constitution Statute 1855, as the Constitution Act 1855. More importantly, it is unclear whether the source of the operation of the Constitution Act 1855 was as a New South Wales Act (a modified Bill assented to by Her Majesty) or by reason of s 8 of the Imperial Act. Anne Twomey concludes, with the apparent support of Lords Hanworth and Atkin *arguendo* in the hearing of the appeal in *Trethowan’s Case*<sup>223</sup>, of Deane J in *Smith v R*<sup>224</sup> and of Menzies J in *Clayton v Heffron*<sup>225</sup>, that the Constitution Act 1855 Act (of New South Wales) appears to have been given the authority of a British statute, but with power in the New South Wales Parliament to amend it, by force of the terms of s 4 of the Imperial Act.<sup>226</sup>

The recitals to the Constitution Statute 1855 describe how the reserved Bill<sup>227</sup> came about, the necessity for Parliamentary authority to assent to it and the omission of certain parts of it. The amended Bill is identified as Schedule 1.

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<sup>221</sup> It was always thought to go beyond what had been authorised by the 1850 Imperial Act. See also in this respect Sir Henry Jenkyns *British Rule and Jurisdiction Beyond the Seas* (Clarendon Press 1902) p 280 discussed by Twomey *op cit* at 22.

<sup>222</sup> Twomey *op cit* at 22.

<sup>223</sup> [1932] AC 526 and [1932] UKPCHCA 1; 47 CLR 97 (PC)

<sup>224</sup> [1994] HCA 60; 181 CLR 338 at 350

<sup>225</sup> [1960] HCA 92; 105 CLR 214 at 270-271

<sup>226</sup> See generally Twomey *op cit* p 21 footnote 124 referring to the transcript of the hearing in *Trethowan’s Case* before the Privy Council where the matter was discussed.

<sup>227</sup> 17 Vict No 41

Section 1 of the Constitution Statute 1855 made it lawful for Her Majesty in Council to assent to the reserved Bill, as amended and contained in Schedule 1.

Section 2 provided, upon proclamation of the Imperial Act in New South Wales, for the repeal of various previous statutes repugnant to the reserved Bill, as amended; and for the entire management and control of the waste lands belonging to the Crown and appropriation of all revenues (including from said land) to be vested in the legislature of New South Wales.

Section 3 preserved the operation of the provisions of the 1842 Act and the 1850 Act in so far as they related to the giving and withholding of Her Majesty's consent to Bills, the reservation of bills for the signification of Her Majesty's pleasure and for instructions to be conveyed to governors for their guidance, and the disallowance of Bills.<sup>228</sup>

Section 4 made it lawful for the New South Wales legislature to make laws to alter or repeal all or any of the provisions of the reserved Bill "in the same manner as any other Laws for the good Government of the said Colony". This was subject to the "Conditions imposed by the .... Reserved Bill on the Alteration of

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<sup>228</sup> The provisions of the 1842 Act dealing with giving or withholding assent bills, disallowance of bills assented to and assent to bills reserved were sections 31, 32 and 33. By section 31, every bill passed by the Legislative Council and every law proposed by the Governor passed by the Council was to be presented for Her Majesty's assent to the Governor and the Governor shall declare according to his discretion, but subject to the Act and to such instructions as may from time to time be given by Her Majesty, that he assents to such bill or that he reserves such bill for the signification of Her Majesty's pleasure. All bills altering or affecting the divisions and extent of the several districts and towns represented in the Council or establishing new and other divisions of the same kind or altering the number of members of the Council to be chosen by the districts and towns or increasing the whole number of the Legislative Council or altering the salaries of the Governor, superintendent or judges, or any of them, and also all bills altering or affecting the duties of customs upon goods imported or exported shall in every case be reserved for the signification of Her Majesty's pleasure with the exception of temporary laws expressly declared to be necessary and pressing. Section 32 provided for a copy of any bill assented to by the Governor being transmitted to one of Her Majesty's principal Secretaries of State; and it was lawful within two years after the bill had been so received for Her Majesty by Order in Council to declare her disallowance and such disallowance would take effect from the date of such signification. Section 33 provided that no bill which shall be reserved for the signification of Her Majesty's pleasure shall have any force or authority within the Colony until the Governor shall signify either by speech or message to the Legislative Council or by proclamation that such bill has been laid before Her Majesty in Council and Her Majesty has assented to the same. Under the 1850 Act, section 32 provided that the provisions of the 1842 Act concerning bills reserved for the signification of Her Majesty's pleasure shall be applicable to every bill reserved under the 1850 Act.



the Provisions thereof in certain Particulars” (ie the two thirds majorities) but only “until and unless said conditions shall be repealed or altered by the Authority of the said Legislature” (ie implicitly by simple majority). The effectiveness of the power of simple majority amendment was soon seen with the repeal in 1857 of the special majority clauses in s 36 of the reserved Bill which became the Constitution Act 1855<sup>229</sup>, with the removal in 1858 of disqualification of ministers of religion elected to parliament<sup>230</sup> and with the move in 1858 to universal male suffrage.<sup>231</sup>

Section 5 settled the boundary between New South Wales and Victoria.

Section 6 dealt with the effect on electoral boundaries in New South Wales, if a northern colony were to be formed.

Section 7 authorised Her Majesty, by Letters Patent, to erect a new colony or colonies from any territory separated from New South Wales and in such Letters Patent or Order in Council to make provision for the government of such colonies and for the establishment of a legislature therein in manner as nearly resembling the form of government and legislature at such time established in New South Wales as the circumstances of the new colony would allow, with power in such Letters Patent or Order to be given to the legislature to make further provision in that behalf.

Section 8 provided for the commencement of the Constitution Statute 1855 and the reserved Bill, as amended to take effect in the colony from the day of their proclamation.

Section 9 dealt with interpretation.

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<sup>229</sup> 20 Vict No 12

<sup>230</sup> 20 Vict No 20

<sup>231</sup> 20 Vict No 20

The Constitution Act 1855 had recitals and 58 sections. It is of utility to survey its provisions, if for no other reason than to recognise that there was no signification of the introduction, or the content, of responsible government.

Section 1, replaced the Legislative Council with a bicameral legislature, a Legislative Council and Legislative Assembly. It provided for the making of laws for the peace, welfare and good government of the colony with the advice and consent of the Council and Assembly; money bills were to originate in the Assembly.

Sections 2-8 dealt with the Legislative Council. Section 2 dealt with the appointment and composition of the Council, which was to have not fewer than 21 members. Section 3 dealt with the initial tenure of five years, with all future members appointed by the Governor on the advice of the Executive Council for life. Sections 4, 5 and 6 dealt with resignation, vacating a seat and the trial of questions of vacancy of seats. Section 7 dealt with the appointment of the President of the Council. Section 8 dealt with quorum, division, and casting of votes.

Sections 9-27 dealt with the Legislative Assembly. Section 9 provided for the summoning and calling together of an Assembly. Section 10 provided for 54 members. Section 11 dealt with qualification for electors being natural born or naturalised subject of Her Majesty or legally a Denizen of New South Wales and having a freehold estate in possession of the clear value of £100 or being a householder occupying premises of the clear annual value of £10 or having a leasehold estate in possession of the value of £10 or holding a licence from the government to depasture lands within the district or having a salary of £100 a year or being the occupant of any room or lodging and paying for board and lodging of £40 a year or lodging only of £10 a year. Section 13 dealt with the division of the Colony into electoral districts and the number of members returned by each. Section 15 made it lawful for the legislature to alter the divisions and extent of the boundaries represented in the Legislative Assembly and to establish new divisions and apportionment of representation. This provision was subject to an entrenching proviso that before presentation of any Bill to the Governor for

assent, any Bill by which the number or apportionment of representatives in the Legislative Assembly may be altered, the second and third readings of such Bill in the Legislative Council and Legislative Assembly shall have passed with the concurrence of a majority of the members of the Council and two thirds of the members of the Assembly. Section 16 dealt with qualification of the members of the Assembly. Section 17 prevented a member of the Council being a member of the Assembly. Section 18 dealt with disqualification of persons holding any office of profit under the Crown or receiving a pension from the Crown from being a member of the Assembly, unless a member of the government being the Colonial Secretary, Colonial Treasurer, Auditor-General, Attorney-General, Solicitor-General or such additional office of not being more than five as the Governor with the advice of the Executive Council may from time to time declare. Sections 19 and 20 further dealt with disqualification of members. Section 21 provided for five year terms of the Assembly. Section 22 dealt with the election of speaker. Section 23 dealt with quorum, division of casting vote. Sections 24 to 27 dealt with various procedural matters concerning the Assembly.

Sections 28 and 29 dealt with disqualification of contractors or other persons interested in contracts from being members of either House.

Section 30 dealt with the place and time of holding Parliament.

Section 31 provided that there be a session of the Legislative Council and Assembly at least once in every year.

Section 32 provided for the first calling of Parliament within six months from the proclamation of the Act.

Sections 33 and 34 provided for the taking of the oath of allegiance.

Section 35 provided for standing orders.

Section 36 provided for the legislature being empowered to alter provisions or laws concerning the Legislative Council and to provide for the nomination or

election of another Legislative Council. This provision was subject to an entrenching proviso that such a bill could not be presented to the Governor for assent unless the second and third readings of such bill had been passed with the concurrence of two thirds of the members of the Council and Legislative Assembly respectively and that every bill so passed was to be reserved for the signification of Her Majesty's pleasure and a copy of such bill laid before both Houses of the Imperial Parliament for 30 days.

Section 37 provided for appointment to officers under the government of the colony to be vested in the Governor. Though a brief provision, it is an oblique reference to responsible government.<sup>232</sup> The appointment to all public offices under the government whether salaried or not was vested in the Governor with the advice of the Executive Council, with the exception of the appointments of the officers liable to retire from office "on political grounds" which appointments were vested in the Governor alone (other than minor appointments).

Sections 38 to 40 dealt with the continuation of the judiciary, their removal upon address of both Houses and continuation of their salaries.

Section 41 dealt with the saving of existing law.

Section 42 dealt with the continuation of courts of civil and criminal jurisdiction.

Section 43 dealt with the regulation, sale and disposal of wastelands.

Section 44 and 45 dealt with duties.

Section 46 dealt with boundaries of the colony. The important proviso for the purposes of detachment of territory was that nothing in the Act was deemed to prevent Her Majesty from altering the boundary of the Colony of New South Wales on the north in such manner as to Her Majesty may seem fit nor from

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<sup>232</sup> *Egan v Chadwick* [1999] NSWCA 176; 46 NSWLR 563 at 569 [28]; and see *Toy v Musgrove* (1888) 14 VLR 349 at 372

detaching from the Colony that portion which lies between the western boundary of South Australia and longitude 129° E being the eastern boundary of Western Australia.<sup>233</sup>

Section 47 dealt with duties and revenues forming part of consolidated revenue.

Section 48 provided that the consolidated revenue be permanently charged with costs, charges and expenses.

Sections 49 and 50 dealt with the Civil List.

Section 51 dealt with pensions.

Section 52 dealt with superannuation pensions.

Section 53 dealt with consolidated revenue being appropriated by an act of Parliament.

Sections 54 to 58 dealt with money bills, revenue, proclamation, interpretation and commencement.

### **The form of government created in 1855**

It has been accepted that the 1855 Constitution brought in “responsible government”.<sup>234</sup> That phrase, however, is not amenable to precise definition. It is a phrase open to considerable debate.<sup>235</sup> As Chief Justice Gleeson said in *Egan v Willis and Cahill*<sup>236</sup> responsible government is:

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<sup>233</sup> For a clear explanation of the boundaries of all the colonies from 1786 to after 1861 see the official year Book of the Commonwealth of Australia 1901-1907 pp 55-56. See also M McLelland “Colonial and State Boundaries in Australia” (1971) 45 *ALJ* 671.

<sup>234</sup> *Egan v Willis and Cahill* (1996) 40 NSWLR 650 and [1998] HCA 71; 195 CLR 424

<sup>235</sup> G Lindell “Responsible Government” in P Finn (Ed) *Essays on Law and Government* (LBC 1995) Vol 1 p 75

<sup>236</sup> 40 NSWLR 650 at 660

“... a concept based upon a combination of law, convention and political practice. The way in which that concept manifests itself is not immutable.”

To similar effect were in the observations in the High Court on appeal in the joint judgment of Gaudron J, Gummow and Hayne JJ<sup>237</sup> where their Honours said:

“It should not be assumed that the characteristics of a system of responsible government are fixed or that principles of ministerial responsibility which developed in New South Wales after 1855 necessarily reflected closely those from time to time accepted at Westminster.”

It is a notable feature of the Constitution Statute 1855 and the Constitution Act 1855 (and of the other Australian colonial constitutions passed in Westminster around this time: Tasmanian, Victorian and South Australian) that there was an absence of reference to responsible government and its principles. Importantly, there were no changes to the Governor’s Commission or Royal Instructions to reflect any new operative governmental principles.<sup>238</sup> It can also be said that the principles of responsible government were not fixed, or even well understood, in the United Kingdom.<sup>239</sup>

Yet the phrase was one which had been in current popular use in New South Wales since the 1840s and in the discourse concerning the growing dissatisfaction with the blended Legislative Council and representative government since 1842. Lord John Russell in his despatch of 20 July 1855 to the Victorian Governor spoke of the “introduction of responsible government.”<sup>240</sup> Governor Denison in his despatches was under no illusion as to the importance of the change between Governor and legislature.<sup>241</sup> Denison’s first address to the legislature recognised the importance of the change<sup>242</sup>:

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<sup>237</sup> [1998] HCA 71; 195 CLR 424 at 451 [41]

<sup>238</sup> Melbourne and Joyce *op cit* pp 429-430; Carney *op cit* p 45

<sup>239</sup> Carney *op cit* p 45; Taylor *op cit* pp 34-36; Jenks *op cit* note 1 p 244

<sup>240</sup> *Commonwealth v Kreglinger & Fernau Ltd* [1926] HCA 8; 37 CLR 393 at 413

<sup>241</sup> Windeyer *op cit* note 15 pp 285-287 and 300

“I address you for the first time as the Legislature constituted under the provision of an enactment framed for the purpose of adopting, so far as circumstances will permit, the principles characteristic of the British constitution.”

The immediate practice after 1855 also reflected a true contemporary understanding of the responsibility of the executive to the legislature.<sup>243</sup>

A number of elements can be seen as relevant to the conception of responsible government in the 1850s. First, was the control of land and all revenues by the local legislature. This was the key to control of power in the Colony, and the control of the executive, that is of the Governor. That control (or responsibility) was what was absent in the 1840s with the struggle by the Legislative Council to influence the Governor. Bound up with this question of control and responsibility was legislative independence or sovereignty on local matters that was sought by those in the Colony. The division of power between colonial and Imperial interests suggested by the New South Wales drafters in 1853 was an aspect of **independence** and, in that respect, a feature of a type of responsible government. This was not granted, leaving the local parliament potentially subordinate to at least Imperial legislative authority. Responsible government connotes a relationship between the executive and the legislature.<sup>244</sup> That, focussed on control of land, was one essential demand of the 1850s. It became a reality after 1855.

The absence of a sovereign legislature in the colonies carried a difficulty under strict Austinian theory, but was a practical constitutional resolution of demands for power.<sup>245</sup>

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<sup>242</sup> Windeyer *op cit* note 15 p 299

<sup>243</sup> Windeyer *op cit* note 15 pp 288-297

<sup>244</sup> Windeyer *op cit* note 15 p 271

<sup>245</sup> Windeyer *op cit* note 15 pp 272-274

The scope of responsible government given in 1855 was debated in the Victorian case of *Toy v Musgrove* in the context of the scope of the prerogative and thus the government's executive power. A majority found that the Governor did not have power from the Royal prerogative, but only those powers conferred by statute or Her Majesty. Higinbotham CJ in a lucid and powerful judgment dissented. In his view, the wide legislative powers conferred required commensurate conferral of executive power.<sup>246</sup> In *Sue v Hill*<sup>247</sup> Gleeson CJ, Gummow and Hayne JJ observed that the grant of responsible government in 1855 carried the vesting of only some prerogative powers.

The vagueness of the terms of the colonial constitutions of the 1850s as to central operative principles of power was discussed by Higinbotham CJ in *Toy v Musgrove*.<sup>248</sup> He succinctly stated the central difficulty:<sup>249</sup>

“to put into written words the unwritten law of the English Constitution.”

Higinbotham CJ described the approach used as follows:<sup>250</sup>

“[The framers] adopted the curious and very hazardous expedient of attempting to enact in a written law, by means of allusions suggesting inferences rather than by express enacting words, the provisions not only unwritten but unrecognised by English law, which regulate and determine the formation and action and the conditions of existence of government in England.”

In the Constitution Statute 1855 and the Constitution Act 1855 mention is frequently made of the “Executive Council”, though nothing is said as to its constitution. The words “responsible officers” are not used. Section 37 refers to “retiring on political grounds”. The preamble contains no object of creating responsible government. The nature, or extent of application, of responsible

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<sup>246</sup> 14 VLR 349 at 390 ff; *Carney op cit* pp 46-47

<sup>247</sup> [1999] HCA 30; 199 CLR 462 at 499 -500 [88]-[89]

<sup>248</sup> (1888) 14 VLR 349 at 390-395

<sup>249</sup> 14 VLR 349 at 391

<sup>250</sup> *ibid*



government is not described. These are considerations which make the history which I have discussed more than contextual. It is subtly, but truly, substantive, because as Higinbotham CJ (though in dissent) said about Victoria in *Toy v Musgrove*<sup>251</sup>:

“That it was the intention of the Legislative Council to establish by law a complete system of responsible government as an essential organic part of the self-governing scheme of the Victorian Constitution is a fact about which **an historic doubt** cannot be entertained.” (emphasis added)

Though Higinbotham CJ was in dissent in *Toy v Musgrove*, the above statement can be accepted at least to the extent that it recognised that the constitutional act embodied in the statutes of 1855 did create a scheme of intended responsible government, in the sense of responsibility of the executive to parliament.

Some elements of modern notions of responsible government were recognised in the 1850s, but not accepted. In the drafting of the New South Wales Constitution Bill discussions took place as to notions of collective responsibility of Cabinet and associated concepts of political parties.<sup>252</sup>

The concept of “responsible government”, in part through what Lord Watson in *Cooper v Stuart*<sup>253</sup> described as “the silent operation of constitutional principles”, plays its part in the conception of the Sovereign in right of a designated territory as the people of that territory considered as a political organism.<sup>254</sup> As Isaacs J said in *Horne v Barber*<sup>255</sup> responsible government is the “keystone of our political system”, as it was of the constitutional system set up in New South Wales in 1855. In the *Woolcombers Case*<sup>256</sup> Isaacs J said:

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<sup>251</sup> 14 VLR 349 at 392

<sup>252</sup> Ward *Colonial Self-Government* pp 317 and 318 ff; Taylor *op cit* pp 35-36

<sup>253</sup> (1889) 14 App Cas 286 at 293

<sup>254</sup> *Amalgamated Society of Engineer v Adelaide Steamship Co Ltd* [1920] HCA 54; 28 CLR 129 at 146-147 per Knox CJ, Isaacs, Rich and Starke JJ

<sup>255</sup> [1920] HCA 33; 27 CLR 494 at 500

<sup>256</sup> *Commonwealth v Colonial Spinning and Weaving Co Ltd* [1922] HCA 62; 31 CLR 421 at 446

“[T]he written words of the Commonwealth Constitution have to take into account the circumstances of the moment and the extent of constitutional development. The doctrine of responsible government, for instance, is invisibly but none the less inextricably and powerfully interwoven with the texture of the written word ....”

As Melbourne said<sup>257</sup>, responsible government was to be made effective on the basis of understanding or convention. The legal instruments, being the Constitution Statute 1855, the Constitution Act 1855 and the Commissions and Instructions of the new Governors after 1855 imposed few restrictions on the Governor and did not delineate the notion of responsible government. Nevertheless, all that had passed left people at the time in no doubt that an executive government responsible to a local parliament had been created, even if the local parliament was ultimately under the authority of the Imperial Parliament. To that extent, the local colonial notion of responsible government lacked a sovereign Parliament, but it always had done so, even under a Durham or Wentworth model. But, importantly, no power, including that in s 37 of the Constitution Act 1855, could be exercised without receiving the advice of the government responsible to the legislature.<sup>258</sup>

In this way, responsible government suitable for a subordinate colonial Parliament was now in place for New South Wales in 1855. No longer was the Governor a mere agent of the Crown wholly under the direction of the Colonial Office.

Uncertainty soon arose in the colonies as to the legislative authority that had been conferred on the local colonial legislatures. In South Australia, between 1859 and 1865, Boothby J in the Supreme Court handed down a number of decisions finding South Australian legislation invalid for being inconsistent with or repugnant to United Kingdom statutes, Royal instructions and the common law of

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<sup>257</sup> Melbourne and Joyce *op cit* p 430

<sup>258</sup> *Toy v Musgrove* 14 VLR 349 at 393; see also the judgment of Spigelman CJ in *Egan v Chadwick* [1999] NSWCA 176 46 NSWLR 563 at 568-573

England.<sup>259</sup> This led to the passing of the Colonial Laws Validity Act 1865 (Imp)<sup>260</sup> to remove any such doubts. Colonial legislatures had full power to pass legislation; repugnancy was limited to Imperial statutes which applied to the colony by express words or necessary intendment.<sup>261</sup> The Act also conferred power to establish courts of judicature and to make laws respecting the constitution, powers and procedure of colonial legislatures.<sup>262</sup>

## Separation of the North

In the first Legislative Assembly of New South Wales the district of Moreton Bay returned nine members from eight districts. But what of separation? In October 1855, Denison forwarded the report that had been requested by Lord John Russell. He advised against separation. He saw the northern region as not sufficiently economically mature for separate government. Notwithstanding these views, in July 1856, Lord John Russell and the Colonial Office came to the view that separation should occur. They accepted Denison's concerns as to a possible lack of economic maturity of the northern territories, but were more concerned at ill feeling becoming more intense as time went on.<sup>263</sup> Further, Parliament in both the 1850 Act and the 1855 Constitution Act had provided for the possibility of separation. Once this decision was made, the question arose as to the southern boundary of the new colony. Sydney's claim to the Richmond and Clarence River districts was supported by the people of those areas, which appeared to be decisive as to the fate of these areas and New England.<sup>264</sup>

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<sup>259</sup> Carney *op cit* p 47; see also the reasons of Isaacs and Rich JJ in *McCawley v The King* [1918] HCA 55; 26 CLR 9 at 48-50 and the reasons of the Privy Council reversing this on appeal (1920) 28 CLR 106 at 120-121; and *Keith's Responsible Government in the Dominion* Vol 1 pp 408 ff

<sup>260</sup> 28 & 29 Vict c 63; as to the effect of which see *McCawley v The King* [1918] HCA 55; 26 CLR 9; reversed on appeal (1920) 28 CLR 106.

