Chapter 1

The Coming of Age of Australian Law

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I Introduction

Common law in its widest connotation encompasses equity and statutory interpretation. Common law is judge-made law. It always has been. A common law system is a system of law in which legal principle is created and maintained and updated as the result of choices made by judges in the context of resolving concrete disputes in real time by making reasoned decisions having the status of precedent. That is so whether the judges involved are prepared to acknowledge it or not. Common law changes. It always has. Capacity for change is one of its strengths.

The Dixonian ideal of a common law system is one of incremental judicial development of legal principle to meet changing societal needs.[1] The experience of common law systems over the 800-year history of common law has seldom met that ideal. Professor Harold Berman traced the profound and enduring impact on the early development of common law in England of the papal revolution of the 12th century[2] and of the protestant revolution of the 17th century.[3]

In the second half of the 18th century, not long before the American revolution and the consequent establishment of a British penal settlement in New South Wales, the totality of the common law as then understood in England was sought to be expounded systematically in the writing of Sir William Blackstone.[4] To a modern reader, common law as expounded by Blackstone appears vaguely familiar yet also strangely foreign. Blackstone's common law is markedly different in content and structure from our common law.[5] The magnitude of development of legal principle through time and space is palpable. The rate of that development, however, has not been constant.

* I am grateful to Sir Anthony Mason for engaging with me in discussion on the subject-matter of this chapter. Although formed with the benefit of our discussion, the opinions expressed are entirely my own. I thank Michael Adams, Paul Finn, Bill Gummow, Geoffrey Lindell and Keith Mason for their comments on earlier drafts. I also thank Katharine Brown, Elizabeth Brumby, Anthony Hall and James Monaghan for their assistance in preparing the chapter for publication.

1 O Dixon, 'Concerning Judicial Method' in S Crennan and W Gummow (eds), *Jesting Pilate* (Federation Press, 3rd ed, 2019), 116–17.

2 H Berman, *Law and Revolution*: *The Formation of the Western Legal Tradition* (Harvard University Press, 1983).

3 H Berman, *Law and Revolution*, *II*: *The Impact of the Protestant Reformations on the Western Legal Tradition* (Belknap Press, 2003).

4 W Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765).

5 Cf D Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28 *Buffalo Law Review* 205.

Since the time of Blackstone, judicial development of common law has been episodic. Development has been notably accelerated during discrete periods at discrete localities. The assimilation of the law merchant in the Court of King's Bench at the Palace of Westminster during the Chief Justiceship of Lord Mansfield in the last quarter of the 18th century is an early example. The fashioning of substantive doctrines of contract and tort, following legislative abandonment of the ancient forms of action and legislative fusion of the administration of law and equity, in the newly established Supreme Court of Judicature at the newly constructed Royal Courts of Justice in England in the last quarter of the 19th century, is another. The crafting of modern principles of negligence and of restitution in the Court of Appeals of New York during the Chief Justiceship of Benjamin Cardozo in the first third of the 20th century is another.

Broadly comparable was the emergence in the High Court of Australia at Canberra during the Chief Justiceship of Sir Anthony Mason in the second half of the 1980s and the first half of the 1990s of a body of common law and equitable principle that was distinctively Australian. The period of a little more than a decade encompassing the eight-year period in which Sir Anthony was Chief Justice, but beginning a few years before, I will refer to as 'the Mason era'.[6] Portrayed as a time of transformative reconstruction by some and as a time of activist deconstruction by others, the Mason era answers both those descriptions.[7] It was a period of rapid and sustained judicial development that saw the coming of age of Australian law.

Not very long before, and even during, the Mason era, it was common to see reference to the common law *in* Australia,[8] just as it was common to see reference to the common law *of* an individual Australian State.[9] Within a decade after the Mason era, it was being said confidently, repeatedly and meaningfully that there existed a unified common law *of* Australia. That distinctive common law *of* Australia had emerged out of the Mason era,[10] and would continue to develop in consequence of the Mason era,[11] to conform to Australian conditions within an integrated Australian legal system having the High Court at its apex.