<sup>261</sup> 28 & 29 Vict c 63, ss 1-4

<sup>262</sup> 28 & 29 Vict c 63

<sup>263</sup> Sweetman *op cit* p 334

<sup>264</sup> Sweetman *op cit* p 335

By Letters Patent dated 6 June 1859, proclaimed on, and taking effect from, 10 December 1859, the northern districts of New South Wales were severed and the Colony of Queensland was erected. The boundary was fixed at 28° 8' S, on the coast at Point Danger and 29° S further inland. Sir George Ferguson Bowen was appointed the new Governor. An Order in Council, also dated 6 June 1859, constituted a Legislative Council and Legislative Assembly<sup>265</sup> gave a Constitution identical to that of New South Wales described in the Schedule to the Imperial Act of 1855 and declared to be in force until altered by the Queensland Legislature.<sup>266</sup>

By the same Order in Council, Denison was authorised to divide the new colony into electoral districts,<sup>267</sup> to arrange lists of voters in accordance with the laws of New South Wales,<sup>268</sup> to nominate a Legislative Council who were to hold office for 5 years<sup>269</sup> and to issue writs for the election of members and to summon the Legislative Assembly.<sup>270</sup>

The Governor of Queensland, in the first instance, filled the offices of Colonial Secretary, Colonial Treasurer and Attorney General and so constituted a temporary Executive Council.<sup>271</sup> Writs for the first elections were issued. The first Legislative Council was appointed by proclamation dated 1 May 1860. The first Legislative Assembly was summoned on 22 May 1860.<sup>272</sup>

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<sup>265</sup> Order in Council, s 1

<sup>266</sup> Melbourne and Joyce *op cit* p 445; Order in Council, s 8

<sup>267</sup> Order in Council, s 6

<sup>268</sup> Order in Council, ss 5 and 6

<sup>269</sup> Subsequent nomination by the Governor of Queensland would be for life.

<sup>270</sup> Order in Council, s 6

<sup>271</sup> Melbourne and Joyce *op cit* p 445; Sweetman *op cit* pp 335-336

<sup>272</sup> Melbourne and Joyce *op cit* p 446

In 1861, an Imperial Act<sup>273</sup> was passed to validate the Order in Council of 1859 and all actions done under its authority.<sup>274</sup> New South Wales had introduced manhood suffrage and amended accordingly the qualifications for sitting in its Legislative Assembly before 1859.<sup>275</sup> The qualifications for the Queensland Legislative Assembly and the suffrage were drawn up on a property basis in accordance with the 1855 New South Wales Constitution. Because of doubts as to the validity of this provision and the qualification of members of the two legislatures not being the same, the Imperial Parliament passed the Act of 1861. Dr Macpherson deals with this in detail.

Queensland's last territorial demand on New South Wales occurred in 1862 when a strip of land between longitudes 138° and 141°E above South Australia was detached from New South Wales.<sup>276</sup> No other change was made to the Queensland Constitution until 1867 when the Queensland Parliament, pursuant to the power conferred upon it by the order in Council<sup>277</sup>, passed "an Act to consolidate the laws relating to the Constitution of the Colony of Queensland".<sup>278</sup> This Act brought into one Act some provisions of the Constitution Act 1855, the Constitution Statute 1855,<sup>279</sup> the Letters Patent and Order of Council of 1859 and the Imperial Act of 1861.

The struggle for colonial power to be wrested from Imperial control was in large part a New South Wales struggle, unsubtly materialistic in many respects, intense, often strident and combative in tone and, at times, expressly threatening of Imperial authority. Queensland's struggle was for separation, directed primarily against control from Sydney, with Imperial authority as its, sometimes

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<sup>273</sup> 24 & 25 Vic c 44

<sup>274</sup> Melbourne and Joyce *op cit* at p 446

<sup>275</sup> 22 Vic No 20, ss 8 and 9

<sup>276</sup> Carney *op cit* p 55. A strip of land of New South Wales between longitudes 129°E and 132°E, north to latitude 26° S had been given to South Australia in 1861.

<sup>277</sup> Order in Council, s 22

<sup>278</sup> 31 Vict No 38

<sup>279</sup> 18 & 19 Vict c 54

less than staunch, ally. The ripples and echoes of these struggles have, or at least have had in the not so distant past, some resonance.

Brisbane

29 May 2009

**Australian Academy of Law 2009 Symposium Series**

**Professionalism and commercialism – conflict or harmony in modern legal practice?**

**5 May 2009**

**James Allsop\***

- 1 Let me begin with a question about practical affairs, drawn from anecdote. (Some of you who know my interests will no doubt sigh. But indulge me.) The question is: Despite the size of merchant marine tonnage owned by maritime powers such as Japan, Korea, China, Malaysia, Russia, the countries of Europe and India, the proportion of commercial shipping tonnage still owned or controlled by often tightly owned family or clannish Greek interests under a variety of flags is still significant – something in the order of 18%.<sup>1</sup> By and large, through the consistent use of arbitration clauses in their operative charterparties, Greek shipowners still overwhelmingly choose London for their dispute resolution, as their fathers and grandfathers did in years past. Why is this so? I will return to discuss the answer to this question in due course.
  
- 2 On the occasion of the launch of the Academy in July 2007, the former Chief Justice of Australia, the Hon Murray Gleeson AC, noted that one object of the Academy is the support of professional values in a time of what he referred to as the “increasing mercantalisation of legal practice”. He continued:

“[T]he single-minded pursuit of private gain has never been consistent with a full acceptance of the ideals of professionalism. It is of the essence of professional values that the pursuit of personal interest is modified by an acceptance of responsibilities, to the public, and in the case of lawyers,

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\* President, New South Wales Court of Appeal

to the court. Those responsibilities may in some circumstances conflict with the dictates of private interest.”

3 In a similar vein, the Chief Justice of New South Wales, the Hon James Spigelman AC, said in his speech at his swearing-in:

“... the operation of a market gives absolute priority to the client’s interest. A profession gives those interests substantial weight, but it is not an absolute weight. In many circumstances, the lawyer’s duty to the Court prevails over a client’s interest, let alone the client’s enthusiasms.”<sup>2</sup>

4 In October 2005, one of the most senior practitioners in the country, Bret Walker SC, gave a forthright speech confronting directly and bluntly what he saw as important structural failings of the legal profession and an overemphasis on commercial factors in the contemporary practice of law.<sup>3</sup>

5 It cannot be sensibly doubted, in my opinion, that the maintenance of the highest standards of ethics and professional skill and responsibility is not only essential for the maintenance of a healthy system of the administration of justice and the rule of law, but it is also essential for the long term profitability of legal practice in this country. These professional standards are the core goodwill of a legal practice, a legal profession, as well as the foundation for the administration of justice in a free civil society.

6 But, why should you listen to me on this topic? I am not sure. To the extent that I have any insights they come from one year, or thereabouts, as an articled clerk at a large Sydney firm of its day (about 25 partners), twenty years in private practice at the Bar being briefed by small, medium and large firms in New South Wales and

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<sup>1</sup> United Nations Conference on Trade and Development, **Review of Maritime Transport 2008**, “Table 12 – The 35 Countries and territories with the largest controlled fleets, as of 1 January 2008” at p 39 ( [http://www.unctad.org/en/docs/rmt2008\\_en.pdf](http://www.unctad.org/en/docs/rmt2008_en.pdf) ).

<sup>2</sup> “Swearing In Ceremony of The Honourable J J Spigelman QC as Chief Justice of The Supreme Court of New South Wales” [http://infolink/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speech\\_spigelman\\_250598](http://infolink/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_250598)

<sup>3</sup> “Lawyers and Money” St James Ethics Centre Lawyer’s Lecture 2005 ( <http://www.ethics.org.au/about-ethics/ethics-centre-articles/ethics-subjects/law-and-justice/article-0465.pdf> ).



other States as well as by government lawyers, seven years as a first instance and appeal judge in the Federal Court and a little under one year as an appeal judge in the New South Wales Court of Appeal. I have not worked for any length of time as a solicitor, whether in a small, medium, large or “mega” firm, I have not worked as an in-house lawyer, and, happily, I have not been a client, except in the most minor of non-contentious matters. I mention this because it should be recognised, at the outset, that many of the issues which I will discuss are ones that I deal with at an anecdotal or experiential level. They are issues, however, that are amenable to empirical research and, to a degree, measurement, or, at least measured assessment. The use of anecdotal data for debate may be legitimate, but it has its limitations, and dangers. One of the tasks of the Academy may well be to help develop or encourage research in these areas.

7 Importantly also it should be understood that (to the detriment of any contribution I may make) my training and professional practice are not in moral philosophy. Much of what I will be touching on, some of my questions and some of my apparent certitudes either rest on, or raise questions about, philosophical issues of some importance.<sup>4</sup> You may have noticed that I have already used the expression “it cannot be sensibly doubted” about how standards of conduct are relevant to society. This involves normative standards of conduct in the context of the organisation of society. A recognition of at least the existence of this dimension to the subject throws light upon its importance.

8 One further matter to raise at the outset in this discussion is the proper framework for consideration of our legal profession. Thankfully, and finally, the creation of a national profession appears to be widely accepted throughout the Commonwealth. Less emphasis in discussion of the legal profession has been given to Australia’s place in providing legal services to the outside world. It is my experience and observation that, with some notable exceptions (the larger firms of solicitors being among them), Australian lawyers tend to be a somewhat provincial group; happy, by and large, to ply their profession in a municipal market with few foreign

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<sup>4</sup> The clarity with which one can see the importance of moral philosophy to the present subject can be seen at once from a consideration of the work of two scholars, Oakley and Cocking in their

competitors and with little desire or pressure to seek work outside Australia. I suspect that a shockingly large proportion of practising Australian lawyers are ignorant of the New York Convention on the Recognition and Enforcement of Arbitral Awards and the worldwide scale of international dispute resolution by international commercial arbitration.

- 9 Before turning to the matter of commercialism it is apt first to consider the notions of “profession”, “professional” and “professionalism” and the meaning and content of these concepts.

### **Notion of “Profession”**

- 10 The **Oxford Dictionary** (2<sup>nd</sup> ed) defines “profession” as ‘an occupation in which a professed knowledge on some subject, field or science is applied; a vocation or career, especially one that involves prolonged training and a formal qualification...’; and “professional” as: ‘[of], belonging to, or proper to a profession ... [r]elating to, connected with, or befitting a [particular] profession or calling; preliminary or necessary to the practice of a profession ... [e]ngaged in a profession, especially one requiring special skill or training ...’. This meaning stresses learning, training and skill.
- 11 The notion of a profession was described by Roscoe Pound as “a group pursuing a learned art as a common calling in the spirit of public service – no less a public service because it may incidentally be a means of livelihood”.<sup>5</sup> This notion of service, stressed by Pound, beyond the narrow confines of private interest and gain, necessarily carries with it the existence of a body of rules to identify and regulate the demands of that service – professional ethics.
- 12 When courts have canvassed the notion of a “profession”, they have said that the word is not susceptible to precise definition and is not rigid or static in its

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2001 publication “Virtue Ethics and Professional Roles” (Cambridge 2001). No doubt there are many other similar illuminating sources which further illuminate the topic.

<sup>5</sup> R Pound **The Lawyer from Antiquity to Modern Times** (1953) p 5

signification.<sup>6</sup> Undoubtedly it involves the employment of intellectual skill, such skill being acquired by learning and training.<sup>7</sup>

- 13 That the term profession is not one which is rigid or static in its signification is a reflection of a dynamic society and a malleable living language. It may be observed that areas which are considered as a “profession” in the modern day have multiplied. This is not a new phenomenon. In 1944, du Park LJ commented in **Carr v Inland Revenue Commissioners**<sup>8</sup> “...there are professions today which nobody would have considered to be professions in times past.” The same is true in the present day.
- 14 While resisting any temptation to define exhaustively those occupations which may be considered “professions” it is sufficient to acknowledge that the law is unquestionably a profession and has been viewed as such for centuries.
- 15 Lawyers were first recognised as professionals in the mid 13<sup>th</sup> century. This development has been attributed to the development of law as a body or discipline of coherent learning, the emergence of universities teaching law, that is, Roman law, in Western Europe, the formalised training and examination of law students, the formation of a body of qualified practitioners and the emergence of courts with complex procedures requiring expert knowledge.<sup>9</sup>
- 16 The widening denotation of the word “profession” in modern society may be one reason for a less acute perception of the content of the professional duties of the lawyer that may have occurred. But there can be no doubt that the practice of law is a profession, requiring learning, skill and service to the public.

### **The centrality of ethical principles and service to the public**

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<sup>6</sup> **Bradfield v Federal Commissioner of Taxation** (1924) 34 CLR 1 at 7 (Issacs J); **Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd** (1987) 14 FCR 215 at 219 (French J); **Prestina v Aknar** (1996) 40 NSWLR 164 at 184 (Santow J).

<sup>7</sup> **Commissioners of Inland Revenue v Manse** [1919] 1 KB 647 at 651 (Scrutton J)

<sup>8</sup> [1944] 2 All ER 163

<sup>9</sup> J A Brundage, **The Medieval Origins of the Legal Profession: Canonists, Civilians and Courts** (University of Chicago Press, 2008) 489.

17 The observance of ethical guidelines and enforcement of ethical principles was, and remains, the essence of a profession. Such ethical principles are the manifested structure of the minimum required service to the community.

18 It is not my task today to set these principles out exhaustively. Justice David Ipp in a valuable article in 1998, discussed the lawyer's duty to the court.<sup>10</sup> He referred in particular to:

- A duty of full disclosure of the relevant law;
- A duty of candour not to mislead the Court as to fact, nor to knowingly permit a client to do so;
- A duty to prepare the case properly and to know the relevant law;
- A duty to refuse to permit the commencement or continuance of baseless proceedings or proceedings brought for an ulterior purpose, such as malice, or to exploit the advantage of Court delay;
- A duty to exercise care, by testing any instructions, before making allegations of misconduct against anyone;
- A duty not to assist improper conduct, whether illegal or dishonest or otherwise improper.

19 Whilst that article is valuable for all lawyers to read, it is directed most particularly to those who exercise their profession in appearing before the courts. The practice of law is, of course, much wider than that. The successful commercial advisory solicitor will rarely, if ever, go to court. A court appearance (even one leading to a resounding victory) to such a practitioner may well be a badge of failure.

20 It is, however, helpful to recognise that the proximity of practice to the courts brings to the fore, on a daily basis, to the practitioner the realisation that there are duties that may conflict with the duty or loyalty to the client or at least to the client's immediately apparent interests. Litigators, whether counsel or attorneys,

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<sup>10</sup> D Ipp "Lawyers' Duties to the Court" (1998) 114 **Law Quarterly Review** 63

daily face ethical decisions as to disclosure of facts, not running hopeless points or cases and not wasting time which may be to the tactical advantage of the client or to the financial advantage of the practitioner. The effect of the proximity to the court is real because judges can see these things and they do act as a direct supervisory mechanism.

- 21 The practice of both civil and criminal litigation is replete with rules and expectations of behaviour of lawyers which run directly contrary to the apparent immediate interests of the client – the obligations of discovery, the obligations of disclosure, the obligations to isolate and co-operate to address only substantive issues in dispute to assist the court to further the just, quick and cheap resolution of conflict.<sup>11</sup> These duties arise from the need of society to make the best use of scarce public resources and to make them available to all in society. Litigation is generally expensive, time consuming and stressful. The profession has a duty to assist in minimising these features and in the efficient operation of the judicial system. The courts are becoming increasingly aggressive and assertive in their demands for efficient and co-operative conduct of litigation.<sup>12</sup>
- 22 These broader duties to the public and the administration of justice operate hand in glove with duties of the lawyer of good faith and fidelity of the highest order: the fiduciary in equity. These duties include the duty of honesty, of full disclosure,<sup>13</sup> of not placing oneself in a position of conflict of duty with duty to another or with personal interest (other than the fee properly bargained for). It is the fiduciary duty and the recognition of its relevance to everyday aspects of legal practice in both organisation of the lawyer's firm and the conduct of the retainer that gives the foundation for important aspects of the expectations, and potential enforcement, of behaviour, at least to the extent of the relationship of loyalty and service to the client.

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<sup>11</sup> **Civil Procedure Act 2005** (NSW), s 56

<sup>12</sup> **White v Overland** [2001] FCA 1333 at [4]; **Nowlan v Marson Transport Pty Ltd** [2001] NSWCA 346; 53 NSWLR 116 at 127 [26]-129 [32] (Heydon JA with whom Mason P and Young CJ in Eq agreed); **Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd** [2008] NSWCA 206; 252 ALR 659 at 730 [418]-731 [421]; **Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd** [2008] NSWCA 243 at [160]-[164]; **Civil Procedure Act 2005** (NSW), s 56

23 These duties are not limited, of course, to the litigator. The lawyer is an officer of the court. When advising the client she or he is still an essential working part of the administration of justice (using that expression in the broad sense). In a case about legal professional privilege and the recognition of the privilege of foreign lawyers<sup>14</sup> I said speaking of legal professional privilege as a human right as well as a common law privilege:

Part of the practical guarantee of the fundamental, constitutional or human right and part of the practical worth of the fundamental common law privilege is to seek advice from a lawyer as to one's rights and obligations in a complex human, commercial and governmental environment which may be, for any particular person, multi-jurisdictional. A principle which differentiates between foreign and domestic lawyers in terms of approach based on training, ethics and curial control is not warranted, in my view, by reference to the underlying rationale of the privilege...

24 Justice is administered by good advice given, and sensibly taken, in law offices on a scale that dwarfs the productive work of the courts.

25 A free civil society has a basal social need for skilled, honest, articulate lawyers who recognise that their advice must be fearless and based in learning and skill. That recognition must also be that their place is to assist in the vindication and protection of the rights of their clients under the rule of law by the administration of justice to which administration, ultimately, they owe their paramount duty.

26 This is all familiar to you, I know. But to express it thus highlights, I think, what has always brought many young people to the study and the practice of law. They recognise that, as well as the opportunity to earn a living at a reasonable level, they will become part of an essential functioning institution of society of great importance. This recognition helps instil in the profession, in each new generation, the required idealism and sense of service necessary for the natural, organic regeneration of the ideal of service and of the intuitive adherence to the ethics and principles of the profession which are essential to the administration of justice and the healthy functioning of a free society.

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<sup>13</sup> At least if a possibility of conflict arises.

<sup>14</sup> **Kennedy v Wallace** [2004] FCAFC 337; 142 FCR 185 at 222 [208]

- 27 Bound up with these propositions are assumptions and premisses about moral conduct, the duty of service and the type of society we have, or want. For instance, a paramount duty to the administration of justice can be accepted as legitimate to over-ride a duty of loyalty to further the client's interests if the system of justice that is administered is morally acceptable. The memory of the failure of the German legal system in the years prior to 1939 and of the role played by the over-riding "public good" of the State, the Volk and National Socialism in the administration of the law in the Nazi State<sup>15</sup> reinforces the need for the relationship between "service", "justice" and a free civil society to be based on acceptable foundations of moral philosophy, justice and essential social norms. They also remind one that the duties that can legitimately over-ride fidelity to the client and the protection and vindication of his or her rights should be clear and legitimately based upon the requirements of the administration of justice.
- 28 All this, of course raises philosophical debates involving relativism, realism and interpretivism.<sup>16</sup> The proper relationship of the individual to the community is also central to the philosophical and governmental debate.
- 29 What I take as a given (at least for consideration of the subject municipally or nationally) is the essential need of society for a just, fair and efficient method of individuals understanding the rules and expectations of society and their rights so that they can order their affairs and behave appropriately and of resolving disputes without the need for force or the exercise of personal influence, such as money, power or family or clan influence.
- 30 Society must have such a system. (I put to one side anarchist or nihilist objections to that.) The form of the system depends on constitutional, social and governmental influences and structures. Our society expects the lawyer to be an integral part of the functioning, organic, governmental and social institution being

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<sup>15</sup> See generally M Stolleis *The Law Under the Swastika* (University of Chicago Press 1998).

<sup>16</sup> R Atkinson "Beyond the New Morality for Lawyers" (1982) 51 Maryland Law Review 852. And see generally O'Dair *Legal Ethics: Text and Materials* (Butterworths Law in Context Series)

the administration of justice. To play that part lawyers must be trusted by clients, government and society. For this to be possible, their service, duties and loyalty must exist, be understood and be clearly and swiftly enforced.

### **Commercialism and modern legal practice**

- 31 One needs to be careful with terminology and language: “professionalism – good; commercialism – bad”. Such a mantra is not only misleading, but it is dangerous. The practice of law and an acute appreciation of commercial enterprise have always been intimately related. The principled, well-organised, efficient and profitably-run law firm or counsel’s practice not only generates returns for the practitioner but jobs for associated staff and service providers. Such a firm is well placed to deploy its skill and expertise more widely than the principled, well-meaning but incompetently organised lawyer or firm.
- 32 No society, such as ours, whose substantial wealth is generated by commercial enterprise can function with a legal profession of salaried public service lawyers only driven by the altruistic desire for social good. Not much helpful acute commercial advice there.
- 33 It should also be recalled that business and commerce and the pursuit of commercial gain are not intrinsically unwholesome undertakings. We do not have the social view of the 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> century Spanish hidalgo or the English landed gentry looking down on the grubbiness of trade, though sometimes a little of this peaks through the debate. The “morals of the market place” are sometimes juxtaposed with the fidelity of the fiduciary,<sup>17</sup> however it is not to be forgotten (as it sometimes is in our heavily positivist influenced legal tradition) that one of the basal tenets of the law merchant, as a transnational body of law recognised as municipally binding by lawyers and judges such as Blackstone,<sup>18</sup> Mansfield,<sup>19</sup> Story,<sup>20</sup> Lord Campbell<sup>21</sup> and Dr Lushington<sup>22</sup>, which was the product of the

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<sup>17</sup> **Meinhard v Salmon** 249 NY 458; 164 NE 545; 62 ALR 1 at 5 (Cardozo J)

<sup>18</sup> 1 Bla Comm 273; 137 ER 788

<sup>19</sup> **Luke v Lyde** (1759) 2 Burr 882 at 887; 97 ER 614 at 617

<sup>20</sup> **De Lovio v Boit** 7 F Cas 418 (1815)

<sup>21</sup> **Brandao v Barnett** (1846) 3 CB 519; 136 ER 207



international acceptance of mercantile custom and usage, was the duty of good faith.<sup>23</sup> As Lord Steyn has said, honest commercial common sense is at the root of the common law.<sup>24</sup>

- 34 However for tonight's purposes let us not (within living memory of Enron, Worldcom, the dotcom bubble and bust, Rothwells, Spedley, Bond, WA Inc, HIH and others) dwell too roseately on the potential for self-denial and honest common sense in business. Let us recognise its essential element of the pursuit of private gain. That said, many a supposed divergence between the so-called interests of the client and a professional duty of a lawyer can properly be seen not to exist with a proper appreciation of the duty of good faith as a basal expectation and obligation in the client in commerce.
- 35 It is not easy to identify in terms of general principles expressed in clear a priori logic what is a good or healthy relationship between professionalism and the business (or, if you like, the commerce) of the practice of law.
- 36 Chief Justice Spigelman has written extensively on the professional duties of practitioners and the conflict between the law as a business and the professional obligations of lawyers.<sup>25</sup>
- 37 As Chief Justice Spigelman said in his "Are Lawyers Lemons?" speech, there is a tension between the pursuit of commercial advantage and the ethic of service to the client and public. That tension is mediated and drawn away in a healthy profession by (a) recognition and adherence to professional ethics and (b) recognition and adherence to the requirement of fiduciary fidelity.
- 38 Is this an adequate structure? Is it even a reasonable expectation? It should be both.

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<sup>22</sup> **The Segredo** 1 SP Ecc & Ad 36 at 45; 164 ER 22 at 27

<sup>23</sup> L Trakman *The Law Merchant: The Evolution of Commercial Law* (1983)

<sup>24</sup> **First Energy (UK) Ltd v Hungarian International Bank Ltd** [1993] 2 Lloyd's Rep 194 at 196 (Steyn LJ)

- 39 Let me take a simple example, a claim by a client that it was charged for (a) work not done or expenses not made; (b) unnecessary work; (c) necessary work done in a wasteful fashion.
- 40 The charge for (a), if the case, is a breach of the fiduciary duty of honesty.
- 41 So, however, might be (b) and (c). A solicitor or barrister without disclosing the facts to his or her client or solicitor, has no right to charge profit costs for work that is unnecessary or wasteful. In particular if intentional, it is to prefer his or her interests to his or her duty to his or her principal.
- 42 Take the example of work done in-house within a firm of solicitors where the retention of a readily available independent bar to undertake the task at a cheaper rate would be productive of a better or the same quality of service. A solicitor, at least one who recognises that the choice is available and who does not have at least a bona fide view (and probably one that is reasonably held) that she or he can do a better job than the bar may well breach his or her fiduciary duty by preferring his or her own interests to the client. Where is the fiduciary loyalty in having the client pay more for the same or worse service?
- 43 Does the matter truly require 5,000 photocopies? Even if scale fees allow \$1 per page this may well involve an element of profit for a service company. Does not this profit or self-dealing need to be disclosed?
- 44 These are small and mundane matters; but out of small and mundane costs real bills of costs are made.
- 45 To a degree, a realistic answer to these mundane examples might be that no one looks at such things and there is no way of the client learning about them.

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<sup>25</sup> See for example “**Are Lawyers Lemons? Competition Principles and Professional Regulation**” 2002 St James Ethic Centre Lawyer’s Lecture

- 46 This highlights, in a prosaic and unspectacular way, one of the real issues in the conduct of the profession: what has been termed information asymmetry.<sup>26</sup> Put another way – the client just does not know. The lawyer is the skilled professional. How is the client to know what truly is required to solve his or her problem? If the client can rely on the lawyer to approach his or her problem recognising the duty of fidelity and seeking to solve the problem in the shortest possible time and at an appropriately reasonable cost, why should she or he need to know?
- 47 Can we say that the conduct and structure of our legal profession warrants that trust on an institutional basis? If this is a question about which people disagree, there is a problem. As the “Mad Men” (the Madison Avenue advertising firms) showed in the 1950s perception sells, or, in this case may not sell.
- 48 What are some of the points of tension about which, at least on an anecdotal basis one hears of concerns?
- 49 The growing appearance that revenue generation and profit are the organising principles of legal practice is the most concerning. This is an anecdotal and personal impression.
- 50 Some features of this appearance are the fact, or proposal, of:
- (a) the widespread issue of time charging, leading to work filling budgets, rather than completed work providing cashflow;
  - (b) the growth of partnerships to sizes making it difficult, if not impossible, to assess the skill, professional quality and worth of peers other than through revenue generation;
  - (c) the capitalisation (and indeed public listing) of commercial enterprises whose aim is to make money from generation of litigation;

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<sup>26</sup> JJ Spigelman “Are Lawyers Lemons?” and the valuable article by G Akerlof (1970) 84 *The Quarterly Journal of Economics* 488.

(d) the proposed listing of corporations, effectively being firms of lawyers, on the stock exchange;

(e) proposals for large multi-disciplinary partnerships.

51 The pressure of these developments on the faithfulness of the fiduciary and on the following of ethical principles designed to see service to the public and the administration of justice is real. That is not to say that each is not an arguably legitimate response or outgrowth of practice, but each, in its own way, can press on the fiduciary.

52 Only a very slight change of focus needs to be made by a lawyer to change from (a) expecting a profitable return from running as well and as efficiently as possible a large case in court, to (b) planning how to make as much money as possible from running the same large case in court.

53 The difference will be difficult to discern externally, with precision, but will be reflected in large amounts of money, leading to that well-known feeling householders sometimes get with builders: when you cannot put your finger on it, but you know you are, to use a colloquial expression, “being handled”.

54 The difference will, however, be easy to recognise internally, especially by the young keen-eyed and quite likely still idealistic lawyers ordered from the trenches to throw themselves against the barbed wire and machine guns of litigation preparation. They will survive with an enhanced carapace of cynicism, but will their ideals and their spirits?

55 The difference in point of fiduciary duty will be profound.

56 What are necessary are cost effective structural mechanisms to reduce information asymmetry. Let me give you an example. In the last few years there has been a growth of a small niche area of practice: what might be called the ad hoc in-house lawyer, or, less flatteringly the out-house in-house lawyer. Such a person is engaged, as a lawyer, to inspect and comment on work done by the earlier retained

firm. The file will be examined, questions asked and a report given to the client. Lawyers are being watched, checked and reported on.

- 57 This has been happening because some people have at least a degree of disquiet or distrust about the provision of their legal services.
- 58 This is one mechanism to remedy a lack of knowledge. In-house lawyers have quietly conducted this kind of activity for years. The front page of the Financial Review on 1 May 2009 carried a story of the pressure that leading in-house lawyers were placing on hourly rate billing. This is healthy commercial and professional pressure.
- 59 There may be other ways of doing the same thing. The access by clients to knowledge about the reasonableness of the conduct of a retainer while it is being undertaken is essential. It could and should be provided by lawyers themselves. It breeds trust.
- 60 It may be said that the breeding of an environment for fierce cost competition for supply of services commercialises or “de-fiduciarises” the relationship: “If you want to beat me down in cost in a ‘beauty parade’, I will maximise the return under my retainer.”
- 61 I do not think that this is a valid conclusion. The lawyer should not fear either competition or a client understanding how he or she works and charges. The fiduciary loyalty, skill, learning and recognition of professional principles should be, in an honest commercial system that is based on good faith, points of attraction, not handicaps.
- 62 The underlying obligations are strict. The fiduciary obligation is the strictest known to our legal system. The task is the creation of the mechanisms for enforcement in a working consensual way which are not artificially imposed, but are part of the fabric of practice.

63 None of these comments is intended to advocate the size or structure of any firm. A degree of size and thus capitalisation may well be essential for the task of seeking to provide legal services outside Australia and making Australia a centre for legal professional services in the region. That goal is one that should be aimed at. The recent announcement of the Prime Minister and Attorney-General about National Legal Profession Reform includes this aim. It also reflects the true harmony that can exist between the practice of law and commercialism. What can be “sold”, and what is worth buying from the legal profession are the skill and wisdom derived from deep learning and experience, the force of honest attention to duty and the recognition of value for money. These attributes, whether offered to an Australian or foreign client, underpin the true goodwill of the so-called legal services market.

64 If clients believe:

(i) the tribunals of the jurisdiction are skilled and fair;

(ii) that the practitioners are skilful;

(iii) that the practitioners are honest, dutiful and faithful to the client’s interests; and

(iv) that within the boundaries of the negotiated fee the client is in trusted, trustworthy and safe hands

they will engage and return. These things are worth paying for. They are the real foundation of the goodwill of the legal profession and of the business of lawyering.

65 This is also the answer to the question I first asked about the Greek shipowners. I once asked a Greek gentleman familiar with the shipping business why Greek shipowners went back to London time and again. His answer was simple: the courts are fair, the arbitrators are fair, the practitioners are honest and highly skilled and, though it was expensive, they trusted the whole system: judges,

arbitrators, counsel and solicitors to provide a fair result – in all circumstances, even against London underwriters, and even when they lost.

- 66 This obtains in one of the fiercest and most lucrative “legal markets” in the world.
- 67 Trust and reliability are everything. They are built incrementally case by case, file by file, generation by generation. They cannot be faked. Trust must come from clients, the public and the state. The state, society and government should all view the profession as one engaged with them in the administration of justice. It is this essential characteristic that gives the state the right of influence over the profession. It is also the reason why the enforcement of the highest ethical and fiduciary standards should be swift and uncompromising. By this means, the protection of the reputation of the profession involves the protection of the administration of justice.
- 68 The task we face, as some of the custodians of the legal profession today, is ensuring that our profession has the structural features to permit a degree of commercialism commensurate with the profession meeting the challenges of the growth of national and transnational legal practice without detracting from the underlying essential elements of the goodwill of that “business market” – the faithful administration of justice based on the faithful adherence to professional standards and ethics and to the required fiduciary fidelity.
- 69 Rectification of information asymmetry is one suggestion. There are no doubt others. One task for the Academy might be to consider the promotion of a programme of research to ensure that our profession retains and enforces the strongest professional and fiduciary standards. National regulation and supervision of the legal profession is entering the political debate. The recent announcement of the Prime Minister, the Attorney-General and COAG and the establishment of a working group on national regulation is a significant beginning. Much stands to be done. The profession and the Academy should recognise their roles in the development of policy in this area.

- 70 One aspect of legal practice which has been neglected in Australia by many is international dispute resolution. This poses interesting problems and opportunities. These both, in part, stem from the absence of a municipal administration of justice to whom practitioners owe duties. The *lex arbitri* may be a substitute and the obligation of good faith on the commercial party reflected on to his or her legal adviser may also play a part. In any event the establishment of Australia's presence in this worldwide system requires in business terms "market exploration and market development". Two of the principle rules of practice at the Bar which are designed to maintain strict independence are the sole practitioner rule and the related cab-rank rule. While entirely defensible and salutary at the local level, they have less relevance for overseas or international practice. Further, they inevitably hamper the Bar in participating in this "market" because of the necessary costs of engaging in the area. Thus there may be a need to adjust some rules of practice to encourage the sharing of costs and benefits in international practice.
- 71 Let me conclude with some brief comments on two subjects – the idealism of young graduates and cut price overseas legal services. The two are not unrelated.
- 72 One of the privileges of being a judge is the opportunity to hire and work with a young graduate every year as an assistant – an Associate in the Federal Court and a Tipstaff in the Supreme Court. They are intimidatingly bright. All in their own way are ambitious; but they all have their own sense of idealism about the law. Almost all are wary of aspects of future professional practice. None fears hard work, all wish to do well, but all wish to have a sense of fulfilment from their life in the law. The task of the profession, including the Academy, is to see that fulfilment is achieved, not by money, but by the participation in a service to the public, by the development and maintenance of a fine legal system, helping to support a free civil society in Australia and in our wider region. Drive the idealistic young from the profession by perceived venality and exploitative drudgery and they will be replaced by others content to pay the price in order, later, to pluck the goose.



- 73 This is intended much more than a penultimate comment for the young ones so that I can be seen not to have ignored them. It is central to the problem of any perceived decline of professionalism and the ethic of service and to any solution to the problem. William S Sullivan has written cogently on the disintegration of professionalism and the potential for redemption.<sup>27</sup> It is a lucid sociological commentary on professional life with some of its most powerful themes illustrated by perceptions through the eyes of young practitioners. Perhaps we should be asking them how they would see the proper way to fuse a lifelong rewarding career based on service with building a career; and, not only asking them, but modifying our professional structures accordingly.
- 74 If the profession becomes stripped of its role, and duty, of service and becomes the provider of information and services (not service) as commodities and the practice of law comes to be merely the commercialised sale of legal information, then fundamental issues such as the very rationale for the existence of the profession and attendant concepts such as legal professional privilege arise. Also, we might look to Pangea3 for our model. Le Monde recently reported the growth in Mumbai of a legal advisory service, called Pangea3, employing graduate lawyers sitting in open planned offices in front of flat digital screens giving advice and legal services over the internet to clients around the world. Such customised packaging of information may well take some place in informing clients and even lawyers. Companies such as General Electric and Microsoft were reported by Le Monde to be using Indian lawyers for some of their contract and intellectual property work. Whilst there will, no doubt, be a place for this, if legal practice becomes the mere selling of information, the future has some hard lessons for the profession and a significant dysfunctionality for society.
- 75 I hope this has not seemed pessimistic. I am not. Perhaps I should be. I also hope that I have said something useful. The topic is a difficult one, involving philosophy, sociology, ethics, practical daily life and the subtle and complex working of an essential social and governmental institution – the administration of justice. The Academy, in conjunction with law faculties and the profession itself,

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<sup>27</sup> **Work and Integrity: The Crisis and Promise of Professionalism in Modern America** (New York 1995)

has a real role in assisting in the maintenance of true professionalism, in particular perhaps, by promoting research, thinking and discussion into the development of structures to ensure the maintenance of professional skill, learning, ethics, principles and fiduciary duties, which are to be safeguarded as the foundations of a learned profession, of a fair and efficient system of justice, and (for those who would prefer to view it thus) of the successful pursuit of the business of lawyering.

Sydney

5 May 2009

**The 2009 William Tetley Lecture  
Tulane University**

**Maritime Law – the Nature and Importance of its  
International Character**

**15 April 2009**

**James Allsop\***

- 1 It is a great honour to be asked to deliver a lecture bearing the name of one of the great scholars of maritime law of the 20<sup>th</sup> and 21<sup>st</sup> centuries at such an august centre of learning in the same field. I am fully aware that whatever analysis and small insights might be found in this paper have been written about already by Professor Tetley. As a former practitioner, as a judge and as a teacher of maritime law, I wish to express my debt to him. I hope I repay the kindness and confidence of those who invited me. I apologise in advance should I fail.
- 2 I should also preface my remarks with the qualification that, though I will have liberal resort to United States' cases, I do not presume to deal comprehensively or in a disciplined way with United States' law.
- 3 The topic that I have chosen represents an abiding interest of mine in international commercial law and the relationship between municipal law and international commercial conduct and the regulation and enforcement of the latter, in particular by reference to a body of principles distinct from municipal law.
- 4 Maritime law and maritime commerce are fields of human activity ripe for consideration of these issues. Few maritime ventures are undertaken without a complex interconnection of international participants. Though not all are in direct legal relations with each other, the conduct by each of its part in the venture will generally have an effect on the safety or commercial viability of the venture for the others. It is the fact that maritime activity is almost always international or transnational that provides one essential characteristic of maritime law. The second essential characteristic is, of course, provided by the sea, and her demands.

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\* President, New South Wales Court of Appeal, formerly a Judge of the Federal Court of Australia.

- 5 The necessarily central part in international commercial intercourse played by international maritime transport makes the solutions to problems of contract, insurance, loss, security and enforcement of rights matters of common interest to the international commercial community.
- 6 This character of internationality is not limited, of course, to maritime law. Commercial law and its elemental concepts – the bargain and promise, the means of exchange of value, including in particular, the promissory note and bill of exchange, performance, the spreading of risk by such means as insurance, partnership and joint venture, the lending and repayment of money and notions of restitution all bear the hallmarks of internationality in their history and development. Space and time do not permit any consideration of the wider law merchant and its history and current relevance.<sup>1</sup> I will content myself with some comments about the branch of the law merchant of interest to us all – maritime law.
- 7 At the outset, it is instructive to remind oneself of the expressions of views of great judges, of the not so distant past, concerning the nature of maritime law, both as a separate and distinct body of doctrine and as part of the fabric of international private law (by which I do not mean private international law, that is, conflict of laws).
- 8 It would, of course, be a mistake to restrict the consideration of the internationality of maritime law to western sources. Space and time, however, do not permit a discussion based more broadly than on our immediately common roots.<sup>2</sup>

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<sup>1</sup> See generally, Trakman L *The Law Merchant: The Evolution of Commercial Law* (Fred B Rothman 1983); Sanborn F *Origins of the Early English Maritime and Commercial Law* (William Hein & Co 2002); Chitty J *Lex Mercatoria: or a Complete Code of Commercial Law by Wyndam Beawes* (6<sup>th</sup> Ed London 1813); Malynes G *The Ancient Law Merchant* (3<sup>rd</sup> Ed 1686); Holdsworth A *History of English Law* (3<sup>rd</sup> Ed 1945) Vol V pp 60-154; Rose F (Ed) *Lex Mercatoria: Essays in Honour of Francis Reynolds* (LLP 2000); and footnote 2 below.

<sup>2</sup> See generally as to the history of maritime law and its international roots, Tetley W *International Maritime and Admiralty Law* (Editions Yvon Blais 2002) pp 5-30; Sanborn F *op cit* chs 1, 2 and 4; McFee W *The Law of the Sea* (J B Lippincott Company 1950) chs 3-6; Gold E *Maritime Transport: The Evolution of International Marine Policy and Shipping Law* (Lexington Books 1981) ch 1; *Benedict on Admiralty* (7<sup>th</sup> Ed) vol 1 chs 1 and 2; Gilmore G and Black CL *The Law of Admiralty* (2<sup>nd</sup> Ed, The Foundation Press 1975) pp 1-11; Schoenbaum TJ *Admiralty and Maritime Law* (4<sup>th</sup> ed, West Publishing 2004) ch 1; Beutel FK *Brannan's Negotiable Instruments Law* (7<sup>th</sup> Ed, The WH Anderson Company 1948) Part 1 ch 1; Day C A *History of Commerce* (Longmans, Green & Co 1922, Garland Publishing Facsimile Edition 1983); Hourani GF *Arab Seafaring in the Indian Ocean* (Princeton University Press 1951); Laing L "Historic Origins of Admiralty Jurisdiction in England" (1946) 45 *Michigan Law Review* 163; Marsden RG *Select Pleas in the Court of Admiralty* (Selden Society 1897, 1953 Reprint) Vol 1; Selfridge HG *The Romance of Commerce* (Bodley Head 1918); Mangone G *United States Admiralty Law* (Kluwer International, 1997) ch 1; Mears T "The History of Admiralty Jurisdiction" 2 *Select Essays in Anglo-American Legal History* 312; Mookerji R *Indian Shipping: A History of the Sea-Borne Trade and Maritime Activity of the Indians from the Earliest Times* (Longmans, Green & Co 1912); Oakeshott WF *Commerce and Society* (Oxford 1936); Anand RP *Origin and Development of the Law of the Sea* (Martinus Nijhoff 1983); Abu-Lughod JL *Before European Hegemony: The World System AD 1250-350*; Charlesworth MP *Trade Routes and Commerce of the Roman Empire*

- 9 It is difficult not to start with the view of one of the creators of English commercial law, Lord Mansfield, in 1759 in **Luke v Lyde**,<sup>3</sup> which is instructive of maritime law as an integral part of the law merchant:

“The maritime law is not the law of a particular country, but the general law of nations.”

- 10 In 1815, one of the enduringly influential judicial scholars, Justice Story, in **De Lovio v Boit**<sup>4</sup> saw the maritime law of Western Europe as the source of the content of the Constitutional conception “admiralty and maritime jurisdiction” in Art III Section 2 of the United States’ Constitution, in the following terms:

“[T]hat maritime jurisdiction, which commercial convenience, public policy, and national rights, have contributed to establish, with slight local differences, over all Europe; that jurisdiction, which under the name of consular courts, first established itself upon the shores of the Mediterranean, and, from the general equity and simplicity of its proceedings, soon commended itself to all the maritime states; that jurisdiction, in short, which collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable Consolato del Mare, and still continues in its decisions to regulate the commerce, the intercourse and the warfare of mankind.”