The common law of Australia that emerged out of the Mason era was in important respects permanently altered from the common law as it had appeared in Australia before that era. For starters, the framework within which legal principle was being

6 Cf Sir Anthony Mason, 'A Reply' in C Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996), 113.

7 See G Lindell, 'Judge(s) and Co' (1998) 21 *University of New South Wales Law Journal* 268, 289–94.

8 See, eg, *Viro v The Queen* (1978) 141 CLR 88, 94; *R v O'Connor* (1980) 146 CLR 64, 70. See also *Judiciary Act 1903* (Cth) s 80, as amended by the *Law and Justice Legislation Amendment Act 1988* (Cth).

9 See, eg, *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, 669.

10 See, eg, *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 15; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 556.

11 See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 565; *Lipohar v The Queen* (1999) 200 CLR 485, 509–10 [57]; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 61–2 [23]; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 517–18 [15]; *Paciocco v Australian & New Zealand Banking Group Ltd* (2016) 258 CLR 525, 529–31 [8]–[10].

developed in Australia was the Australian Constitution.[12] The common law rules governing intra-national choice of law were being re-fashioned to fit within the law area established by the Constitution.[13] The content of the substantive common law of defamation was being reshaped to conform with the newly implied constitutional freedom of political communication.[14]

Interpretation of the Constitution had itself developed in respects that went well beyond implication of freedom of political communication.[15] Gone was the impediment to national economic development imposed by a narrow and legalistic interpretation of the one express constitutional guarantee of freedom of interstate trade and commerce which had for too long prevailed.[16] Embraced was the fact that 'Australia ha[d] grown into nationhood'[17] as a consideration informing the scope of national legislative power[18] and national executive power.[19] Expanded was the scope of national legislative power to implement Australia's international obligations and to control the activities of corporations.[20] Fundamentally altered was our understanding of what gave the Constitution the force of higher law – no longer was it the will of the Imperial Parliament but the continuing acceptance of the Australian people.[21] Pivoting was our understanding of the constitutional justification for judicial review of legislative and executive action from one focused on the relationship between polities in a federation to one focused on the relationship between the citizen and the state.[22]

Of the many non-constitutional developments that had occurred, the most profound and pervasive was undoubtedly recognition by the common law of Australia of customary native title.[23] It was also the most controversial – legally and politically.

Less dramatic, but important, were numerous modifications to common law and equitable doctrine. A distinct common law of restitution had emerged, with unjust

12 See generally L Zines, 'The Common Law in Australia: Its Nature and Constitutional Significance' (2004) 32 *Federal Law Review* 337.

13 *Breavington v Godleman* (1988) 169 CLR 41; *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1; *Stevens v Head* (1993) 176 CLR 433. See later *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 534–5 [66]–[71].

14 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211. See later *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562–6.

15 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

16 *Cole v Whitfield* (1988) 165 CLR 360. See S Gageler, 'The Section 92 Revolution' in J Stellios (ed), *Encounters with Constitutional Interpretation and Legal Education: Essays in Honour of Michael Coper* (Federation Press, 2018).

17 *Bonser v La Macchia* (1969) 122 CLR 177, 223.

18 *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340, 378–9.

19 *Davis v Commonwealth* (1988) 166 CLR 79, 93–4, 110–11.

20 *Commonwealth v Tasmania* (1983) 158 CLR 1. But not to allow for incorporation of trading or financial corporations: *New South Wales v Commonwealth* (1990) 169 CLR 492.

21 See G Lindell, 'Why is Australia's Constitution Binding? – The Reasons in 1900 and Now and the Effect of Independence' (1986) 16 *Federal Law Review* 29, cited in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138.

22 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–6; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 10, 26–28.