- 11 In 1828, Chief Justice John Marshall in **American and Ocean Insurance Co v 356 Bales of Cotton**<sup>5</sup> in explaining the content of the same Constitutional phrase as was dealt with by Story J in **De Lovio v Boit** expressed the international source of such jurisdiction as follows:

“Admiralty cases [do not] arise under the constitution or laws of the United States [but] are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is supplied by our Courts to the cases as they arise.”

- 12 The debateability of the validity of this proposition, for all purposes, is visible immediately to the modern eye attuned to the place of national sovereignty. Yet, one

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(Ares Publishing Inc 1974); Rimaboschi M *L’Unification du Droit Maritime: Contribution à la Construction d’un Ordre Juridique Maritime* (Presses Universitaires D’Aix-Marseille 2006); and Glenn H *On Common Laws* (Oxford 2007) pp 114-116.

<sup>3</sup> (1759) 2 Burr 882 at 887; 97 ER 614 at 617.

<sup>4</sup> 7 F. Cas 418 (1815), after developing his ideas in **The Emulous** 8 F. Cas 697 (1813).

<sup>5</sup> 26 US 511 at 545-46 (1828).

might think, this would hardly have been lost on someone who had earlier in his adult life participated in his nation's revolutionary political liberation. The context and limits of the words of Marshall CJ can be recognised, however, by the expressions of view of Justice Bradley, almost 50 years later, on behalf of the Supreme Court in **The Lottawanna**,<sup>6</sup> which give content to the subtle, but real, relationship between the two bodies of law – the general maritime law and the particular municipal maritime law. The passage is long but deserving of careful consideration.<sup>7</sup> In it there is express

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<sup>6</sup> 88 US 558 (1875).

<sup>7</sup> At 572-573, Bradley J said:

“But it is hardly necessary to argue that the maritime law, is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such; or, like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each state only so far as it is adopted therein, and with such modifications as are deemed expedient. The adoption of the common law by the several States of this Union also presents an analogous case. It is the basis of all the State laws; but is modified as each sees fit. Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common laws are by those who use them. But, like those laws, however fixed, definite, and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, peculiarities exist either as to some of the rules, or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with, or shades off into the local or municipal law of the particular country and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed – as, in justice, it should be. No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third; still, the convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. Hence the adoption by all commercial nations (our own included) of the general maritime law as the basis and groundwork of all their maritime regulations. But no nation regards itself as precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of merely local and municipal consequence and do not affect other nations. It will be found, therefore, that the maritime codes of France, England, Sweden, and other countries, are not one and the same in every particular; but that whilst there is a general correspondence between them arising from the fact that each adopts the essential principles, and the great mass of the general maritime law, as the basis of its system, there are varying shades of difference corresponding to the respective territories, climate, and genius of the people of each country respectively ...

... Each state adopts the maritime law, not as a code having any independent or inherent force, proprio vigore, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law. And thus it happens, that, from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common, comes to be the common maritime law of the world.

This account of the maritime law, if correct, plainly shows that in particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole ...

That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend ‘to all cases of admiralty and maritime jurisdiction.’ But by what criterion are we to ascertain the precise limits of the law thus adopted? The Constitution does not define it. It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received

recognition of the following six propositions: first, the existence, separate from municipal maritime law, of the general maritime law; secondly, this separate existence of the general maritime law being owed to its internationality; thirdly, the necessity for the adoption of the general maritime law by relevant sovereign act for it to be an enforceable municipal law; fourthly, the adoption in the United States of the general maritime law by the sovereign act of the creation of a nation and a Constitution which in its terms recognised the existence of maritime law as United States' law; fifthly, the content of the general maritime law not being fixed or uniform, but being capable of local particular adaption; and sixthly, the general maritime law being the basis or groundwork of municipal maritime law. As Story J said in **De Lovio v Boit**, and as affirmed in **The Lexington**<sup>8</sup> in 1848, the maritime law recognised and adopted by the Constitution was pre-existing. It was not English maritime law but the general maritime law.<sup>9</sup> (At this point, I should say something of terminology. I will use the phrase "general maritime law" not as a reference to United States' municipal federal maritime law, but to the international body of principles about which I wish to speak.)

- 13 Similar views (or at least aspects of them) were expressed by the Supreme Court in cases such as **The Scotia**,<sup>10</sup> **The Belgenland**,<sup>11</sup> **Panama Railroad v Johnson**,<sup>12</sup> **Detroit Trust Co v The Thomas Barlum**,<sup>13</sup> **United States v W M Webb**,<sup>14</sup> and, more recently, by the 11<sup>th</sup> Circuit Court of Appeals in **Schiffahrtsgesellschaft Leonhardt & Co v A Botacchi SA De Navegacion**.<sup>15</sup>

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in England, or lastly, such modification of both of these as was accepted and recognized as law in this country. Nor does the Constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary. It assumes that the meaning of the phrase 'admiralty and maritime jurisdiction' is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of 'cases in law and equity,' or of 'suits at common law,' without defining those terms, assuming them to be known and understood."

<sup>8</sup> 47 US (6 Howard) 344 at 385-391 (1848).

<sup>9</sup> A similar approach has been taken in Australia at least as to Admiralty jurisdiction: **The Shin Kobe Maru** (1994) 181 CLR 404 at 423-426.

<sup>10</sup> 81 US 170 at 187-188 (1872).

<sup>11</sup> 114 US 355 at 362-363 (1885).

<sup>12</sup> 264 US 375 at 385-386 (1924).

<sup>13</sup> 293 US 21 at 43 (1934).

<sup>14</sup> 397 US 179 at 191 (1970).

<sup>15</sup> 773 F2d 1528 at 1531-1533 (1985).

- 14 In **The Western Maid**,<sup>16</sup> Justice Holmes, citing **The Lottawanna**, emphasised that sovereign power is required to create enforceable rules, “there being no mystic over-law to which even the United States must bow.” This much is clear. It does not, however, address the nature of the corpus of principles from which the municipal law can be seen to spring. Nor does it address the type and extent of the sovereign power required for adoption, and the capacity for that sovereign power to be the judicial power.<sup>17</sup> The “mystic over-law” became the “brooding omnipresence in the sky” in Holmes J’s dissent in **Southern Pacific Co v Jensen**.<sup>18</sup> In that case, Holmes J. rejected the notion of the maritime law as a “corpus juris” saying “it is a very limited body of customs and ordinances of the seas.” The majority in **Jensen**, however, in applying **The Lottawanna**, recognized the adoption of the general maritime law as United States’ municipal maritime law. The issue in question was, of course, the authority of State legislatures to make law which would disturb the uniformity of United States’ maritime law.
- 15 The need for care in the extrapolation of notions of internationality beyond sovereign boundaries can be seen in the United States by the fact that Story J., in delivering the opinion of the Supreme Court in 1842 in **Swift v Tyson**<sup>19</sup> as to the existence of federal common law, grounded his view that the commercial law concerning negotiable instruments, for the purpose of s 34 of the *Judiciary Act 1789*, was not State common law, but a federal common law based on the commercial law of the world, citing **Luke v Lyde**. The fate of **Swift v Tyson** was delayed 96 years, but reversal occurred in **Erie Railroad Co. v Tompkins**.<sup>20</sup>
- 16 One aspect of what was said in **The Lottawanna** which has been made clear in other cases in the United States is the limit on the power of Congress to change maritime law, if to do so would have it cease to answer that description. As a consequence of the Constitutional conception “admiralty and maritime jurisdiction”<sup>21</sup> being the

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<sup>16</sup> 257 US 419 at 432 (1922). The important notions of sovereignty in **The Western Maid** were also present in the dissents of Holmes J in **Kuhn v Fairmont Coal Co** 215 US 349 at 370-372 (1909) and **Black & White Taxicab Co v Brown & Yellow Taxicab Co** 276 US 518 at 532-53 (1927) commenting critically on **Swift v Tyson** 41 US (16 Peters) 1. In **Black & White Taxicab Co**, Holmes J rejected the notion of a “transcendental body of law outside of any particular State but obligatory within it.”

<sup>17</sup> The place of the courts in making, as opposed to merely declaring, the law was recognised by Holmes J in **Kuhn** at 371. Thus recognised, this aspect of the judicial power can act as the agent for adoption of the general maritime law.

<sup>18</sup> 244 US 205 (1917).

<sup>19</sup> 41 US (16 Peters) 1 at 19 (1842).

<sup>20</sup> 304 US 64 (1938).

<sup>21</sup> Carrying with it implicitly the subject of maritime law: **The Genesee Chief** 53 US 263 (1851) ; **Butler v Boston and Savannah Steamship Co** 130 US 527 (1889); **In re Garnett** 141 US 1 (1891) **Panama**



source of the federal law making power, the content of the conception provides a limit as to that power. The power is one to change, but not to rent and transform the subject into something not maritime law, the true limits of which conception remain a question for the courts.<sup>22</sup> A reflection or analogue of this limitation on the sovereign power of Congress can perhaps be seen in a limitation on courts changing or developing municipal maritime law in a manner or in a direction not reflective of the underlying general maritime law or, at least, otherwise than by reference to taking it into account, if it is reasonably discernible. Bradley J did not say this in **The Lottawanna**, but there are at least hints of it. I will return to this idea later.

- 17 The jurists of the English Admiralty Court and of its era also routinely referred to the law merchant and the general maritime law, though with different degrees of conviction. Blackstone recognised the law merchant, stating “that the affairs of commerce are regulated by a law of their own, called the law merchant or *lex mercatoria*, which all nations agree in, and take notice of; and, in particular it is held to be part of the law of England, which decides the causes of merchants by the general rules that obtain in all commercial countries”.<sup>23</sup> There was recognition of the law merchant and the general maritime law by Sir William Scott (later Lord Stowell),<sup>24</sup> Sir John Nicholl,<sup>25</sup> Lord Campbell,<sup>26</sup> and Dr Lushington.<sup>27</sup>

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**Railroad Co v Johnson** 264 US 375 at 385-386 (1924); **The Thomas Barlum** 293 US 21 at 42 (1934); **Moragne v States Marine Lines Inc** 398 US 375 (1970); and **Romero v International Terminal Operating Co** 358 US 354 at 360-361 (1959).

- <sup>22</sup> **The St Lawrence** 66 US 522 at 527 (1861); **The Lottawanna** at 576; **Butler v Boston & Savannah Steamship Co** 130 US 527 (1889); **Southern Pacific Co v Jensen** 244 US 205 at 216-217 (1917); **Knickerbocker Ice Co v Stewart** 253 US 149 at 159-164 (1920); **Washington v WC Dawson & Co** 264 US 219 at 227-228 (1924); **Crowell v Benson** 285 US 22 at 55 (1931); and **Panama Railroad Co v Johnson** at 386-387. I will not descend into the complexity of this and the related question of the relationship between State legislation and the United States’ law maritime.

- <sup>23</sup> 1 Bla Comm 273; see 137 ER 788.

- <sup>24</sup> In 1801, in **The Gatitudine**, 3 C.Rob 240; 165 ER 450, Sir William Scott (later Lord Stowell) recognised the *lex mercatoria* as the practice of merchants “which all tribunals are bound to respect, whenever that practice does not cross upon any known principle of law, justice or national policy.”

- <sup>25</sup> In 1834, in **The Neptune**, 3 Hagg 129 at 136, 166 ER 354 at 356, Sir John Nicholl referred to the law marine, together with the civil law and the law merchant as governing the court of Admiralty, as part of the law of England. In the same year, in **The Girolamo**, 3 Hagg 169 at 185-186; 166 ER 368 at 374, Sir John Nicholl applied the above extract from Blackstone and described the law merchant as “the true principles of international law” and emphasising the phrase in the extract “and take notice of” as a recognition of the need for municipal adoption (by the Admiralty Court).

- <sup>26</sup> In 1846, in **Brandao v Barnett**, (1846) 3 CB 519; 136 ER 207, Lord Campbell, in a non-maritime context, recognised the lien of bankers as part of the law merchant.

- <sup>27</sup> In 1853, in **The Segredo, otherwise Eliza Cornish**, 1 Sp Ecc & Ad 36 at 45; 164 ER 22 at 27, Dr Lushington adopted the “general maritime law of all nations”, in terms that expressed the view that the general maritime law was of such force as to override an otherwise applicable operative municipal law not of the maritime character. He stated: “Perhaps it is not possible to define it with great accuracy, because the

- 18 In 1865, in **Lloyd v Guibert**,<sup>28</sup> there was a debate as to the general maritime law operating enforceably above the relevant applicable municipal law. Mr Justice Willes speaking for the Court, in discussing the term “general maritime law”, recognised that it could not create binding enforceable rights and stated that “it is easier longed for than found”.
- 19 The second aspect of the character of maritime law to be appreciated along with, and intimately connected with, this international aspect is its coherence as a recognisable body of principles for the governance of human affairs in the maritime field. This can be seen clearly in the **The Lottawanna**. The aspects which give separate coherence in this sense are the maritime, as opposed to terrene, subject matter, and the necessarily transnational practical operation of the underlying conduct and governing principles. Both factors lead to the creation of common and distinct principles.
- 20 The recognition of the separate coherence of maritime law can be seen in many cases and subject areas. By way of example, in the 19<sup>th</sup> century, Story J in **Harden v Gordon**<sup>29</sup> and **Reed v Canfield**<sup>30</sup> contributed to the development of maritime law in a manner unconstrained by apparently applicable rules of contract and the common law. **Harden v Gordon** involved the setting aside of articles of a seaman which purported to restrict contractually his right to maintenance and cure.<sup>31</sup> The juridical

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law of almost every foreign country in some part differs from that of other foreign countries. Still it is an expression in common use and I apprehend it is intended to convey the meaning, that it is the law which generally is practised by maritime nations. I think, therefore, this is the law which I must seek to discover and I must not deviate therefrom by introducing the English municipal law, unless I should happened to be compelled to do by virtue of statutes which of course it is my duty to obey ... I think, also, that I am equally prohibited from giving effect to the law of the island Fayal, unless it accords with the general maritime law; or in other words, unless upon consideration of the peculiar circumstances of this case, I should be of opinion that the *lex loci contractus* is a part of the general maritime law, or ought to be imported ... for special reasons into this cause.” See also Dr Lushington’s judgment in **The Bonaparte** 3 W Rob 297 at 306; 166 ER 973 at 976. This aspect was disapproved in 1860 in **Cammell v Sewell**, (1860) 5 H & N 728; 157 ER 1371, in which Mr Justice Byles, in the Exchequer Chamber, did recognise the “general maritime law of the world”, although denied its capacity otherwise to override an applicable municipal law.

<sup>28</sup> (1865) 6 B & S 100; 122 ER 1135.

<sup>29</sup> 11 F.Cas 480 (1823).

<sup>30</sup> 20 F.Cas 426 (1832).

<sup>31</sup> In dealing with the contractual articles Story J said at 485:

“Every court should watch with jealousy an encroachment upon the rights of seamen because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily over reached. But courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favour and guardianship. They are emphatically the words of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs, dealing with their expectations, wards with their guardians, and *cestuis que trust* with the trustees. ... If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits on the other, the judicial interpretation of the

foundations for Story J's approach were said to be general principles of justice, doctrines of general equity and the customs and usages of the sea. The case, and the principles of maritime law expressed by Story J in it, were approved a century later in the Supreme Court in **Garrett v Moore-McCormack Co.**<sup>32</sup>

- 21 In **Reed v Canfield**, Story J reached beyond the common law, stating that seafarers were “in some sort co-adventurers upon the voyage” and thus were both entitled and subject to “peculiar rights, privileges, duties and liabilities”. He found the shipowner to be liable for ordinary medical expenses of a crewman who suffered frostbite in returning to his ship after shore leave until he reached the completion of his cure. Story J departed from the common law by rejecting the defence of contributory negligence. A century later, the Supreme Court in **Farrell v United States**<sup>33</sup> agreed with this analysis.
- 22 Story J was not alone in his work which recognised the separate sources and development of the general maritime law. For instance, Justice Chase in 1865 in **The Sea Gull**<sup>34</sup> refused to recognise the common law rule that saw the end of a cause of action with the death of the plaintiff. The husband of a stewardess on the steamer **Leary** who had been killed in the collision of **Sea Gull** with **Leary** successfully sued **Sea Gull** as defendant.<sup>35</sup>
- 23 In **The Osceola**<sup>36</sup> Justice Henry Billings Brown declared the remedy of maintenance and cure for seamen by reference to the general maritime law drawn from centuries of international sources and a multitude of contemporary Codes of maritime states.

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transaction is that the bargain is unjust and unreasonable, that advantage has been taken of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable ...”

<sup>32</sup> 317 US 239 at 246-247 (1942). In **Garrett v Moore-McCormack** at 244 the Court said that in many cases it had declared the necessary dominance of admiralty principles in actions to vindicate rights arising from admiralty law. Reference was made to **Jensen, Knickerbocker, Chelentis v Luckenbach SS Co** 247 US 372 (1918), **Carlisle Packing Co v Sandanger** 259 US 255 at 259 (1922); **Messel v Foundation Co** 274 US 427 at 434 (1927); and see also **Schuede v Zenith SS Co** 216 F 566 (1914).

<sup>33</sup> 336 US 511 (1949).

<sup>34</sup> 21 F.Cas 909 (1865); see **Moragne v States Marine Lines Inc** 398 US 375 at 387-88 (1970) for other cases to the same effect.

<sup>35</sup> The Supreme Court, however, in 1886 in **The Harrisburg** 119 US 199, rejected this particular doctrinal difference between the maritime law and the common law. **The Harrisburg** itself was overruled in **Moragne v States Marine Lines Inc** 398 US 375 (1970).

<sup>36</sup> 189 US 158 (1903).

- 24 In 1959, in **Kermarec v Compagnie General Transatlantique**<sup>37</sup> the Supreme Court refused to apply the existing common law rules governing occupiers' liability in respect of a gratuitous licensee in deciding upon a claim in respect of an injury to a visitor to a crew member on board a ship. The Court held that the rights and liabilities of the shipowner were to be measured by the standards of the general maritime law freed from inappropriate common law concepts, having their history in terrene considerations. The Court held that the shipowner owed a duty to exercise reasonable care for all those on board the vessel for purposes not inimical to the owner's legitimate interests.
- 25 Also in 1959, in **Romero v International Terminal Co**,<sup>38</sup> the separate nature and sources of maritime law as well as its separate existence as a Constitutional and legal conception were recognised. Important and far-reaching questions of United States' municipal maritime law lie at the fault lines between the decision of Justice Frankfurter for the majority and the dissent of Justice Brennan.<sup>39</sup>
- 26 In England, prior to the common lawyers taking over maritime law in the organisational reforms of the last quarter of the 19<sup>th</sup> century, the civilian trained jurists of Doctors' Commons had no difficulty in recognising and expressing their own legal identity, founded as it was on a separate body of jurisprudence informed by civilian rules. For instance, different rules existed for the recovery of interest for late payment of money;<sup>40</sup> and contributory negligence had a different role to play in maritime torts.<sup>41</sup>
- 27 One of the most obvious examples of the separateness of maritime law from terrene law is, of course, salvage. Here, the civil law and the common law systems diverged. The common law did not recognise rights of restitution or compensation or reward for

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<sup>37</sup> 358 US 625 at 628-632 (1959).

<sup>38</sup> 358 US 354 (1959). See generally as to **Romero**, Bederman D "Romero's Enduring Legacy" (2008) 38 *JoML&C* 27.

<sup>39</sup> In particular, the reconciliation of **Jensen** and the uniformity of maritime law on the one hand, and **Erie Railroad v Tompkins** on the other: Bederman D, *ibid*.

<sup>40</sup> See the discussion by Lord Brandon of Oakbrook in **President of India v La Pintada Compania** [1985] AC 104 at 115-116 as to the different approaches at common law, in Admiralty and in Equity.

<sup>41</sup> Tetley *International Maritime and Admiralty Law* (Editions Yvon Blais 2002) Ch 6 and see **Reed v Canfield** above.

the voluntary exercise of skill and undertaking of risk to save life or property.<sup>42</sup> The law maritime with its civilian roots recognised such a claim.<sup>43</sup>

28 A recent example of the application of the general maritime law reflecting both its internal coherence and its international character is **The Titanic**<sup>44</sup> in which the Fourth Circuit Court of Appeals in 1999 applied the general maritime law as the effective governing law of salvage rights over the wreck of **Titanic** on the seabed in international waters.

29 Another recent example of the development of maritime law principles is in the decision in Australia of the Full Court of the Federal Court in **The Cape Moreton**.<sup>45</sup> In that case, a ship was arrested at Port Kembla, 75 km south of Sydney, as she was waiting to load coal. The validity of the arrest was challenged on the basis that the relevant person (the putative defendant to the cargo claim) had sold the ship five days earlier. There being no maritime lien for such claims in Australia, the validity of the arrest depended on the relevant person being the owner of the ship when the action was commenced. The ship was under the Liberian flag. The sale (in a standard way pursuant to the Norwegian Sale Form) had taken place when the ship was in Australian territorial waters, while at anchor at the Port of Brisbane. The question arose: which law applied to govern the legal consequences of the sale? Was it the *lex fori* (the law of Australia), the *lex situs* (the ship being a chattel, this would be Brisbane and so the law of Australia) or some other law? The Court said that it was a question concerning maritime law and that to choose the *lex situs* as being the place where the chattel happened to be at the time of the sale would be capricious. This was a working commercial vessel. The coherent maritime answer was to give a role or place to the law of the flag as the law to govern the proprietary effect of the sale transaction involving the ship (as distinct from the proper law of any antecedent contract). Once one understood, by reference to the law of the flag, the proprietary consequences of the acts in question, one turned to the *lex fori* to characterise such consequences by reference to the domestic statute governing arrest, here, to answer the question as to who was “the owner” at the relevant date for the local statute. The

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<sup>42</sup> **Falcke v The Scottish Imperial Insurance Co** (1886) 34 Ch D 234 at 248 and **Mason v The Blaireau** 2-7 US 479 at 485-486; 2 Cranch 240 at 266 (1804).