23 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

enrichment as its centrally informing concept.[24] Bearing on contract, the objective theory had been embraced (with rescission in equity adopted for unilateral mistake),[25] modernised principles of frustration[26] and penalties[27] had been fashioned, as had modernised principles governing unconscionable conduct[28] and relief against forfeiture.[29] Equitable estoppel had been embraced and explained.[30] Negligence had come to assimilate occupiers' liability[31] as well as liability for damage caused by the escape of dangerous substances.[32] Within negligence, the non-delegable duty of care had been conceptualised and deployed.[33] The constructive trust had emerged as a remedial tool of equity, flexible enough to adjust property interests on the breakdown of domestic relationships.[34] Fiduciary duties had been recognised in novel commercial settings.[35]

Statutory construction was updating to meet the challenges of ever-expanding statute books: becoming less formulaic, more sensitive to legislative purposes,[36] more cognisant of legislative consequences,[37] and more protective of fundamental common law rights and freedoms.[38] Taxation legislation was being construed through the application of mainstream principles.[39] Procedural fairness had come to be implied as of course into the statutory conferral of administrative powers absent clear manifestation of a contrary legislative intention.[40]

The precept that no one should be convicted of a crime other than after a fair trial had been held to justify permanently staying criminal proceedings where unreasonable

24 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; *ANZ Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344; *Commissioner of State Revenue* (*Vic*) *v Royal Insurance Aust Ltd* (1994) 182 CLR 51.

25 *Taylor v Johnson* (1983) 151 CLR 422.

26 *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337; *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17.

27 *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170.

28 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Stern v McArthur* (1988) 165 CLR 489; *Louth v Diprose* (1992) 175 CLR 621.

29 *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359.

30 *Legione v Hateley* (1983) 152 CLR 406; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Foran v Wight* (1989) 168 CLR 385; *Commonwealth v Verwayen* (1990) 170 CLR 394.

31 *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

32 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

33 *Kondis v State Transport Authority* (1984) 154 CLR 672; *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16.

34 *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137.

35 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41; *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1.

36 *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, 315; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417.

37 *Cooper Brookes* (*Wollongong*) *Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320–1.

38 *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625; *George v Rockett* (1990) 170 CLR 104; *Plenty v Dillon* (1991) 171 CLR 635; *Coco v The Queen* (1994) 179 CLR 427.

39 *Cooper Brookes* (*Wollongong*) *Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 323; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 434. See also *Federal Commissioner of Taxation v Myer Emporium Ltd* (1987) 163 CLR 199.

40 *Kioa v West* (1985) 159 CLR 550; *Annetts v McCann* (1990) 170 CLR 596; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

delay in prosecuting resulted in a trial not being able to be conducted without substantial unfairness to the accused.[41] The fairness of the trial of a serious criminal offence had been reconceived to include capacity on the part of the accused to obtain representation by counsel, if necessary, at public expense.[42]

Principle, clarity and consistency had been brought to the determination by a court of criminal appeal of whether a conviction should be set aside on the ground that a jury verdict was unreasonable or could not be supported by the evidence.[43] A rule of practice had been introduced requiring a jury to be warned of the danger of convicting on the basis of an uncorroborated confession.[44]

The list goes on.

My purpose is not to catalogue the developments of the Mason era or to explain any one of them. My aim is to explore the drivers of the overall transformation that occurred.

Any explanation of the transformation of Australian law during the Mason era must take account of the spirit of the times. The Mason era largely coincided with the Hawke–Keating era. The Queen had already become 'Queen of Australia'.[45] 'Breaker Morant' had been released to popular and critical acclaim. 'Advance Australia Fair' replaced 'God Save the Queen' as the National Anthem.[46] The Australian Bicentenary focused attention on Australian history and Australian national identity as well as on the place of Aboriginal and Torres Strait Islander Australians. The Australian population was being enriched and diversified through unprecedented levels of immigration and unprecedented levels of international travel. The Australian economy was undergoing major microeconomic and macroeconomic reform. Australia was becoming more distinctive and more assertive as a nation. We were, in the words of David Malouf, 'putting ourselves on the map'.[47]

Any explanation of the Mason era must also take account of parallel developments in comparable common law systems.[48] Sir Anthony's Chief Justiceship coincided almost exactly with the tenure of Sir Robin Cooke as President of the Court of Appeal of New Zealand and overlapped substantially with the tenure of Brian Dickson as Chief Justice of the Supreme Court of Canada. Judge-made law administered within both of those jurisdictions was undergoing its own significant revision. Each jurisdiction looked to the others for inspiration and guidance.

The writing of a comprehensive account of the Mason era must await the writing of a comprehensive institutional history of the High Court. Acknowledging the incompleteness of the explanation I am about to give, I suggest that the coming of age of Australian law during the Mason era can be attributed to six main factors.

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41 *Jago v District Court* (*NSW*) (1989) 168 CLR 23.

42 *Dietrich v The Queen* (1992) 177 CLR 292.

43 *Whitehorn v The Queen* (1983) 152 CLR 657; *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521; *Knight v The Queen* (1992) 175 CLR 495; *M v The Queen* (1994) 181 CLR 487.

44 *McKinney v The Queen (*1991) 171 CLR 468.

45 *Royal Style and Titles Act 1973* (Cth).

46 Commonwealth, *Gazette: Special*, No S 142, 19 April 1984.

47 D Malouf, *A First Place* (2014), 99.

48 P Finn, 'Unity, Then Divergence: The Privy Council, The Common Law of England and the Common Laws of Canada, Australia and New Zealand' in A Robertson and M Tilbury, *The Common Law of Obligations: Divergence and Unity* (Hart, 2016), 37–61.

Foremost was abolition of appeals to the Judicial Committee of the Privy Council. Second were structural changes within the Australian system of courts. Third were autochthonous legislative innovations by the Commonwealth Parliament and by State Parliaments. Fourth was the advent of Australian legal publishing. Fifth was the coincidence among the membership of the High Court of a core group of exceptionally talented, experienced, collegiate and visionary Justices. Sixth was the co-location of the Justices with their staff in the recently constructed High Court building in Canberra.

Commentators on the Mason era sometimes refer to the influence of Lionel Murphy as a Justice of the Court.[49] Undeniably, some of the views Justice Murphy persisted in expressing alone on the High Court over a period of nearly a decade leading up to the Mason era were prescient. As to whether they were causative, I am aware of no evidence of Justice Murphy directly or indirectly influencing the reasoning or attitude of any other Justice.

II Abolition of Appeals to the Privy Council[50]

Now that appeals to the Privy Council from Australian courts have long been gone, it is difficult fully to comprehend the deadening effect they had on the Australian judicial system. The main problem was not that the Privy Council added another layer of appeal from the High Court and an alternative avenue of appeal from State Supreme Courts, though that was a problem. The main problem was not that the appeal was to an ad hoc tribunal comprised principally of members of a foreign judiciary, though that too was a problem. The main problem was that the ad hoc tribunal in question confined its image of what common law might be to legal principle from time to time declared by domestic courts in England. The blinkered approach of the Privy Council to the exercise of its appellate function stifled local innovation and promoted an attitude of colonial subordination.

The approach was not unthinking. The Privy Council had adopted it as a matter of policy in 1879. The circumstances were these. The Privy Council was entertaining an appeal from the Supreme Court of New South Wales about the construction of a New South Wales statute. The text of the New South Wales statute was based on the text of a United Kingdom statute. The Full Court of the Supreme Court of New South Wales in an earlier case had adopted a construction of the text of the New South Wales statute which was in accordance with the construction of the text of the United Kingdom statute earlier adopted by the English Court of Common Pleas. The English Court of Appeal had afterward overruled the decision of the Court of Common Pleas. The majority of the Full Court of the Supreme Court of New South Wales in the case under appeal preferred to maintain the construction which the Supreme Court had earlier adopted rather than to adopt the different construction newly arrived at by the English Court of Appeal.

49 See generally M Coper and G Williams, *Justice Lionel Murphy: Influential or Merely Prescient?* (Federation Press, 1997).

50 See generally Sir Anthony Mason, 'The Break with the Privy Council and the Internationalisation of the Common Law' in P Cane (ed), *Centenary Essays for the High Court of Australia* (LexisNexis, 2004), 66–81.