<sup>43</sup> For instance, see **The Sabine** 101 US 384 (1874) and **The Calypso** (1828) 2 Hagg 209; 166 ER 221.

<sup>44</sup> 171 F3d 943 at 960-964 (1999).

<sup>45</sup> (2005) 143 FCR 43. For a full discussion of **The Cape Moreton** and issues surrounded with it, see Myburgh P “Arresting the Right Ship: Procedural Theory, The *In Personam* Link and Conflict of Laws” in Davies M *Jurisdiction and Forum Selection in International Maritime Law* (Kluwer 2005).

potentially important question was the identity of the governing shipping registration legislation (whether by reference to *lex fori*, *lex situs* or law of the flag) and whether that legislation involved registration of title, or title by registration. This was important because while at the time of the commencement of the action *in rem* the sale had been completed, the entry in the Liberian register identifying the owner had not been changed.

- 30 It is important to recognise that in both the United States and Australia there is a sufficient coherence and separateness in admiralty and maritime law for jurisdiction over the resolution of disputes that concern it to be a separate Constitutional conception for assignment of cases to certain courts and that the conception was a reference to the general maritime law.<sup>46</sup> The framers of Australia's national Constitution, a little over a century after the formation of the United States, copied the relevant Constitutional provision concerning Admiralty and maritime jurisdiction (s 76 (iii)) *verbatim* from Art III Sec 2. It is also important to recognise that in both nations, constituted by relevantly not dissimilar federal compacts, the authority for the resolution of maritime controversies was a matter of national concern allocated to the national judiciary, exclusively in the United States in admiralty jurisdiction,<sup>47</sup> concurrently in Australia – at the choice of the national legislature, which has the power to make admiralty and maritime jurisdiction exclusive to federal courts.
- 31 All the cases to which I have referred, to a degree, recognise the international sources of maritime law and its separate and individual character. One can recognise, however, greater confidence exhibited by the American courts in giving expression to this. The explanation for this is the express Constitutional recognition and adoption of the general maritime law by Art III Sec 2 and the robust interpretation of it. Without such a clear defining point for commencement of the analysis, courts must continually reassert the sources and living roots of municipal maritime law in the general maritime law, a process dependent upon understanding that these exist.

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<sup>46</sup> At least in the United States: see footnote 16 above. In Australia there has been a reluctance to recognise the reference to "Admiralty and maritime jurisdiction" in the Constitution as implicitly bringing Admiralty and maritime law within the authority of the national Parliament: see Allsop "Australian Admiralty and Maritime Law – Sources and Future Directions" (2006) *University of Queensland Law Journal* 179.

<sup>47</sup> This exclusivity was, of course, in admiralty jurisdiction only, the saving to suitors clause of the *Judiciary Act 1789* maintaining a role for State courts and common law remedies: **Romero** at 373-375.

32 It is necessary, however, to confront some of the more blunt positivist expositions of municipal monopoly in the discussion of maritime law. In **The Tojo Maru**,<sup>48</sup> that great English commercial and shipping lawyer, Lord Diplock, said the following:

“Outside the special field of ‘prize’ in times of hostilities there is no ‘maritime law of the world,’ as distinct from the internal municipal laws of its constituent sovereign states, that is capable of giving rise to rights or liabilities enforceable in English courts. Because of the nature of its subject matter and its historic derivation from sources common to many maritime nations, the internal municipal laws of different states relating to what happens on the seas may show greater similarity to one another than is to be found in laws relating to what happens upon land. But the fact that the consequences of applying to the same facts the internal municipal laws of different sovereign states would be to give rise to similar legal rights and liabilities should not mislead us into supposing that those rights or liabilities are derived from a ‘maritime law of the world’ and not from the internal municipal law of a particular sovereign state.”

33 The question before the House of Lords was the nature of the obligations arising out of the performance of a salvage agreement. In particular, the question arose: were salvors liable in damages for negligence? The particular concern of Lord Diplock was to reject what he saw as the heresy in Lord Denning’s judgment in the Court of Appeal that the applicable law was the “maritime law of the world”. For the same reasons as expressed by Bradley J in **The Lottawanna** that way of expressing the matter may be taken to overreach the point. This can be seen from the decision cited by both Lord Denning and Lord Diplock to support their respective, and opposite, views: **The Gaetano and Maria**<sup>49</sup> in 1882, in which Lord Justice Brett (the future Lord Esher MR, a noted shipping lawyer of his day) said that English maritime law as administered in English courts, was the general or common maritime law, as adopted.<sup>50</sup>

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<sup>48</sup> [1972] AC 242 at 290-91.

<sup>49</sup> (1882) 7 PD 137.

<sup>50</sup> At 143 Brett LJ said:

“Now the first question raised on the argument before us was what is the law which is administered in an English Court of Admiralty, whether it is English law, or whether it is that which is called the common maritime law, which is not the law of England alone, but the law of all maritime countries. About that question I have not the smallest doubt. Every Court of Admiralty is a court of the country in which it sits and to which it belongs. The law which is administered in the Admiralty Court of England is the English maritime law. It is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty either by Act of Parliament or by reiterated decisions and traditions and principles has adopted as the English maritime law; and about that I cannot conceive that there is any doubt. It seems to me that this is what every judge in the Admiralty Court of England has promulgated (Lord Stowell and those before him, and Dr Lushington after him), and I do not understand that the present learned judge of the Admiralty Court differs in the least from them. He says that this case must be determined by the general maritime law as administered in England – that is in other words by the English maritime law.”

- 34 **The Tojo Maru**, in this respect, was adopted and applied by the High Court of Australia in **Blunden v The Commonwealth**,<sup>51</sup> in which case the issue was the applicable law concerning death and personal injury claims arising out of a collision of two Australian naval vessels in international waters. It was submitted that Australian law did not apply, but the maritime law of the world did. This was, unsurprisingly perhaps, rejected. Interestingly, however, a body of footnotes to the adoption of **The Tojo Maru** included a reference to **Moragne v States Marine Lines Inc**<sup>52</sup> where at the relevantly cited pages from the opinion of the Supreme Court delivered by Justice Harlan, there was an express recognition of the separateness of maritime law from the common law in source and principle.<sup>53</sup>
- 35 It is to be noted, however, that Lord Diplock, on one view, was only rejecting the existence of a general maritime law that was capable (without more) of giving rise to enforceable rights in English courts. This is to say no more than did Bradley J in **The Lottawanna** and Holmes J in **The Western Maid**.<sup>54</sup> It can be argued that Lord Diplock did not reject the existence of a general maritime law from which municipal maritime law is adopted, including by judicial decision. It was the derivation of the enforceability of municipal maritime law (and no other law) in municipal courts with which his Lordship was principally concerned, not the source and derivation of principle.
- 36 Echoes (indeed powerful ones) of the debate as to the place to accord the influence of international or transnational doctrine can be found in other fields. Without wishing to presume to take part in a domestic United States debate, the highly charged debate as

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<sup>51</sup> (2003) 218 CLR 330 at 337-38 [13].

<sup>52</sup> 398 US 375 (1970).

<sup>53</sup> 398 US at 386-387, where Harlan J said:

“Maritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law; and, from its focus on a particular subject matter, it developed general principles unknown to the common law. These principles included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages. ... These factors suggest that there might have been no anomaly in adoption of a different rule to govern maritime relations, and that the common-law rule, criticized as unjust in its own domain, might wisely have been rejected as incompatible with the law of the sea.”

[footnotes omitted]

The opinion of Harlan J was a powerful rejection and overruling of **The Harrisburg** which had exhibited an approach of assimilation of the common law and admiralty on this question.

<sup>54</sup> Though one must accept that in the light of what he said in **Jensen**, Holmes J can be seen to be going somewhat further than Bradley J in **The Lottawanna**.



to the role, if any, of “foreign” decisions in American Constitutional jurisprudence exceeds by far any of the municipal abruptness of Lord Diplock.<sup>55</sup>

37 It is essential, however, to recognise that maritime law is a tolerably coherent body of common conceptions, principles and rules (not merely conclusions as to municipal laws drawn from the study of comparative law) from which domestic legitimacy (with any necessary adjustment) is given by their adoption as municipal maritime law. This hardly comes as a surprising proposition to anyone passingly familiar with the degree of uniformity of principle that maritime law has always revealed from ancient, through medieval to modern times.<sup>56</sup>

38 Before turning to the importance of recognising and adhering to this international character of maritime law, I should epitomise my remarks to this point on the nature of its international character by referring to two illuminating expressions of the matter, from both sides of the Atlantic. They are drawn from the words of judges living and working in an era in which international co-operation, shared principle and the recognition of the real authority of the law of nations were sharply in focus. The first is by Lord Justice Scott<sup>57</sup> in 1946 in the English Court of Appeal in **The Tolten**,<sup>58</sup> the second is by Justice Jackson in 1953 in the Supreme Court in **Lauritzen v Larsen**.<sup>59</sup>

39 In 1946, Lord Justice Scott was dealing with the question of whether “damage done by a ship” extended to damage caused by an allision of a ship with a wharf in a foreign country. It was submitted that the principle in **British South Africa Co v**

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<sup>55</sup> See, for example, **Thompson v Oklahoma** 487 US 815 (1988); **Printz v United States** 521 US 895 (1997); **Atkins v Virginia** 536 US 304 (2002); **Lawrence v Texas** 539 US 558 (2003); and **Roper v Simmons** 543 US 551 (2005); and see generally the article by a Scottish judge, The Rt Hon Lord Reed “Foreign Precedents and Judicial Reasoning: The American Debate and British Practice” (2008) 124 *LQR* 253.

<sup>56</sup> European maritime law can be traced from its Greek roots, through Roman law and the codes of Justinian and later Emperors, through the codes of city states and feudal territories of, amongst others, Venice, Ravenna, Pisa, Genoa, Amalfi, Trani, Marseille and Barcelona, through the laws and codes of Oléron, the Judgments of Damme, the laws of Wisby and the laws of the Hanseatic League are well known. They reveal elements and principles of commercial law and shipping law of universal application. They formed the basis for modern European Maritime Codes. See generally Schoenbaum *Admiralty and Maritime Law* (West) Ch 1; Gilmore and Black *The Law of Admiralty* (Foundation Press 1975 2<sup>nd</sup> Ed) Ch 1; Tetley *International Maritime and Admiralty Law* Ch 1; *Benedict on Admiralty* 7<sup>th</sup> Ed Vol 1 Chs I-VIII; Wiswall *The Development of Admiralty Jurisdiction and Practice Since 1800* (Cambridge 1970) and the references at footnotes 1 and 2 above.

<sup>57</sup> The Rt Hon Sir Leslie Scott was the Président d’Honneur of the CMI 1947, the delegate of His Majesty’s Government at the International Conferences on Maritime Law in 1909 (Collision), 1910 (Salvage), 1922 (Carriage of Goods) and 1926 (Liens).

<sup>58</sup> [1946] P 135 at 142.

<sup>59</sup> 345 US 571 at 581-582 (1953).

**Companhia de Moçambique**<sup>60</sup> applied, with the consequence that only the relevant foreign court had authority to deal with questions of ownership of foreign land (the plaintiff's ownership of the wharf having been put in issue) and of the tort of damage to foreign land. In the discernment and declaration of English admiralty and maritime law, Scott LJ recognised the need to resort to, and not depart unduly from, what he described as "the general law of the sea". He described the importance of uniformity of development of maritime law in terms which recognised, explicitly, the existence of the general maritime law and its place in influencing the development of contemporary municipal maritime law. To Scott LJ, the general maritime law was a living force in the development of contemporary municipal law.<sup>61</sup>

40 In **Lauritzen v Larsen**, Justice Jackson, not long returned from his experiences prosecuting and, consequent upon the discharge of his forensic duty, seeing convicted, imprisoned and hanged Nazi war criminals under the authority and legitimacy of the law of nations, and speaking for a Court which included one of the great judicial scholars of the 20<sup>th</sup> century, Justice Frankfurter, summed up both the nature and importance of the general maritime law. He referred to a "non-national or international maritime law of impressive maturity and universality".<sup>62</sup> The terms in which he described the nature of this law are instructive. It had, he said, "the force of law, not from extra-territorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilised communities of rules designed to foster amicable and workable commercial relations." Maritime law derived from the common acceptance of principles at a level of generality sufficient to enable its local adoption and adaptation. As such, it was a body of accepted principles capable of meaningful description as law. Justice Jackson then went on to discuss the importance of the international character of maritime law

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<sup>60</sup> [1893] AC 602.

<sup>61</sup> [1946] P at 142, Scott LJ said:

"... The question is, however, one of far-reaching importance and calls for careful consideration of British admiralty law, and if there be doubt about that, then of the general law of the sea amongst Western nations, out of which our maritime law largely grew, and from which it is to the interest of maritime commerce that it should not unnecessarily diverge. Judicial action cannot of course reverse a definite departure from the general law of the sea once definitely taken by our own maritime law and expressed in the judgment of a court which binds: but where there is doubt about some rule or principle of our national law, and one solution of the doubt would conform to the general law and the other would produce divergence, the traditional view of our admiralty judges is in favour of the solution which will promote uniformity. For this there are two good reasons, first, because that course will probably be the true reading of our legal development, and, secondly, because uniformity of sea law through the world is so important for the welfare of maritime commerce that to aim at it is a right judicial principle – as many of our admiralty judges have said in the past."

<sup>62</sup> For this proposition the citations included **De Lovio v Boit**, **The Scotia** and the scholarly articles by Dickinson "The Law of Nations as Part of the National Law of the United States" (1953) *U Pa L Rev* 27 and 792.

in human affairs and of adhering, as far as possible, to these common principles to further the aims of stability, comity, forbearance, reciprocity and long-range national interest. Underlying these aims was the desire to avoid parochial national jealousies and competing laws governing international conduct, in particular commercial conduct, in order to advance the mutual interests of all countries.

41 To this practising judge, these expressions of principle are both inspiring and enduring. They are a clear expression of the binding cohesion of common principle and of the value of shared human experience.

42 As more than a shadow of the similar forms of municipal laws perceived through the prism of the study of conflict of laws and comparative law, the general maritime law is, perhaps, an early example of what people today call “soft law”, being legal norms not strictly binding in terms of sovereign authority, but generally adhered to by those who subscribe to them because of contract, moral suasion or fear of other adverse consequences.<sup>63</sup> Numerous forms of drafted principles now exist divorced from national legislative origins, but taking their place among the available accepted bodies of principles to assist in the regulation of human behaviour.<sup>64</sup> In large part, these form, in many fields of commercial law, the building blocks of common principle and a modern *lex mercatoria*.<sup>65</sup>

43 The general maritime law is, however, more than that. It is the living source of principle derived from ancient practice, custom, codes and organised doctrine which affects, constrains and inspires the development of contemporary legal doctrine.

44 It can be readily accepted that the body of principles called the general maritime law described as such, and as separately existing, by lawyers and judges such as Blackstone, Mansfield, Stowell, Story, Marshall, Lushington, Bradley, Scott, Jackson, Frankfurter and Harlan does not, without more, bind a sovereign nation, a national court or a national community. But, to say as much, does not deny its existence as a

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<sup>63</sup> Goode R *Commercial Law* (2<sup>nd</sup> Ed Penguin) pp 21-22.

<sup>64</sup> See generally Goode, Kronke, McKendrick and Wool *Transnational Commercial Law* (Oxford 2004).

<sup>65</sup> See generally Tetley “The General Maritime Law – The Lex Maritima” (1994) 20 *Syracuse J Int’l L & Com* 105 at 133-145 and the literature referred to therein; Galgano “The New Lex Mercatoria” (1995) 2 *Annual Survey of International and Comparative Law* 99; Goode, Kronke, McKenrick and Wool *op cit*; Dalhuisen J *Transnational and Comparative Commercial, Financial and Trade Law* (Hart Publishing 2007); Goode R “Usage and its Reception in Transnational Commercial Law” (1997) 46 *Int’l & Comparative Law Quarterly* 1; Wiggers W *International Commercial Law* (Kluwer 2007); Marquis L *International Uniform Commercial Law* (Ashgate 2005).

body of law and principles broadly accepted and capable of adaption to national circumstances, in particular by judges in their role in the declaration and development of municipal maritime law.

45 It is also necessary to recognise that, as law, the general maritime law is not all judge or scholar made in the sense of common law or *la doctrine*. It exists in international treaty and convention, international regulation, codes, both historical and contemporary, and judicial and scholarly exposition.<sup>66</sup>

46 This being the nature of the international character of maritime law, what is the importance of it? Justice Jackson expressed it in **Lauritzen v Larsen**. Lord Justice Scott expressed it in **The Tolten**. A Scottish advocate, Mr James Reddie expressed it in 1844 in his treatise “Researches, Historical and Critical in Maritime International Law”.<sup>67</sup> He said that there is the need for foreign merchants and sea-faring people to be admitted to common protection of their rights by a uniform system. In particular, questions of ownership of the ship, the rights concerned with contracts of affreightment, sale of goods, payment and exchange, insurance and co-partnership should be dealt with in a way common to accepted commercial usages. This is, perhaps, to say no more than did Charlemagne when in the ninth century he wrote to Offa, King of Mercia in reply to the latter’s letter which concerned English merchants travelling to France. Charlemagne offered protection and justice to these English merchants. He expected reciprocity. An important aspect of this was, of course, physical protection and freedom from tolls. However, involved in the desired reciprocity was the prompt and just settlement of commercial disputes.<sup>68</sup>

47 Also, the co-existence of the common general principle and the local particular rule was well understood in the Middle Ages. In the Freiburg Charter of 1120, it was stated that disputes would be decided “according to the customary and legitimate law of all merchants and especially by the law of the merchants of Cologne”.<sup>69</sup>

48 Let me now move to illustrating the importance of recognising the international character of maritime law by reference to a discussion of some aspects of enforcement

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<sup>66</sup> Tetley W “The General Maritime Law – The *Lex Maritima*” (1994) 20 *Syracuse J Int’l L & Com* 105 and Tetley W “International Maritime Law” (1999 – 2000) 24 *Tul Mar LJ* 775.

<sup>67</sup> Edinburgh 1844 (Reprinted – Elibron Classics 2004) at pp 17-20.

<sup>68</sup> See Mitchell W, *An Essay on the Early English History of the Law Merchant*, Cambridge 1904 p 23.

<sup>69</sup> Mitchell *op cit* at p 28.

of maritime claims, the carriage of goods by sea and judicial technique in the resolution of maritime claims and in the declaration of maritime law.

- 49 As Professor Tetley makes clear<sup>70</sup> the varied arrangements of different legal systems through the maritime lien, the action *in rem*, the action *in personam* and maritime attachment have the effect of creating a coherent and harmonised (though not uniform) system of enforcement of maritime claims. Personal claims are transformed by the exercise of maritime jurisdiction by maritime courts into secured claims over defined and quarantined property, taking their ranking by reference to well-known harmonised rules, regulated in part by international convention<sup>71</sup> and in part by the general law.
- 50 The action *in rem* has taken somewhat different paths in the United States on the one hand, and England, together with the countries that have adhered to its model,<sup>72</sup> on the other. The differences stem from the much wider denotation of the maritime lien in the United States. The underlying conception of the maritime lien, or connotation of the phrase maritime lien, is the same in both systems.<sup>73</sup> The acts or events that are taken to give rise to a maritime lien (its denotation) are extremely limited under what I will call (inaccurately perhaps) Anglo-Commonwealth law: damage done by a ship, salvage, seamen's wages, master's wages and disbursements and bottomry.<sup>74</sup> In the United States, on the other hand, most maritime claims give rise to some kind of maritime lien.<sup>75</sup>
- 51 The immediate consequence of this difference can be recognised if one views the action *in rem* as vindicating, through Admiralty procedure, the maritime lien. The lien attaches to the hull by the act or events which give rise to it; the lien is not defeated even by the bona fide sale of the ship without notice of the lien; the lien takes preference over a mortgage; but the lien is only enforceable by Admiralty action *in*

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<sup>70</sup> Tetley *International Maritime and Admiralty Law* Ch 10.

<sup>71</sup> International Convention for the Unifications of Certain Rules Relating to Maritime Liens and Mortgages 1926 (the 1926 Lien Convention); International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1967 (the 1967 Lien Convention); International Convention on Maritime Liens and Mortgages 1993 (the 1993 Lien Convention).

<sup>72</sup> Canada, Australia, New Zealand, Singapore, Malaysia, Hong Kong, Nigeria, Kenya, Ghana, South Africa (to a degree) India and others.

<sup>73</sup> Tetley *Maritime Liens and Claims* (Editions Yvon Blais 1998) Ch 1; Mayers "Maritime liens" (1928) 6 *Can Bar Rev* 516; Thomas *Maritime Liens* (Sweet and Maxwell).

<sup>74</sup> Tetley *Maritime Liens and Claims* Part III Chs 7-11.

<sup>75</sup> Tetley *Maritime Liens and Claims* Parts IV, V and VI Chs 12-20.

*rem*. In 1851, in the Privy Council (the then highest Admiralty appellate court in England) in **The Bold Buccleugh**,<sup>76</sup> Sir John Jervis said that the availability of the action *in rem* was co-ordinate with the existence of a maritime lien.

52 To similar effect in 1867, in **The Rock Island Bridge**,<sup>77</sup> Justice Field said:

“The lien and the proceeding *in rem* are, therefore, correlative – where one exists the other can be taken and not otherwise.”