Unimpressed by such antipodean upstartery, the Privy Council allowed the appeal on the basis that the Supreme Court of New South Wales ought to have treated itself as bound by the decision of the English Court of Appeal. Their Lordships who comprised the Privy Council went so far as to say that they would not themselves have felt justified departing from a decision of the English Court of Appeal unless they entertained the clear opinion that the decision was wrong. Their Lordships then decreed, it was 'of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same'.[51] The common law throughout the British Empire was by force of the policy so decreed to become a closely guarded monopoly in which legal principle was to be made and remade only by judges in England from whence it was to be exported to the colonies. Long after Empire faded, the policy survived.[52]

The policy was resented in the Australian colonies from the time it was decreed. An attempt was made by the Australian framers of the Constitution to establish the High Court as the single ultimate court of appeal for Australia. The attempt encountered strong resistance from the British Colonial Office, which insisted on a role for the Privy Council being maintained.[53] The compromise reached was that, in all but a narrow category of constitutional cases, an appeal would lie from a decision of the High Court to the Privy Council with leave of the Privy Council. The Commonwealth Parliament was to have legislative power to limit the matters in which such leave might be asked, subject to the condition that a proposed law containing any such limitation was to be reserved by the Governor-General for Her Majesty's pleasure.[54]

In the *Judiciary Act 1903* (Cth), the Commonwealth Parliament cleverly minimised the scope for Privy Council appeals by investing federal jurisdiction in State courts on a condition that operated to exclude appeals directly to the Privy Council in matters arising in federal jurisdiction.[55] Not until 1968, however, did the Commonwealth Parliament make use of its legislative power to limit the matters in which leave might be asked of the Privy Council to appeal from a decision of the High Court.[56] Not until 1975, during the period of the Whitlam Government, did the Commonwealth Parliament make full use of that legislative power by limiting the matters in which that leave might be asked to none at all.[57]

With the ever-present prospect of an appeal to the Privy Council looming over it, the High Court had until then been forced to treat itself as constrained to follow decisions of the English Court of Appeal and the House of Lords, often against its

51 *Trimble v Hill* (1879) 5 App Cas 342, 345.

52 See, eg, *Robins v National Trust Co Ltd* [1927] AC 515, 529.

53 See generally S Gageler, 'James Bryce and the Australian Constitution' (2015) 43 *Federal Law Review* 177, 194–9.

54 Constitution s 74.

55 *Judiciary Act 1903* (Cth) ss 38 and 39(1) and (2)(a) were held to be invalid by the Privy Council in *Webb v Outrim* [1907] AC 81, a decision which was never accepted by the High Court: *McIlwraith McEacharn Ltd v Shell Co of Australia Ltd* (1945) 70 CLR 175, 209. See generally G Brennan, 'The Privy Council and the Constitution' in H Lee and G Winterton, *Australian Constitutional Landmarks* (Cambridge University Press, 2003), 312, 316–18.

56 *Privy Council* (*Limitation of Appeals*) *Act 1968* (Cth). See R Menzies, 'Australia and the Judicial Committee of the Privy Council' (1968) 42 *Australian Law Journal* 79.

57 *Privy Council* (*Appeals from the High Court*) *Act 1975* (Cth).

better judgment.[58] The judicial method employed in the many scholarly and creative judgments of Sir Owen Dixon between his appointment as a Justice in 1929 and his retirement as Chief Justice in 1964 needs to be appreciated against that background. An aspect of Sir Owen's brilliance lay in his ability to tread a path by which in truth he reconceptualised and revitalised legal principle all the while appearing to stay within the confines of often mediocre English precedent.

The prospect of an appeal to the Privy Council, combined with the prospect of the Privy Council on appeal following a decision of the House of Lords, led the High Court during the Chief Justiceship of Sir John Latham to take the pragmatic, if despondent, position of declaring it to be 'a wise general rule of practice that in cases of a clear conflict between a decision of the House of Lords and of the High Court, [the High] Court, and other courts in Australia, should follow the decision of the House of Lords on matters of general legal principle'.[59] There were notable departures from that general rule. The high point of departure was the outright refusal of the High Court led by Dixon in 1963 to follow a decision of the House of Lords given two years before which had confused the mental element for murder. The House of Lords had laid down 'fundamental' propositions, said Dixon CJ, that he believed to be 'misconceived and wrong' and that he could never bring himself to accept.[60] The departures increased under the Chief Justiceship of Sir Garfield Barwick as impatience with poor quality English precedent increased.[61] Still, overall, the departures were few.