53 This view of the co-ordinate relationship of the maritime lien and the action *in rem* is at least one foundation for the so-called personification theory. The ship is responsible and is the defendant because the action *in rem* vindicates a species of property or security of the claimant in the ship without necessary regard to the personal liability of the current owner. This conformance between the existence of the inchoate security right by way of property and the action against the property to perfect it means that no human or corporate defendant is necessary. The action does not depend on personal liability of the current owner, but on the asserted existence of the maritime lien. With a wide denotation of the maritime lien, a wide effect is given to enforcing maritime personal claims through the action *in rem*. With a narrow denotation of the maritime lien, there would be an inadequate system of enforcing personal maritime claims by action *in rem*, unless the scope and basis of that action were more widely framed.

54 In the United States, of course, the action *in rem* is supplemented by maritime attachment, both under the Federal Rules and under the inherent authority of

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<sup>76</sup> (1851) 7 Moo PC 267 at 284-285; 13 ER 884 at 890-891:

“A maritime lien does not include or require possession. The word is used in Maritime Law not in the strict legal sense in which we understand it in Courts of Common Law, in which there could be no lien where there was no possession, actual or constructive; ... having its origin in this rule of the Civil Law, a maritime lien is well defined by Lord Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr Justice Story ... explains that process to be a proceeding *in rem*, and adds, that wherever a lien or claim is given upon the thing, then the admiralty enforces it by a proceeding *in rem*, and indeed is the only court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process. This claim or privilege travels with the thing, into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attaches.”

<sup>77</sup> 73 US 213 at 215 (1867).

the maritime law derived from the general maritime law.<sup>78</sup> This mechanism, of course, provides attachment of any property of an absent or concealed debtor in support of a maritime claim. A link, however, must be made between the person said to be liable to the claimant and the property — that the person owns the property. Attachment can be seen to provide an encouragement to the defendant to enter an appearance to protect his, her or its property and a basis for jurisdiction.

55 Though it can be debated,<sup>79</sup> the action for attachment can be taken to have ceased to be part of the common law or maritime law of England (and so the Anglo-Commonwealth law) from the 19<sup>th</sup> century.

56 Meanwhile, in England in the 19<sup>th</sup> century, two processes were occurring. First, the legislature, sensibly, was clarifying and widening the jurisdiction of the Admiralty Courts in the Admiralty Acts of 1840 and 1861. This was the repairing of some of the jurisdictional wreckage of centuries of attacks by the common law judges. These Acts widened the bases for the action *in rem* against the ship by adding personal maritime claims that could henceforth found the action *in rem*, for instance, a claim in respect of necessities.

57 The issue arose whether each of these new claims gave rise to a maritime lien, because of the availability of the action *in rem*. Adherence to the approach in **The Bold Buccleugh** would have given an affirmative answer to that question.<sup>80</sup> After some suggestions to that effect, it was authoritatively decided that the new claims did not give rise to maritime liens.<sup>81</sup> As a consequence of this, in England, the action *in rem* was both the means to vindicate a claim asserting the (narrowly based) maritime lien and to vindicate a personal claim against the owner of the ship, not giving rise to a maritime lien.

58 This latter basis for the action *in rem* became important in England and Commonwealth (or then Empire) countries, because it focused the purpose of the

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<sup>78</sup> Federal Rules of Civil Procedure, Supplemental Rules For Admiralty or Maritime Claims and Asset Forfeiture Actions Rule B; and **Schiffahrtsgesellschaft Leonhardt v A Botacchi SA De Navigacion** 773 F 2d 1528 (1985).

<sup>79</sup> Tetley *International Maritime and Admiralty Law* pp 408-409; Wiswall *op cit* pp 169-171.

<sup>80</sup> Attendance to the reasoning of Justice Ware in **The Rebecca** 20 F. Cas 373 (1831) would also have had that result.

<sup>81</sup> **The Two Ellens** (1871) LR 2 Ad & El 345 and on appeal (1872) LR 4 PC 161; **The Rio Tinto** (1884) 9 App Cas 354; **The Heinrich Bjorn** (1886) 11 App Cas 270. See the discussion in **The Cape Moreton** 157 FCR at 70-73 [107]-[116].

action *in rem* away from the perfection of the maritime lien and towards the enforcement of an *in personam* claim against a personal defendant. In this respect, the action could thus be seen to have a rationale beyond the perfection of an existing security right, and to fulfil a number of other functions: founding jurisdiction against the ship, securing the presence of the defendant and securing value for the claim should it be successful. Some similarity with attachment is immediately discernible.

- 59 In England, the cutting of the umbilical connection between the maritime lien and the action *in rem* led to the development of the so-called procedural theory of the action *in rem*.<sup>82</sup> In a series of cases (not without their controversy) in the latter part of the 19<sup>th</sup> and early 20<sup>th</sup> centuries<sup>83</sup>, the character of the action *in rem* was worked out, as one both against the ship and, if an appearance were filed, also (but not limited to being) against the owner, personally. The action remained available to enforce the maritime lien. In light of the refusal of the English courts to extend the scope of the maritime lien and of the lack of a procedure for maritime attachment, this mixture of characters and purposes of the action *in rem* in Anglo-Commonwealth law gave rise to a doctrinally confused, but practically effective, system of maritime security. It operated as follows.
- 60 First, as had always been the case, presence of the ship within the jurisdiction was necessary. Service outside the waters of the jurisdiction was not permitted. Presence (but only presence of the ship) gave jurisdiction (but only against the ship).
- 61 Secondly, unless the claim was based on a maritime lien, only the ship owned by the person said to be liable for the personal claim (the relevant person) could be the subject of the action. This was so because it was the person said to be liable on the underlying claim who was to be persuaded to come into the jurisdiction and appear in the action to defend his, her or its property that had been proceeded against and in all likelihood arrested. Thus, the clear basis of the action *in rem* (for non-maritime lien cases) was the relationship of ownership, between the ship and the relevant person.
- 62 Thirdly, if the defendant did choose to come to defend his, her or its ship, he, she or it would be required to file an appearance submitting to the jurisdiction of the court. This was a personal submission and made the defendant potentially liable, personally,

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<sup>82</sup> Derrington and Turner *The Law and Practice of Admiralty Matters* (Oxford 2007) pp 18-30 and see **The Cape Moreton** 143 FCR at 70-73 [107]-[117].

<sup>83</sup> **The Dictator** [1892] P 304, **The Gemma** [1899] P 285 and **The Duplex** [1912] P 8.



on the action *in personam*, for the full amount of the claim. If such a submission were made, the action continued against the ship up to its value and against the defendant, personally, for the full value of the claim.

- 63 Fourthly, if the defendant did not appear, the action proceeded against the ship, but only to the value of the ship, and upon successful judgment *in rem* there was no merger with any claim *in personam*. No *in personam* claim had been begun (let alone served) on this hypothesis. Thus, the claimant could start the action *in personam* afresh, serving the person in any relevant jurisdiction while bringing to account any sums gained from the action *in rem*.
- 64 Fifthly, upon the success of the claim against the ship (whether or not the defendant appeared) the claimant would not necessarily obtain the full value of the ship for his, her or its claim. The court would advertise the sale and other maritime claimants who also had a right to claim *in rem* (whether based on a lien or not) could come in and prove their claims against the ship represented by the fund. In these circumstances, the rules of priorities as between maritime claimants which had been developed would see the ranking of different claimants. The successful original plaintiff might, conceivably, get nothing out of the fund, because of the claims of maritime lienholders or mortgagees; and the original plaintiff may be left with his judgment against the defendant personally if he appeared or with nothing (beyond reimbursement for the costs of the arrest) if the relevant person did not appear.
- 65 Sixthly, other persons besides the defendant owner could come in, if interested, to defend the claim against the ship: for example, a charterer or mortgagee, without exposing themselves to personal liability, other than as to costs.
- 66 Seventhly, if the action were permitted to proceed by reason of ownership of the ship by the relevant person at the time of commencement of the action a change in ownership after that time, but before the cause came on for hearing or judgment, would not defeat the claimant's entitlement to continue the action *in rem* against the ship. This was a limited form of the action running against the ship despite a change of ownership (akin to a lien), and explains why the non-maritime lien action *in rem* is sometimes called the statutory lien claim.
- 67 The above attributes of the action *in rem* in Anglo-Commonwealth countries and the relationship of the action *in rem* with the action *in personam* are not fully explained

by the procedural theory.<sup>84</sup> Nevertheless, the above attributes, together with the maritime lien, gave rise to a distinct maritime system of enforcement and security. It is a system which overcomes the narrowness of the Anglo-Commonwealth maritime lien and the general lack of attachment in those countries. It is a system with some symmetry and efficacy. It makes maritime assets of the responsible individual available for maritime claims, preserving the ability of the maritime claimant to pursue the responsible individual by action *in personam*. In these Anglo-Commonwealth jurisdictions, the action *in rem* is the instrument which isolates and makes available maritime property for the realisation of both secured and unsecured maritime claims in the priority provided by the national law.<sup>85</sup> To a degree, the unsecured non-maritime lien claimants whose claims entitle to them to commence an action *in rem* are converted into a species of secured creditors by virtue of the action. This is so because the asset is specifically made available for maritime claims and because their hitherto unsecured claims against the owner can be asserted against the value of the ship if it is sold, albeit it in competition with other maritime claimants.<sup>86</sup>

68 Central to the successful and convenient operation of this coherent integrated Anglo-Commonwealth enforcement regime was the separateness of the actions *in rem* and *in personam*. It was the ability to proceed against the ship irrespective of the location of the relevant person that gave maritime claimants access to the value of the ship, and after the 1952 Arrest Convention, sister ships. Once the ship was arrested and the fund created, it was potentially available to all maritime creditors. As long as the claimant taking the trouble and cost to instigate the action was protected against the costs of the arrest (as he, she or it was through most of his costs being channelled into Marshal's expenses), the maritime claimant had a valuable quasi-proprietary remedy against the relevant person's likely valuable asset. As long as the actions *in rem* and *in personam* were separate, the institution of the procedure against the ship did not in any way prejudice the potential action *in personam* against the relevant person if that relevant person could be found in his, her or its own jurisdiction.

69 This structure was the foundation for Admiralty and maritime jurisdiction throughout the 20<sup>th</sup> century in Anglo-Commonwealth countries. It provided the foundation for the

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<sup>84</sup> For a discussion of these aspects of the Anglo-Commonwealth Law see **The Cape Moreton; Comandate Marine Corp v Pan Australian Shipping Pty Ltd** [2006] FCAFC 192; 157 FCR 45; and Derrington and Turner *op cit*.

<sup>85</sup> In respect of which priority there are three international conventions. See footnote 71 above.

<sup>86</sup> I leave to one side the complexity of the interrelationship between this regime and insolvency laws.

negotiation by them of three maritime lien conventions<sup>87</sup> and two arrest conventions.<sup>88</sup> All these conventions were, in some degree, influenced by the Anglo-Commonwealth maritime enforcement system which I have described.<sup>89</sup>

70 Not only was this Anglo-Commonwealth enforcement and security regime the foundation for negotiation of five international conventions it provided the framework of maritime enforcement statutes around the world.<sup>90</sup> Some countries, such as Singapore, Hong Kong and Malaysia followed the structure of the English Admiralty legislation almost verbatim. Other countries such as Australia, New Zealand, Canada and South Africa used their own statutory terms, but nevertheless used the well known architecture of the separateness of the actions *in rem* and *in personam* as the basis for their written admiralty law and their admiralty practice. The international coherence and harmony brought about by the adoption by the Anglo-Commonwealth countries of this structure is obvious.

71 Of course, it is a different system to that employed in the United States and to that of the maritime Code countries in Europe, China and elsewhere. The former based on a proprietary maritime lien and attachment; the latter does not know of an action against a ship, being based on maritime attachment and the maritime injunction.<sup>91</sup> Nevertheless, the Anglo-Commonwealth mechanism was one which sought to achieve the same result by a mixture of separate actions *in rem* and *in personam* in a maritime enforcement mechanism, well known since the 19<sup>th</sup> century.

72 It was in this context that the House of Lords in 1998 in **The Indian Grace**<sup>92</sup> denounced the very existence of the action *in rem* as an historical relic based on a fiction which had outlived its usefulness. Lord Steyn, with the unanimous concurrence of Lord Brown-Wilkinson, Lord Hoffmann, Lord Cooke of Thorndon

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<sup>87</sup> See footnote 64 above.

<sup>88</sup> International Convention Relating to the Arrest of Sea-Going Ships 1952 (the 1952 Arrest Convention); International Convention on Arrest of Ships 1999 (the 1999 Arrest Convention).

<sup>89</sup> In the maritime lien conventions, specific provision was made for the statutory lien, see the 1926 Lien Convention, Art 3, the 1967 Lien Convention, Art 6 and the 1993 Lien Convention, Art 6. In the 1952 Arrest Convention Art 7 (1) reflected a capitulation to the English position on *in rem* claims and their ability to found jurisdiction; compare the 1999 Arrest Convention, Art 7. A central aspect of the negotiation of the 1952 Arrest Convention was the attributes of the Anglo-Commonwealth action *in rem*.

<sup>90</sup> See generally Derrington and Turner *op cit* and Cremean *Admiralty Jurisdiction: Law and Practice in Australia, New Zealand, Singapore and Hong Kong* (3<sup>rd</sup> Ed, Federation Press 2008).

<sup>91</sup> See, for example The Maritime Procedure Law of the PRC Chs 1-11.

<sup>92</sup> [1998] AC 878.

and Lord Hope of Craighead, said that it was time to unmask and reveal what the action *in rem* was always in substance, an action *in personam* against the relevant person. The judgment denied the very existence of the claim against the ship. The relevant importance of this sweeping change was to equate the action against the ship with the action against the relevant person and to deny the claimant in the action *in rem* any right to proceed against the relevant person personally upon the conclusion of the action *in rem*. This was because the action *in rem* was to be seen as the action *in personam*. Therefore, the *in personam* claim merged in the *in rem* judgment which was, in truth, an *in personam* judgment. The reasons of Lord Steyn put to one side, and did not deal with, the maritime lien and the role of the action *in rem* in its perfection.

- 73 **The Indian Grace** did not win critical acclaim amongst London practitioners.<sup>93</sup> The Singapore Court of Appeal distinguished the critical discussion by Lord Steyn as “theoretical expositions on the nature of the *in rem* action”.<sup>94</sup> In New Zealand a single judge expressed disagreement with the case.<sup>95</sup> In Australia, the Full Court of the Federal Court in **Comandate Marine Corp v Pan Australia Shipping Pty Ltd**<sup>96</sup> analysed the reasoning of Lord Steyn and rejected it as wrong.
- 74 I wrote the judgment in **Comandate**. I will not repeat the reasons why I came to the respectful conclusion that each limb of Lord Steyn’s reasons was inadequate to support the conclusion that he drew. No doubt, arguments can be put on both sides of these debates. For present purposes, however, I wish only to make the following remarks which relate to the subject of this paper. A reading of the judgment in **The Indian Grace** would lead one to believe that the matter being dealt with was one of merely English municipal law, of no concern to the rest of the world. There was no consideration of the place that the underlying Anglo-Commonwealth theory and practice of maritime enforcement and security had taken in the previous one hundred years. There was no consideration of the coherent international fabric of maritime law found in treaties, statutes, jurisprudence of courts of many jurisdictions and doctrine developed by scholars of many jurisdictions on that subject matter, and the place of the action *in rem* in that international fabric.

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<sup>93</sup> Notes by Rose and Teare [1998] *LM & CLQ* 27 and 33 and Davenport (1998) 114 *LQR* 169; and see Derrington and Turner *op cit* pp 20-30.

<sup>94</sup> **Kuo Fen Ching v Dauphin Offshore Engineering & Trading Pty Ltd** [1999] 3 *SLR* 721 at [24].

<sup>95</sup> Young J in **The Irina Zharkikh** [2001] 2 *NZLR* 801.

<sup>96</sup> [2006] *FCAFC* 192; 157 *FCR* 45.

- 75 The question which I wish to raise is whether, in the exercise of municipal judicial power on a subject matter such as this, there inheres the obligation to give consideration to the international character of the subject matter of consideration, maritime law. In other words, in **The Indian Grace**, should consideration have been given to the kind of matters to which I have referred before bringing about a complete change in English maritime law, and thus potentially influencing all Anglo-Commonwealth jurisdictions? If English maritime law were a minor provincial backwater in the contemporary operation of maritime life, including dispute resolution, their Lordships' approach could be seen as less important. However, although England's fleet is not what it was, England's important place in the maritime field, by its place in international commercial dispute resolution, insurance and financing, makes the dramatic change to English maritime law and the consequent fracturing of a pre-existing harmonised international approach a matter of the utmost importance and, with respect, regret. I venture to suggest, with the utmost respect, that Lord Justice Scott (and perhaps others whom I have mentioned) would have approached the matter rather differently.<sup>97</sup>
- 76 We are all familiar with the theory of international conventions being interpreted by reference to the Vienna Convention<sup>98</sup> and courts having regard to the considered decisions of foreign courts in approaching the subject matter of international conventions in order that uniformity to the extent possible is achieved.<sup>99</sup>
- 77 But surely the task is wider than that. Does not the international character of maritime law mean that the judicial development of municipal maritime law should take place, not merely by reference to domestic interests and considerations, but also by reference

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<sup>97</sup> In **Comandante**, I expressed the view that the assimilation of the action *in rem* with the action *in personam* and the judgments resulting therefrom is to debilitate the utility of the action *in rem*, by making the use of it a dangerous lottery, stating at [118] of the judgment:

"The force of the procedural theory is to bring the owner liable on the action to court to appear and expose itself to the claim for its full amount. If the claimant has to bring the action *in rem* knowing that this is its one action against the defendant owner it may risk disaster in proceeding *in rem*. If the owner does not appear and if the claimant proceeds against the ship, it may gain little from the action (even if it has a strong case). Other claimants may come in – mortgagees, lienees, other statutory claimants. None of these, or at least the amount each is owed, would be apparent to the proceeding claimant before judgment. Yet, having gone to judgment *in rem*, the claimant is precluded from proceeding again *in personam* because really it has ... already had its opportunity against the defendant owner in personam by the *in rem* action. There has been no personal submission by the relevant person and so it is difficult to see how the plaintiff can somehow enforce the *in rem* judgment against other assets of the relevant person ... The action *in rem* is a necessary tool of international maritime commerce for the recovery of just claims. To treat it as the equivalent of the *in personam* claim risks making it a dangerous lottery, thereby diminishing its practical value."

<sup>98</sup> See for example in England **The Muncaster Castle** [1961] AC 807; **Fothergill v Monarch Airlines** [1981] AC 251; **Stag Line v Foscolo Mango** [1932] AC 328.

to the recognition of the common international interests in harmony and uniformity and the principles of the general maritime law, if discernible?

- 78 The recognition of the desirability of international uniformity has not always been found in analysis of foreign jurisprudence whether the court in question be English, American, Australian or other. Two recent examples show how the task should be undertaken. Lord Justice Rix in the English Court of Appeal in **The Rafaela S**<sup>100</sup> and the judges of the Fourth Civil Division of the Supreme People's Court of the People's Republic of China in **American President Lines v Guangzhou Feida Electrical Apparatus Factory of Wanbao Group**<sup>101</sup> both dealt with the problem of straight bills of lading in the carriage of goods by sea. Both these scholarly and important judgments can be seen to undertake not merely an analysis of comparative law in order to aid the development or identification of municipal law, but also an engagement with the existing and historical state of maritime law in order that the maritime law of England and China should conform with fundamental international principle.
- 79 To the contrary, in 1928, in **Gosse Millerd Ltd v Canadian Government Merchant Marine**,<sup>102</sup> Viscount Sumner baldly stated:
- “Of foreign decisions of course the legislature is not deemed to take notice and, although the [Hague] conference was doubtless well acquainted with the United States cases, it has not yet been held that the legislature of this country is deemed to know, what those, whose reports or conventions it affirms, have been familiar with.”
- 80 Not long after this, in 1932, by way of countervailing balance, Lord Macmillan, Lord Atkin and others in **Stagline v Foscolo Mango**<sup>103</sup> made clear that the task of interpreting an Act based on an international convention included the examination of foreign cases.
- 81 One can sometimes see in the jurisprudence of important maritime powers a preference for national commercial interest at the expense of international comity and

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<sup>100</sup> [2003] 2 Lloyd's Rep 113 at 126-139 (on appeal to the House of Lords in [2005] 2 AC 423).

<sup>101</sup> 4<sup>th</sup> Civil Division, unreported 25 June 2002, referred to by Rares J of the Federal Court of Australia in **Beluga Shipping GmbH & Co v Headway Shipping Ltd** [2008] FCA 1791.

<sup>102</sup> [1929] AC 223 at 237.

<sup>103</sup> [1932] AC 328.

uniformity. One suspects that sometimes there is the unspoken assumption that what is good for the international power is good for the international community. Let me turn to the carriage of goods in part to illustrate this.

- 82 Notwithstanding the tolerably clear words of Article 2 and Article 3 rule 2 of the Hague and Hague Visby Rules which on their face appear to place obligations on the carrier to load, stow and discharge with care, Justice Devlin in **Pyrene v Scindia Navigation**<sup>104</sup> said that the words only stipulated the manner of performance of the functions of loading, stowage and discharge if such obligations were contractually assumed by the carrier and that responsibility for such activity can be transferred to the shipper by contract (including bill of lading contract). An examination of his Lordship's reasons can be seen to be underpinned by the desire for flexibility to permit the shipowner not to undertake the responsibilities for loading in charters which place that responsibility on the charterer. Yet it is difficult to see why the position of the charter and the parties to it should have been relevant to the interpretation of a convention on bill of lading carriage and why the interests of the shipowner should have prevailed. The words of the Articles were tolerably clear, and the contrary view had been adopted by the authors of two of the three leading English texts of the day: Temperley and Scrutton (though contra Carver), that Art 3 r 2 imposed a non-delegable duty.<sup>105</sup>
- 83 Recently, the House of Lords in **Jindal Iron and Steel Co v Islamic Solidarity Shipping Co**<sup>106</sup> revisited this question. Whilst there was an express reservation as to the initial correctness of the approach in **Pyrene**, certainty in English law was said to mandate the retention of the accepted interpretation. Certainty of English maritime law was seen as more important than correctness and uniformity in approach by different maritime states.
- 84 Maritime conventions such as the Hague Rules are generally a product of hard negotiation by competing interests. The danger of fragmentation of uniformity through interpretation of such instruments by reference to national interest are well

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<sup>104</sup> [1954] 2 QB 402 at 417-418.