Abolition of appeals from the High Court to the Privy Council in 1975 led the High Court under Barwick CJ eventually to declare in 1978 that it was no longer bound by decisions of the Privy Council any more than it had ever treated itself as bound by its own decisions.[62] The anomaly of appeals directly to the Privy Council from decisions of State Supreme Courts in matters not arising in federal jurisdiction nevertheless remained.[63] Not unknown was for one party to appeal from a decision of a State Supreme Court to the High Court and another party to appeal from the same decision directly to the Privy Council.[64] Not unknown either was for a party refused special leave to appeal by the High Court to go on to seek special leave to appeal from the Privy Council.[65] The position was even more complicated by the practice of the British Government after 1963 of appointing members of the High Court to sit as members of the Privy Council, the last to be appointed being Sir Ninian Stephen in 1979.

State Supreme Courts were in those unsatisfactory and unsustainable circumstances still being told by members of the High Court that they should continue to

58 See, eg, *Waghorn v Waghorn* (1942) 65 CLR 289, 297–8.

59 *Piro v W Foster & Co Ltd* (1943) 68 CLR 313, 320. See also at 326, 335–6, 341–2.

60 *Parker v The Queen* (1963) 111 CLR 610, 632–3.

61 See *Skelton v Collins* (1966) 115 CLR 94; *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118; *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556 (overruled by the Privy Council in *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1970) 122 CLR 628); *Public Transport Commission (NSW) v Perry* (1977) 137 CLR 107.

62 *Viro v The Queen* (1978) 141 CLR 88, 93–4; *Shaddock & Associates v Parramatta City Council (No 1)* (1981) 150 CLR 225, 248. See earlier *Favelle Mort Ltd v Murray* (1976) 133 CLR 580, 590–2.

63 See *Southern Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246.

64 See *Caltex Oil (Aust) Pty Ltd v XL Petroleum (NSW) Pty Ltd* (1984) 155 CLR 72.

65 See *Attorney-General (Cth) v Finch (No 2)* (1984) 155 CLR 107.

treat themselves as bound by decisions of the Privy Council as well as by decisions of the English Court of Appeal and the House of Lords, which the Privy Council could still be expected to follow.[66] For the High Court itself to depart from a decision of the English Court of Appeal or the House of Lords carried the potential for an appeal to be taken from a State Supreme Court directly to the Privy Council, which would follow the decision of the English Court of Appeal or the House of Lords, leaving State Supreme Courts to be faced with conflicting decisions of the High Court and the Privy Council, neither of which would bind the other.[67]

The whole 'absurd and infantile system' left lingering by the anomalous and intolerable residue of appeals to the Privy Council after 1975 was 'given its quietus'[68] only with the enactment of the *Australia Act 1986* (Cth), which emphatically and irrevocably declared that no appeal was thereafter to lie to the Privy Council 'from or in respect of any decision of an Australian court'. The *Australia Act* came into force in March 1986.

Nine months later, in December 1986, five members of the High Court, led by Mason J, took the opportunity to recant numerous earlier statements of deference and to declare that decisions of English courts were henceforth no longer to be treated as binding on Australian courts. What was then said was this:[69]

> Whatever may have been the justification for such statements in times when the Judicial Committee of the Privy Council was the ultimate court of appeal or one of the ultimate courts of appeal for this country, those statements should no longer be seen as binding upon Australian courts. 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.

The statement was a declaration of Australian judicial independence. Two months later, in February 1987, Sir Anthony succeeded Sir Harry Gibbs in the office of Chief Justice of the High Court. In his swearing-in speech, Mason CJ referred to the abolition of appeals to the Privy Council as 'a landmark in our legal history' the result of which was that the High Court then had 'exclusive final responsibility for declaring what is the law in Australia'. The 'obligation' of Australian courts he then explained as being 'to shape principles of law that are suited to the conditions and circumstances of Australian society'.[70]

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66 *Public Transport Commission (NSW) v J Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336, 341, 349; *Viro v The Queen* (1978) 141 CLR 88, 121.