<sup>105</sup> Temperley R, *The Merchant Shipping Acts* (4<sup>th</sup> Ed, Stevens 1932), Scrutton T *Charterparties and Ocean Bills of Lading* (15<sup>th</sup> Ed, Sweet & Maxwell 1948), Carver TG *Carver's Carriage of Goods by Sea* (9<sup>th</sup> Ed, Stevens 1952). Compare the American cases **Nichimen Co Inc v McFarland** 426 F 2d 319 (1972 2 CCA) and **Associated Metals and Minerals Corp v M-V Arktis Sky** 978 F 2d 47 (1992 2 CCA) and the Australian case in the New South Wales Court of Appeal in **The Nikolay Malakhov** (1998) 44 NSWLR 371.

<sup>106</sup> [2005] 1 WLR 1363.

illustrated by the very circumstances that led to the need for Hague Rules. These are, of course, well known. In the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, the prevailing doctrine of freedom of contract in an age of huge economic growth and burgeoning world trade in a economic environment dominated by powerful cartels and the concentration of shipping power and influence in a small group of countries had led to the one sided operation of the general law. The competing sides and their sponsoring polities then put forward markedly different regimes (some reorganised by reforming statutes) which could not co-exist without an underlying fragmentation of international commerce and its central instrument, the bill of lading. For instance, New York State courts enforced exclusion clauses in bills of lading as valid contractual provisions and federal courts, including the Supreme Court, struck these down as contrary to public policy.<sup>107</sup>

- 85 It was the threat of impending fragmentation of international sea commerce by inconsistent and idiosyncratic national legislation which led even the imperial power of Great Britain to recognise its national interests in a coherent international bargain. The appreciation of this background should then inform the interpretation of the Hague Rules as a balanced attempt as far as they went to compromise these differences with due recognition of the contours and context of particular compromises.
- 86 It can legitimately be argued that there is a responsibility upon courts and judges to interpret and develop maritime law with an international and balanced approach, because to do so reflects the immanent fabric of maritime law. If balance be lost, whether because courts are seen to favour ship or cargo or some other particular national interest the international basis of maritime law is undermined to the good of no one. In such circumstances, decisions lose their international acceptance and the need arises to expend vast bodies of energy to devising new conventions in part because many see a lack of balance in the way earlier attempts at agreement have developed in practical operation.
- 87 This should be the approach not only to solving problems involving international conventions, but also in solving other maritime law problems. To do otherwise will

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<sup>107</sup> See the discussion in **El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA** [2004] FCAFC 202; 2004 AMC 2886; 140 FCR 296 at 329-333 [154]-[165]; Knauth *The American Law of Ocean Bills of Lading* (4<sup>th</sup> Ed 1953); *Benedict on Admiralty* (7<sup>th</sup> Ed) Vol 2A ch II; **The Delaware** 161 US 459 at 471-473 (1896); **The Southwark** 191 US 1 at 6-7 (1903).



only provoke distinctions based on national interests in a field of jurisprudence and human endeavour necessarily international.

88 How this international foundation of municipal maritime principle translates into the development of any given aspect of legal doctrine is not always straightforward; nor is it likely to be without differences of opinion. That said, it is an important consideration that is, perhaps, sometimes neglected.

89 Let me give you two illustrations of the problem from two highly experienced and highly respected Australian judges from the High Court. First, in the major Himalaya clause case in Australia in the early 1980s<sup>108</sup>, Justice Stephen gave voice to a call for the bringing into consideration in the analysis of such clauses in Australian law Australian public policy as a “trading nation”. He saw the clause as a species of shipowner protection by the shielding of its agents, the stevedores. This was national interest, and legitimate national interest in one sense. Was it, however, an appropriate consideration for the development of maritime law in a trading nation?

90 Some years later in dealing with the relationship between Articles 3 and 4 in the Hague Visby Rules, Justice Callinan in **The Bunga Seroja**<sup>109</sup> said:

“Whilst no chauvinistic of the rule should be taken, it has to be remembered that Australia is a cargo country: it is one of the largest exporters in the world of seaborne commodities such as coal, beef, sugar, iron ore and wheat. The construction and application of rules in other jurisdictions should therefore have relevance and persuasive value in this country, according to the extent that the courts of other jurisdictions give due weight, in cases of uncertainty, to reciprocity of obligation and interest between shippers and carriers.”

That may have been a call for national self interest; or, it may have been a call only to recognise those foreign cases which themselves reveal the necessary balance.

91 I have resisted the temptation of discussing the influence of arbitration and de-localised dispute resolution mechanisms in fostering common legal principles and the modern growth of the *lex mercatoria*. Much has been written on the subject in recent

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<sup>108</sup> **Port Jackson Stevedoring v Salmond & Spraggon** (1978) 139 CLR 231 at 258-259 (The Privy Council reversed the decision of the High Court of Australia: (1980) 144 CLR 300.)

<sup>109</sup> (1998) 196 CLR 161 at 228.

years.<sup>110</sup> There is no doubt that the mature development of the New York Convention enabling the enforcement of arbitral awards in over 140 countries and the development of conventions, statutes and jurisprudence encouraging arbitral autonomy and independence will see the continued growth of non-curial practical law-making. Rather, I wish to say something of courts and their approach to maritime disputes.

92 In a lucid article some years ago<sup>111</sup> the late Judge John Brown bemoaned the direction of admiralty and maritime jurisprudence in the Supreme Court from the 1980s. I will not comment on that. I can say, however, in Australia, in my experience, there is a constant battle for the legitimacy of recognition of maritime law as a coherent body of principle having its own international and maritime sources. Often, such notions are seen as quaint or absurd. Such views often can be seen to originate from ignorance of the historical and contemporary sources and importance of maritime law.<sup>112</sup>

93 The assimilation of the courts of the 19<sup>th</sup> century in England into a uniform court structure was undeniably a sensible course. The submerging of Admiralty law and practice into the Queens Bench Division has fully assimilated maritime law into the fabric of the common law in England. Australia has tended to view maritime law in this assimilated way. This certainly has its advantages in taxonomical coherence, though it can come at the price of a lack of attendance to maritime principle or lack of focus on maritime sources in dealing with maritime problems. That said, it must be recognised that England has given the English speaking world some of the greatest commercial and maritime lawyers of the 20<sup>th</sup> and 21<sup>st</sup> centuries within this framework of doctrinal assimilation. Whilst over-specialisation of judges can be deleterious, in a field so coherently distinct, any court system which does not offer practical but skilled specialist dispute resolution in the area will fail to serve fully the maritime community.

94 One development which will be very interesting to watch is the growth of maritime dispute resolution in the emerging powers. I have had the great privilege to participate in the commencement of a standing dialogue between the Supreme People's Court of

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<sup>110</sup> See footnote 58 above, and see also Fall A "Defence and Illustration of *Lex Mercatoria* in Maritime Arbitration" (1998) 15 *Journal of International Arbitration* 83.

<sup>111</sup> "Admiralty Judges: Flotsam on the Sea of Maritime Law" (1993) 24 *Journal of Maritime Law and Commerce* 249.

<sup>112</sup> A matter of curious irony in Australia, being a country so dependent on maritime trade.

the People's Republic of China and the Federal Court of Australia. Maritime judges of both courts meet on a regular basis for detailed scholarly exchange. May I respectfully say that the scholarship, erudition and practical experience of the maritime judges of the Fourth Civil Division of the Supreme People's Court is of the highest order. The Division supervises and oversees the resolution of international commercial disputes (including the enforcement of international arbitration awards) and a huge national system of maritime courts. China is not only building a maritime merchant fleet, but also a scholarly, erudite and practical body of maritime judges of the highest calibre.

- 95 It will be of great interest to see the general maritime law administered and developed by a new, confident and skilled judiciary. One hopes that the approach to maritime law and its doctrinal development avowed by Lord Justice Scott and Justice Jackson prevails under the jurists of the developing maritime powers of the world. If so, the special character of maritime law will live on: its internationality.

New Orleans

15 April 2009

**AIJA – APPELLATE JUDGES’ CONFERENCE**

***Farah Constructions v Say-Dee Pty Ltd***

**Some Reflections for Intermediate Courts of Appeal**

**James Allsop  
7 November 2008**

- 1 The purpose of what I wish to say today is not, in any way, to be controversial - rather to explore some of the issues raised by *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89, particularly in relation to the underlying common law of Australia and the role of the intermediate appellate court structure in its application and development.
- 2 The comments that I will be making in relation to *Farah* arise also in part from what the Court said in *Kuru v New South Wales* [2008] HCA 26; 82 ALJR 1021 and some other cases.
- 3 Let me first identify the particular aspects of *Farah* and *Kuru* to which I wish to direct my comments. *Farah* was a case about fiduciary duties, asserted breach thereof and the circumstances in which a third party could be held liable by reason of its relationship with, participation in, or knowledge of, that fiduciary breach. In shorthand equity terms: the first and second limbs of *Barnes v Addy*. The Court of Appeal in New South Wales developed the first limb into a restitutionary rule. This was rejected by the High Court. However, I am not here to discuss the equitable principles, rather what the High Court said about the approach of intermediate appellate courts to existing principle.
- 4 At [135] the Court (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) said the following:

*“Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong; Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485 at 492. Since there is a common law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law.”*

- 5 I leave aside any complications of the context of the general law in federal or non-federal jurisdiction.
- 6 In *Kuru*, the High Court was concerned with a different, but related, topic: the need for intermediate appellate courts to decide all matters in controversy on the appeal, not merely those which it thinks sufficient to dispose of the appeal. This had arisen in a number of patent cases originating in the Federal Court: *Kimberley-Clark Australia Pty Ltd v Arico Trading International Pty Limited* (2001) 207 CLR at 19-20 [34], *Aktiebolaget Hassle v Alphapharm Pty Limited* (2002) 212 CLR 411 and *Lockwood Security Products Pty Limited v Doric Products Pty Limited* (2004) 217 CLR 274.
- 7 Those patent cases involved a dispute about a public register. In *Kimberley-Clark* the Court said at [34]:

*“When a court construes a patent specification it is dealing not with an instrument operating inter partes but with a public instrument which describes and defines monopoly rights. To order revocation of the patent is to do more than determine the immediate controversy between the litigants. ... Plainly there can be no general principle that a court of first appeal should determine all the questions which have arisen. However, in an appeal in a revocation action such as that before the Full Court here, it is desirable that the matter not be approached in a piecemeal fashion, particularly where the Court divides, and for the judge in the minority it is necessary to deal with a range of issues to dispose of the appeal. ...”*

8 Though the same thing occurred in *Hassle*, no comment was made. In *Lockwood*, criticism was again made of the Full Court of the Federal Court for not dealing with all the issues between the parties.

9 The Court returned to the matter in *Cornwell v The Queen* (2007) 231 CLR 260, a criminal case. The Court said at [105]:

*“Intermediate courts of appeal in this country are very busy, and it is understandable that they should not wish to deal with matters which it is not necessary for them to deal. However, while no universal rule can be enunciated, intermediate courts of appeal should bear in mind the factors making it desirable for them to deal with all grounds of appeal, rather than to deal with what is seen as a decisive ground in a way which apparently renders it unnecessary to deal with other grounds. That is because of the trouble caused if this Court, as here, disagrees with the intermediate court of appeal on one ground it did deal with fully, considers that its treatment of the other ground it dealt with was incomplete, and has returned the matter to the intermediate court for the four grounds not dealt with and the one ground not completely dealt with to be considered again. The trouble comes in the form of costs, delay and then need for reargument. This is particularly so in criminal appeals, where adding to delays can result in accused persons who are ultimately acquitted at a second trial having to remain imprisoned for longer than necessary, and longer than in justice they should be ...”*

10 The Court, in a civil damages suit in *Kuru*, said the following at [12] (per Gleeson CJ, Gummow, Kirby and Hayne JJ):

*“This Court has said on a number of occasions, that although there can be no universal rule, it is important for intermediate courts of appeal to consider whether to deal with all grounds of appeal, not just with what is identified as the decisive ground. If the intermediate Court has dealt with all grounds argued and an appeal to this Court succeeds this Court will be able to consider all the issues between the parties and will not have to remit the matter to the intermediate court for consideration of grounds of appeal not dealt with below ...”*

11 The importance of knowing of, and following, other intermediate courts of appeal can now be seen in Commonwealth legislation, uniform State legislation and the general law. It can be seen as a recognition of the

existence, not of one polity, but of one system of law insofar as common law, equitable or other non-statutory law is concerned.

- 12 Is the principle limited to what might be called substantive law? Truly procedural questions about the conduct of litigation may perhaps be seen to be sufficiently close to the administration of justice by the court in question as to have a degree of freedom not caught by the principle. That said, however, the principle from a case such as *J L Holdings* was not limited to the Federal Court and its procedures.
  
- 13 In *Tillman v Attorney General (NSW)* [2007] NSWCA 327 at [110] Giles and Ipp JJA applied a similar approach to a New South Wales statute in similar terms to a statute of another State. That was nothing new. At [108], they referred to *R v NZ* (2005) 63 NSWLR 628 where Howie and Johnson JJ (with whom Wood CJ at CL and Hunt AJA relevantly agreed) referred to the rule of comity in *Fernando v The Commissioner of Police* (1995) 36 NSWLR 567 as having application where the Court was considering a decision of another Australian intermediate appellate court that had interpreted an identical or substantially similar provision in another State. It was said not to be an inflexible or universal formula; and that the weight and respect attached to the decision of an intermediate appellate court concerning similar legislative provisions might be reduced where it was not merely the proper construction of the legislation that was under consideration, but rather issues of practice and procedure in their local context.
  
- 14 In practice how is all this to be done? What should be the legal technique involved? The first answer to this is to recall that we deal with responses to arguments based on material cited by counsel. As we are all, however, aware the arguments of counsel are not always fully researched. This will or may become a serious issue, having aspects of practicality and cost. This may be inevitable if Australia is to be regarded as one non-statutory legal system.

- 15 To what extent should a body of principle worked out in one state Court of Appeal be reassessed by that Court by reference to a comprehensive analysis of coordinate jurisprudence? This may depend upon whether that body of caselaw is settled and coherent, or fractured, or dependent upon an idiosyncratic aspect of state legislative provisions, or court practice. This raises the question as to whether we should use our own Court of Appeal jurisprudence as the primary source of doctrine or whether it should be but one of the nine intermediate jurisdictions to be analysed in any given circumstance. Questions of cost and time immediately arise. It may well be that we need to expect counsel to assure the court that a proper search has been undertaken in other States.
- 16 Further, how should any approach be affected by the distinction between ratio, dicta and, in the latter, “considered dicta”. (In *Farah* the Court made this distinction of considered dicta, though of the High Court.)
- 17 With the approach expected of intermediate courts of appeal by *Kimberley-Clark*, *Lockwood*, *Cornwell* and *Kuru* there will inevitably be a proliferation of dicta, including considered dicta, by intermediate courts of appeal.
- 18 Depending upon the structure of any particular judgment, these dicta might well be seen to be a type of contingent consideration or conclusion. In *Wade v Burns* (1966) 115 CLR 537, Barwick CJ said that the views of a mining warden as to what he would have done, if he had power (which according to his own view he did not) had no weight because it was entirely contingent. See also *King v Gousssetis* (1986) 5 NSWLR at 94-95 where McHugh JA (with whom Kirby P and Hope JA agreed) adopted what Barwick CJ said in *Wade v Burns*. See also *Mahenthirarasa v State Rail Authority* [2008] NSWCA 101 at [35]-[36], *Deputy Commissioner of Taxation v Meredith (No 2)* [2008] NSWCA 133 at [22] and *Tarabay v Leite* [2008] NSWCA 259 at [34] and [35].



- 19 The question of the use of scarce resources also arises. In *Lindholt v Hyer* [2008] NSWCA 264 at [184]-[185], Basten JA raised the “principle of parsimony”, requiring the Court to husband its resources. The reality of that pressing consideration is ever-present.
- 20 It has been suggested that the requirement of following other intermediate courts of appeal in respect of questions of common law will lead to a “first in best dressed” approach that will ossify or freeze legal development. I doubt that this is so. In *Marlborough Gold Mines* the test was identified as **convinced** that the other Court was **plainly wrong**.
- 21 Without wishing to multiply difficulties, it may be that this test will need to be worked out in this context. In *Chamberlain v The Queen (No 2)* (1983) 72 FLR 1 at 8-9 Bowen CJ and Forster J said in a joint judgment about following earlier Federal Court Full Court authorities:
- “We do not regard this Court as being bound by its previous decisions. However, we will normally follow an earlier unless convinced that it is wrong. It was argued that Duff’s case was wrongly decided. It was a closely reasoned decision. We are not persuaded that it is wrong. We consider we should follow it.”*
- 22 It is to be noted that the adverb “plainly” was not used by their Honours.
- 23 In *Nguyen v Nguyen* (1991) 169 CLR 245 at 268-269 Dawson, Toohey and McHugh JJ observed that the extent to which a Full Court regards itself as free to depart from its own previous decisions is a matter of practice for that court citing, without disapproval, *Chamberlain*. However, it is no longer a matter for individual courts, but for the High Court laying down a test to bind a coherent Australian common law. What does “plainly” or “clearly” or “convinced” add to “wrong”?
- 24 In *SZEEU* (2006) 150 FCR 214 Weinberg J and I disagreed in terms of emphasis as to how this kind of test worked, in the context of examining whether to follow an earlier Full Court authority. We both agreed on the

result that we should not depart from a relevant authority. However, we expressed ourselves somewhat differently. Mark analysed the importance of whether the principle concerned was part of the ratio or was dicta. There is, if I may respectfully say so, a most helpful discussion of this, at 247-248. Weinberg J then went on to examine English authority, including in particular *Young v Bristol Aeroplane* [1944] KB 718 and *Davis v Johnson* [1979] AC 264 and discussed the circumstances in which the English Court of Appeal would depart from earlier authority. The three narrow rules enunciated by the Court of Appeal in *Bristol Aeroplane* (sitting a bench of six) Lord Greene MR and Scott, MacKinnon, Luxmore, Goddard and du Parcq LJJ) were as follows:

1. The Court was entitled and bound to decide to which of two conflicting decisions of its own it will follow.
2. The Court is bound to refuse to follow a decision of its own which though not expressly overruled cannot, in its opinion, stand with a decision of the House of Lords.
3. The Court is not found to follow a decision of its own if it is satisfied that the decision was given per incuriam.

25 Weinberg J then turned to *Marlborough Gold Mines*. He said that the word “plainly” does more than simply add emphasis. It suggests that the error must be manifest or if it does not rise to that level at least capable of being easily demonstrated. In a sense, the error must be so clear as to enable a later court to say that the point is not reasonably arguable: see 150 FCR at 250 [148]. He gave as an example the per incuriam rule in *Bristol Aeroplane*.

26 I took a slightly more relaxed view of the rule. I referred to *Chamberlain, Nyugen and Transurban City Link Ltd v Allan* (1999) 95 FCR 553 and some older New South Wales decisions *Bridges v Bridges* 45 SR (NSW) 164 at 172 and at *Bennett & Wood v The Orange City Council* 67 SR (NSW) 426 at 430. I said that for the Federal Court the proper approach enunciated in *Chamberlain* and *Transurban* was that generally a previous Full Court decision would be followed unless the later Full Court was

**convinced or persuaded of the error** in the previous decision. If it was a question upon which minds might reasonably differ, both views being open it would mean the later court would not be convinced of the earlier court's error. Beyond these questions I thought it undesirable to formulate exhaustive criteria as to whether a later Full Court would or should not depart from an earlier Full Court decision. It would depend upon the nature of the controversy, the strength of the arguments and the particular circumstances including the degree to which the later court was persuaded of the error of the earlier court. I thought that it was clear from *Chamberlain* and *Transurban* (the latter of which had introduced the word "plainly") that the question was not that error was obvious or patent, that is whether the error appears obvious or plain to see on the face of the judgment. Rather, the use of words such as "plainly" or "clearly" as qualifying the word "wrong" was merely another way of expressing what both *Chamberlain* and *Transurban* conveyed: the need to be **convinced or persuaded** of the earlier court's **error**.

27 In *Bennett & Wood*, Wallace P shrank from an intransigent expression of any rule based on "manifest or demonstrable error". He said at 430:

*"Giving full credit to the desirability of certainty in the law ... I consider that even an intermediate court of appeal may on special occasions and in the absence of higher authority on the subject in hand play its part in the development of the law and in ensuring that it keeps pace with modern conditions and modern thought and accordingly in appropriate cases I do not think an earlier decision of the court ... should be allowed to stand where justice seems to require otherwise."*

28 Precisely how the test of **convinced** that the decision is **plainly wrong** will play out will affect the degree of rigidity in the development of the common law in Australia from *Farah*.

29 Rigidity is a good thing to a certain extent. When thought to be a good thing it is called certainty. The aim of a single, coherent common law of Australia will add a degree of coherence to our national legal system.