67 See, eg, *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd* [1986] AC 1, following *Elliot Steam Tug Co Ltd v Shipping Controller* [1922] 1 KB 127 and not following *Caltex Oil (Aust) Pty Ltd v Dredge 'Willemstad'* (1976) 136 CLR 529. Cf *Viro v The Queen* (1978) 141 CLR 88, 121.

68 M Byers, Speech given at Bench and Bar Dinner (17 June 1994) [1994] *Bar News* 17, 24.

69 *Cook v Cook* (1986) 162 CLR 376, 390.

70 (1987) 162 CLR ix, x.

III Structural Changes Within the Australian Court System

Three earlier structural changes within the Australian court system were by then bedded down sufficiently to be having a significant effect on the nature and quality of the issues raised by the cases then coming before the High Court in its newly cemented capacity as the sole court of final appeal for Australia.

Legislation in each State had long provided for appeals to lie in civil matters from a single judge of the Supreme Court of the State to a Full Court of the Supreme Court of that State. The provision of the Constitution conferring jurisdiction on the High Court to hear and determine appeals from the Supreme Court of any State[71] had been interpreted from the beginning to allow a party to appeal to the High Court either from a judgment of a single judge or from a judgment of a Full Court.[72] Conferral of that appellate jurisdiction of the High Court was expressed to be 'with such exceptions and subject to such regulations as the [Commonwealth] Parliament prescribes'.[73] But the only regulation that the Commonwealth Parliament had prescribed in respect of appeals in civil matters from State Supreme Courts was a requirement for a party to obtain the special leave of the High Court to appeal in a case where the value of the civil right in issue was below a certain monetary threshold.[74] Otherwise, an appeal to the High Court from any judgment of a single judge of a State Supreme Court or from any judgment of a Full Court of a State Supreme Court in any civil matter was open to any losing party as of right. The consequence was that the High Court had from the beginning been burdened with responsibility for hearing and determining a large number of low-grade appeals, the numbers of which only increased as the years progressed.

Against that background, the first of the structural changes significantly to affect the issues raised in the appeals coming before the High Court by the time Sir Anthony became Chief Justice was an alteration to the structure of one State Supreme Court that had occurred just over 20 years before. In 1965, the Parliament of New South Wales took the initiative of establishing within the Supreme Court of that State a permanent Court of Appeal.[75] Comprised of a President and Justices of Appeal, the Court of Appeal replaced the Full Court in the hearing and determination of civil appeals. The contemporary expectation was that 'the dedicated character of such a body would augment the quality of judgments and the development of the law through the appointment of lawyers with abilities and skills apt for appellate work and the constant close cooperation of a small group of judges'.[76] That expectation came to be met in every respect. Sir Anthony himself spent a short time on the New South Wales Court of Appeal before being appointed to the High Court, as did Sir Cyril Walsh and Sir Kenneth Jacobs.

The President of the Court of Appeal throughout the Mason era was Michael Kirby, who was himself afterwards appointed to the High Court. Another Justice of Appeal

71 Constitution s 73(ii).
72 *Parkin and Cowper v James* (1905) 2 CLR 315.
73 Constitution s 73.
74 *Judiciary Act 1903* (Cth) s 35(3); *Federal Court of Australia Act 1976* (Cth) s 33(4).
75 *Supreme Court and Circuit Courts (Amendment) Act 1965* (NSW).
76 N Hutley, Ceremonial sitting of the New South Wales Court of Appeal to mark the 50th Anniversary of the first sitting of the Court, 8 February 2016, [19].

during an early part of the Mason era, Michael McHugh, was appointed to the High Court in 1989. Other key members of the Court of Appeal throughout the era were Dennis Mahoney and Bill Priestley. The contribution of the Court of Appeal to the development of Australian law is a story in itself.[77] Suffice for present purposes to record that the industry and innovation of the Court of Appeal generated a disproportionately large number of the appeals in which legal principle came to be developed in the High Court. Although often reversed in the result, the Court of Appeal of New South Wales was a judicial powerhouse which became, in effect, a junior partner of the High Court in a process of national judicial reform. The Court of Appeal of Victoria, the next dedicated intermediate court of appeal to be created in Australia, did not come into existence until 1994.[78]

Second in time of the structural changes significantly to affect the cases coming before the High Court during the Mason era was the establishment in 1976 of the Federal Court of Australia.[79] Federal courts had earlier been created to deal with the specialised subject-matters of bankruptcy, industrial law, and most recently family law.[80] The Federal Court of Australia was the first to have broad subject-matter jurisdiction. Generously interpreted by the High Court in a series of cases,[81] the subject-matter jurisdiction of the Federal Court overlapped to a significant degree with that of State Supreme Courts.