- 30 I think the difficulties of any perceived rigidity can be over emphasised. If the previous statement of principle is dicta, not fully argued or not fully reasoned, that may be a clear basis for a later court not to follow it. The test in *Marlborough Gold Mines* is perfectly adequate to deal with the matter. If Weinberg J's approach is required then a renewed emphasis on analysis of earlier authority and as to whether the principle involved is ratio or dicta will be required. If a more flexible approach is appropriate, fully reasoned considered dicta after full argument may well be required to be followed.
- 31 Once these theoretical questions fall out, very practical ones of organisation and information also arise.
- 32 Are our legal tools adequate to provide efficient and quick researching as to the expressions of view by intermediate courts of appeal on matters of general law?
- 33 Should we ourselves set up a bespoke system or information tool that involves the selection, noting up and ready availability of appellate court decisions on matters of general principle? Could we set up a website to which we all contribute to record and share intermediate appellate work dealing with general principle and common statutes?
- 34 Should we seek to encourage the commercial publishers to provide a conspectus of intermediate court of appeal decisions in Australia and New Zealand on general law?
- 35 The exchange of judges from jurisdiction to jurisdiction which is already occurring will bring about greater cross-fertilisation of ideas and practice. The approach of the Chief Justice of the Federal Court to moving interstate judges to hear appeals is one method in the Federal Court which has brought about greater uniformity of practice.

- 36 One interesting aspect of the debate in this area can be seen in some comments of Kirby J in *Harrington v Stephens* (2006) 226 CLR 52 at 99-100 [151] where his Honour said:

*“One of the values of a constitutional federation is the scope that it leaves for local innovation to stimulate the eventual emergence of national standards.”*

- 37 On the other hand, the emergence of Australia as a leading legal system in the region and any desire for this country to assume a leading role in cross-border and international dispute resolution necessarily requires the simplification and harmonisation of our federal legal system. The development of a coherent and cohesive Australian common law can be seen as a welcome part of this. The test in *Farah*, however it is worked out, may be seen to play a part in this important national development.

**THE SUPREME COURT  
OF NEW SOUTH WALES  
BANCO COURT**

**SPIGELMAN CJ  
AND JUDGES OF THE  
SUPREME COURT**

**Monday 2 June 2008**

**SWEARING-IN CEREMONY OF  
THE HONOURABLE JAMES LESLIE BAIN ALLSOP  
AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES  
A JUDGE OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES  
AND PRESIDENT OF THE COURT OF APPEAL OF THE SUPREME COURT  
OF NEW SOUTH WALES**

1 **ALLSOP P:** Chief Justice I have the honour to announce that I have been appointed a Judge of this Court, a Judge of Appeal and President of the Court of Appeal. I present to you my Commissions.

2 **SPIGELMAN CJ:** Thank you, Justice Allsop. Please be seated while your Commissions are read. Principal Registrar, please read the Commissions.

(Commissions read)

(Oaths of office taken)

3 Principal Registrar, I hand to you the form of oaths so that they can be filed with the records of the Court and the Bible so it can have the customary inscription placed in it and presented to his Honour as a memento of this occasion.

4 Justice Allsop, on behalf of all of the judges of the Court, I congratulate you on your appointment and welcome you to this important role in the Court. It is, as everyone here knows, a leadership role of great

significance. Your personal record at the Bar and in particular as a judge of the Federal Court has been such that every member of this Court is completely convinced that you will be able to exercise both the judicial duties and the leadership duties of this position with distinction. I look forward to serving with you in those positions in the future.

5 **THE HONOURABLE JOHN HATZISTERGOS MLC, ATTORNEY GENERAL OF NEW SOUTH WALES:** Your Honour on behalf of the State of New South Wales and the Bar it is my great pleasure to congratulate your Honour on your appointment to the Bench of the Supreme Court.

6 You bring a wealth of experience, exceptional understanding and passion for the practice of law and administration of justice to your new role. Your career to date is notable for its breadth as well as your individual achievements. You have distinguished yourself at the Bar and at the Bench as a scholar, as an author and as an academic.

7 Completing your Bachelor of Arts at the University of Sydney in 1974 you taught English and History for three years at Sydney Grammar School and Marist Brothers Kogarah. You then went on to study Law at the University of Sydney where you graduated with First Class Honours and were awarded the University Medal.

8 After graduating in 1980 you worked as an articled clerk at Freehill Hollingdale and Page, Solicitors, articled to Mr David Gonski and the late Kim Santow.

9 Your introduction to the courtroom was as an Associate to someone you came to admire as a truly great legal mind and a wonderful person, the late Sir Nigel Bowen, Chief Justice of the Federal Court of Australia.

10 In 1981 you were admitted to practice as a barrister of the Supreme Court of New South Wales and the High Court of Australia. You were later

admitted to practice in the Australian Capital Territory, South Australia and Western Australia. In your twenty years of practice you gained repute as a barrister of legendary diligence. One of your colleagues remembers an occasion when you first came to the Bar when you were sent to the Workers' Compensation Commission. You were the first barrister to put in written submissions and the judge adopted your submissions in his decision as they were.

- 11 Your practice spanned commercial law, insolvency, tax, trade practices, maritime, intellectual property, administrative and constitutional law. Your colleagues at the Bar sought your counsel and respected your intellect and meticulous method. In 1994 your excellence in the legal field was acknowledged when you took silk in New South Wales and in Western Australia in 1998.
- 12 In 2001 you were appointed to the bench as a judge of the Federal Court of Australia. Your well-reasoned judgments have contributed greatly to the development of the law across the full range of work at that court. In particular you have made vast contributions to the law of admiralty as the National Admiralty Convening Judge.
- 13 During your time on the bench you have convened and served on a number of court committees, including the Federal Court National Admiralty Committee and the National Practice Committee. You have undertaken an advisory role to the Commonwealth Attorney-General as Chair of the Statutory Rules Committee under the *Admiralty Act*.
- 14 Your passion for the law and the for the efficient administration of justice is well known, so too a continuing enthusiasm for legal education. Your love of teaching has certainly not faded since your qualification as a lawyer. Whilst at the Bar you resumed your first profession, devoting your time generously to the cause of legal education. Since then you have been a constant figure at the University of Sydney's School of Law. You were for a number of years the Challis Lecturer in Bankruptcy. More recently you



have lectured part-time in equity financing and since to 2005 you have coordinated and delivered post-graduate courses in Maritime Law and Admiralty.

- 15 You are regularly invited to present papers at conferences on admiralty and maritime law, commercial arbitration, maritime arbitration and international trade law to organisations within Australia and overseas. Indeed, such is your commitment that you regularly leave behind the pleasure of a Sydney summer to deliver a series of lectures in Swedish universities in the depth of winter. Since 2005 you have been a Governor of the World Maritime University in Malmo.
- 16 You are highly regarded by your colleagues who speak of you as bright, absolutely meticulous, a delight to appear before, and a model of courtesy to counsel. This much-attested sense of propriety you possess is in contrast with a report about you that once appeared in a scurrilous gossip column. As recalled by one of your colleagues at the bench the observer described your Honour as “Justice All-strop”, apparently offended by your Honour’s allegedly belligerent manner in the courtroom. Your colleague hastened to add that this was probably because of counsel’s failure to understand the intricacies of Federal jurisdiction or perhaps it was because counsel did not adequately deal with the multitude of issues that your Honour considered to be necessary for the proper determination of an admiralty proceeding.
- 17 Your Honour is known to be an accomplished whisperer. “Almost as inaudible as the whispered tones of the late Hely J, your good friend and colleague Justice Jacobson informs me. It is likely that this is because of your Honour’s numerous appearances in the Equity Division when you were in practice at the Bar. You are affectionately known as “The Whisperer” or “Whispering Jim”, nicknames infinitely more apt than Justice “Allstrop”.

- 18 Your colleagues also speak of you as a person with great empathy for the plight of those less fortunate. Anyone who saw the newspaper photo of you on the occasion of the recognition of a native title claim could not help but be struck by the warmth of your feeling. There for all to see was the fatherly figure of your Honour walking hand in hand with a group of indigenous children on a cricket field surrounded by the dense rainforest at Cape Tribulation in Far North Queensland. For those who know you well they know that the photo is a true reflection of the real Justice Allsop.
- 19 You are also not lacking in humour. On a recent return from a trip to India you produced a gift of a multi-coloured turban to one of your colleagues. Perhaps this implies that your Honour is in favour of replacing the wig and gown with something more appropriate in our multicultural society.
- 20 One of your last cases in the Federal Court was a hard fought claim for damages for a patent infringement. When the case was settled your Associate reported that there was dancing in the Federal Court's William Street premises. She added that the dancer was Justice Allsop. It is a shame that no photograph was taken. If it were the photo could be hung alongside the famous picture of your Honour's former colleague on the 11th floor of Selborne Chambers, "The Dancing Man", Frank McAlary QC.
- 21 One central aspect of your life which has not been mentioned is your devotion to your children, William and Julia, and your wife, Katharine. Your family share in the honour you receive today.
- 22 Your wealth of experience, knowledge and inimitable personal qualities make you one of the nation's most esteemed judicial officers. You are recognised as meticulous, well prepared, patient and hard-working and having honed a keen sense of justice.
- 23 We take delight in your decision to join the judiciary of New South Wales, knowing that you will serve the people of New South Wales wholeheartedly as the Court of Appeal's new President.

- 24 Congratulations once again. May it please the Court.
- 25 **Mr H MACKEN, PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES:**  
Your Honour on behalf of the solicitors of this State it is a great privilege to have the opportunity to congratulate you on your appointment and to wish you well in your new role.
- 26 On Friday I had the honour of adding to the valedictory remarks in respect to your predecessor, the Honourable Keith Mason AC, at which time it was suggested that his “shock” of white hair might be attributable to the high voltage electricity charging through his hair follicles as a result of his extreme intellectual abilities. It occurred to me that likewise, perhaps your Honour is renowned for keeping the overhead lights dim, not - as suggested by David Bennett at your swearing in as Federal Court judge in 2001 - to stop people who are hard of hearing from lip reading your Honour’s words of wisdom, but rather your perceptions are so heightened you have no need for further illumination. Maybe bright lights just give you a headache!
- 27 Your Honour I don’t wish to reiterate the details of your history and career that have already been covered today but I would like to pay tribute to the significant and long lasting impact you have made on some of those who have been fortunate enough to have crossed your path, and not all of them in the legal sphere.
- 28 As has been mentioned, during the period of 1974 to 1976 it was the History and English students at Sydney Grammar School and Marist Brothers in Kogarah who benefited from your Honour’s depth of knowledge and enthusiasm for subject material. Now in private practice, Phil Heyward, whilst not citing your Honour as directly influencing his decision to study law, clearly attributes his continuing interest in history to your dynamic and engaging teaching style. He said:

“I guess Jim, as we knew him, was not much older than his students when he took us on in 1975 but we learnt our ‘stuff’. I vividly remember studying Germany between the wars and he really brought it to life, he made history fascinating. The story going around the students at the time was that Jim was having a break from University because he didn’t think much of it, but given that he went back to study after teaching our year, perhaps he saw it as the lesser of two evils.”

- 29 As a post graduate student of Law your Honour completed your degree at the University of Sydney in three years. Undergraduates enrolled at that time took four years to complete the straight law course. One of those undergraduates was Joanne Seve, who described your Honour as “a clean cut, smartly dressed, softly spoken gentleman whose gentle presence belied a razor sharp intellect”. Coming straight from high school Joanne said that students thought your Honour had the advantage of age and life experience but it quickly became apparent that it was your incredible legal and intellectual capabilities that set you apart. She said:

“In lectures Jim could enter into discussions with the lecturer on tricky areas of real property law and jurisprudence. He talked way above our heads and we weren’t dumb! Our year included people like Margaret Cole, now global general counsel of Babcock and Brown, and barrister Robertson Wright SC who, despite strongly contesting the University Medal in 1979, was unable to wrest it from Jim’s grasp. In any other year Robertson Wright would have been a model. Jim was extremely dedicated and studious and after lectures he would head straight for the library, not diverting for a coffee in the canteen or a game of bridge.”

- 30 Your Honour it is disappointing to admit that no amount of digging could divulge anything untoward about your Honour’s behaviour during those student days. One of your lecturers, Stephen Robb asserted, “If Jim did anything wicked or outlandish, like we all did at some time in our youth, he kept it a watertight secret”.

- 31 The best another law student at the time and now a partner of Landerer and Co, Geoff Farland, could come up with was that he recalled that your Honour sometimes wore a cardigan, perhaps not common garb in those days but hardly an indictable offence. Clearly the best is yet to come.

- 32 As has been noted your Honour first worked at Freehill Hollingdale and Page where you were articled to the late Kim Santow, the former Justice of the Supreme Court of New South Wales, and David Gonski, now Chancellor of the University of New South Wales. David recalled that your Honour was undoubtedly the best articled clerk he had ever seen at Freehills and, he suspected, anywhere else. He said your Honour's "thinking and advocacy style no doubt reflected from your ability to entertain and educate young and very diligent minds".
- 33 Your Honour has sat on some landmark cases to which some reference has previously been made. The two that I would mention today are the Federal Court decision regarding *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs*. In conjunction with Justice Weinberg and Justice Murray, this particular case - apart from substantially increasing the workload of the Refugee Review Tribunal - was also instrumental in bringing about legislative change. The case centred on the legal issues around the operation of s 424A of the *Commonwealth Migration Act* and the Refugee Review Tribunal's refusal to grant an appellant a protection visa.
- 34 As has also been mentioned, in December last year your Honour facilitated what is understood to be the largest Aboriginal freehold transfer of land in Queensland history, following a special sitting on a cricket field at Cape Tribulation. That decision resulted in the return of almost 1300 square kilometres of World Heritage listed land to the Kuku Yalanji people of the Daintree rainforest.
- 35 Your Honour's service has not been confined to the practice and administration of law. Your Honour has made it your mission to impart your knowledge and expertise, and to mentor and educate others through tutoring and lecturing. Whether discussing jurisdictional issues, commercial or maritime law, law reform or the meaning of "matter", your Honour's diligence in comprehensively presenting issues in a meaningful

and thought-provoking way has made you a much sought after speaker in both the national and international arenas.

36 I have no doubt that your Honour will carry out your new role with the same diligence, commitment and strength of character which have typified your career to date and for which you have rightly earned the respect and admiration of all you serve and all those who serve you.

37 Today's formal ceremony is a cause for celebration and a source of great pride, for your Honour and those closest to you, your wife Katharine, son William and daughter Julia. It is also a cause for celebration for your friends and colleagues and the legal profession as a whole.

38 On behalf of the Law Society of New South Wales I wish your Honour every success and good fortune in the challenges that lie ahead as you cap yet another milestone in an illustrious career. May it please the Court.

39 **ALLSOP P:** Chief Justice and Judges of the Court, Justices of the High Court, Judges of the Federal Court, Mr Attorney, colleagues, family, ladies and gentlemen,

40 Thank you Mr Attorney and Mr Macken for your generous words.

41 A little over seven years ago, on 7 May 2001, at my swearing in as a Federal Court Judge, I thought that I was making a speech of a kind that I would not have to repeat. Though it is a daunting task, I am privileged to make another.

42 One necessary task involved in such a speech is the important expression of thanks to those who have made previous professional life both possible and enjoyable. Today, I will not repeat many of those thanks that I made then. I should at once, however, again express my love and thanks to my family: my parents for giving me opportunity, encouragement and support over my whole life, and my wife, Kate, and children, William and Julia, for

their love, encouragement and patience over the years. Without their love and support neither life as a barrister nor as a judge would have been possible. To my brother Richard go my thanks for his sage and to the point older-brother advice, particularly in recent months.

- 43 I would also like to thank my staff who have assisted me in my work as a judge – my personal assistant, Sharon Hodge, for her unstinting work and patience; and all my associates whose company has been an invariable delight and whose assistance has been invaluable. Many an insight would not have been recognised (such as the significance of the words “as packed” in *El Greco* or the simplicity of the concept of discrimination in the *Racial Discrimination Act* in *Walker*) and many an error would not have been avoided without them.
- 44 I recently looked at photographs of my swearing-in in 2001. My initial joy at seeing my children, William and Julia, looking endearingly angelic (at 11 and 8) was overcome by the confusion and difficulty in accepting the somewhat more youthful visage of the judge in the photograph being sworn in. I fear that the next seventeen years may incur a similar toll.
- 45 I was privileged to serve on the Federal Court for 7 years. The collegial friendliness of the Court (most of the time) was a source of much personal enjoyment and professional satisfaction. I made friendships which, I hope, will endure all my life. I would like to express my gratitude to my former Chief Justice, the Honourable Michael Black, who today is recuperating from surgery. He not only made life as a Federal Court Judge both interesting and enjoyable, but also by his graciousness and generosity, made the announcement of my decision to leave the Court an occasion of easy and well-meant congratulation.
- 46 I will miss aspects of the work of the Court which are exclusive to it. Many people might assume that the migration work done by the Court would not be one of those aspects to be missed. To the contrary; in particular when undertaking original jurisdiction, I found the work of dealing with

information about a multitude of countries and, in most cases, with the profoundly-felt fears and hopes of struggling, decent people both rewarding and important. Repetition and lack of legal merit were common, but almost invariably the cases were of life-changing importance to the litigants, however hopeless their cases may sometimes have been.

- 47 The second aspect of the Court's work that I will miss is native title. While the cases are sometimes difficult and, at times, exasperating to manage, I was privileged to be given the responsibility of managing a number of large claims in Far North Queensland. Those cases provided an illumination of the history of those parts of the country from the 1870s, and of the patient, but determined, confidence in the court system by the litigants, in particular indigenous Australians. These cases provided me with an insight (however distorted through the lens of a privileged white legal background) into the basal and complex task of reconciling history and injustice with present day realities, rights and responsibilities. It is an extraordinarily difficult national task, involving the need for good-will, patience and determination. I am grateful to have been permitted to play a tiny part as a member of the Court in the execution of this task.
- 48 The decision to leave the Court in which I have good friends and colleagues was not easy. This was particularly so when, the judges of the Court, especially in Sydney, had become recently bound together by the loss of so many colleagues in the space of such a short time. The loss in recent times to the Court of so many judges, in barely 2 years, was very difficult for the judges on the Court; not just because of the loss of talented colleagues, but because of the loss of close and dear personal friends: John Lehane, Richard Cooper, Peter Hely, Graham Hill, Bryan Beaumont and Brad Selway. The special talents of the four Sydney judges: Lehane, Beaumont, Hely and Hill are too well-known to a Sydney legal audience to need repeating (though, if I may say, I was recently one of the lucky handful to hear Roddy Meagher's prose poem portrait of Peter Hely at the University of Sydney). People here may not appreciate the talents of Richard Cooper from Queensland who was one of the finest maritime



lawyers in Australia in the last 30 years and Brad Selway who was one of the nation's great constitutional lawyers and, if I may be permitted to say, surely someone who would have been South Australia's first High Court Justice. I would like to think that I have spoken with them about my decision and that they all approve.

49 Upon the news of my intended appointment, I was graced with the most generous congratulations of my colleagues on the Federal Court. I was deeply touched by that. Only one letter commenced "Dear Rat", but that was followed by a quotation from Browning and the writer's warmest well meant wishes.

50 One of the important constitutional mechanisms of the prosaic, but successful, Australian Constitution is the structure of s 77, which permits the Commonwealth Parliament to use the mechanism of both Commonwealth and State Courts to exercise its authority in the deployment of the judicial power of the Commonwealth. This mechanism (absent in the United States Constitution) was placed in the Australian Constitution because of the anticipated trust, respect and comity among the Commonwealth and the States for each other, and each other's courts. The trust, respect and comity between the federal, state and territory courts for each other and each other's processes are matters of constitutional importance of the highest order. They should never be taken for granted, undermined or disparaged, in any way. The warm congratulations of my colleagues in the Federal Court on the news of my intended appointment made me reflect, not only on the quality of their friendship, but also on that respect and comity between the courts of the different polities of the Federation. I am deeply appreciative of their friendship, congratulations and graciousness.

51 I have also been warmly welcomed by my new colleagues, most of whom I have known the whole of my professional life. I am also very appreciative of that warm welcome. I am looking forward enormously to working with them, to returning to some of the work from which I hewed a living as a

barrister and to coming to grips with new areas. It will be a big change and a big challenge – but I am looking forward to it very much. One matter of great sadness to me, however, is not being able to compare notes about life on the Court of Appeal with my former master solicitor Kim Santow.

52 The statistics as to the Court of Appeal workload given last Friday at the farewell of Keith Mason illuminate the important role of this Court in the administration of justice in Australia. I admit to doing some mental arithmetic when the throughput figures of the Court of Appeal and Court of Criminal Appeal were mentioned until, as I looked around, and recalled the terms of the letter that I had written to the Governor-General, I realised that it was probably too late to be concerned about the precise arithmetical answer I was seeking. I would find out soon enough.

53 I am conscious of the magnitude of the task before me to follow in the footsteps of the seven former Presidents of the Court of Appeal. In particular, I am conscious of the responsibility in following such a truly great judge and scholar as Keith Mason. He is a great loss to the judicial system, but, Academe's equivalent gain. I had the good fortune to be his junior when he was Solicitor-General for New South Wales on a number of occasions before 1994. Sitting as a junior at the bar table, knowing the argument and being proximate to the Court and the telepathic lines of communication from bench to bar, one is able to judge the skill of the appellate advocate and the respect in which he or she is held by the Court. It is probably the best place to assess such matters. The deep respect and fixed and unswerving attention that his sophisticated, but clear and simply-expressed submissions always attracted from the High Court bench made me admire enormously his outstanding intellect and skill. That admiration has increased many fold in reading his work since 1997, being the work of as one of the finest appellate judges ever to have graced the bench of any Australian Court.

54 I was privileged to be given the opportunity to serve as a Judge on the Federal Court. I am likewise privileged to be given the opportunity to serve on this Court, as President of one of the most respected intermediate courts of appeal in the common law world.

55 Mr Attorney, thank you for the opportunity to serve the people of New South Wales in this role.

56 Thank you all for doing me the honour of being present today.

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