Naturally, the Federal Court strove from the outset to find satisfying national answers to a range of commonly arising questions of substance and of procedure that had come over time to be answered differently by different State Supreme Courts. The important contribution that the Federal Court was to make in its own right to the development of Australian law has been lauded elsewhere.[82] From the outset, however, its very existence as a national court served to show up the anomalous nature of many State-based differences that then existed.

The subject-matter of the Federal Court's jurisdiction and its composition were also significant from the perspective of the High Court. The creation of the Federal Court facilitated divestiture to the Federal Court of original federal jurisdiction which had until then been required to be exercised by the High Court in taxation, industrial relations and intellectual property matters,[83] thereby enhancing the capacity of the High Court to focus on its ultimate appellate function. But the principal driver for

77 For part of the story, see M Kirby, 'Permanent Appellate Courts – The New South Wales Court of Appeal Twenty Years On' (1987) 61 *Australian Law Journal* 391; M McHugh, 'Law Making in an Intermediate Appellate Court: The New South Wales Court of Appeal' (1987) 11 *Sydney Law Review* 183.

78 *Constitution (Court of Appeal) Act 1994* (Vic).

79 *Federal Court of Australia Act 1976* (Cth).

80 *Family Law Act 1975* (Cth) Pt IV.

81 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Fencott v Muller* (1983) 152 CLR 570; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261.

82 M Black, 'The Federal Court of Australia: The First 30 Years – A Survey on the Occasion of Two Anniversaries' (2008) 31 *Melbourne University Law Review* 1017; S Kenny, 'Federal Courts and Australian National Identity' (2015) 38 *Melbourne University Law Review* 996; P Ridge and J Stellios, *The Federal Court's Contribution to Australian Law: Past, Present and Future* (Federation Press, 2018).

83 *Jurisdiction of Courts (Miscellaneous Amendments) Act 1979* (Cth).

the creation of the Federal Court had been perception of a need to establish a trial and intermediate appellate court that would develop familiarity with and expertise in the exercise of jurisdiction to be conferred on it under pioneering national legislation in the emerging fields of competition and consumer law[84] and administrative law.[85] The novelty and importance of the issues which would inevitably arise in construing and applying that national legislation demanded imaginative and discerning judicial solutions. Under the Chief Justiceship of Sir Nigel Bowen, the new appointments to the Federal Court were lawyers who had the intellect and experience to provide those solutions. The judicial solutions arrived at in the Federal Court in high quality judgments would then in the most important cases naturally find their way to the High Court to be reconsidered on appeal.

The membership of the Federal Court from the time of its establishment included Sir Gerard Brennan, who had previously been appointed as the first President of the Administrative Appeals Tribunal. Brennan was soon joined on the Federal Court by Sir William Deane, who was also appointed President of the Trade Practices Tribunal. Both would go on in the early 1980s to be appointed to the High Court where both would become crucial to its membership during the Mason era.

Last in time of the structural changes significantly to affect the make-up of appeals coming before the High Court during the Mason era was a legislated change to the procedure of the High Court which had been championed by Gibbs against the concerted self-interested opposition of senior ranks of the legal profession in Australia.[86] Legislation in 1984 introduced a general requirement for special leave to appeal to be granted by the High Court as a precondition to any appeal to it from any decision of any State court[87] or from any final decision of the Federal Court.[88] The criteria enacted to inform the discretion of the High Court to grant or withhold special leave[89] presaged that cases coming before the High Court on appeal would henceforth be confined, through the exercise of that discretion, to cases raising questions of law of public importance or in which the interests of justice required consideration by the High Court. A question of law might be of public importance because of its general application or because a decision of the High Court 'as the final appellate court' was required to resolve differences of opinion between or within other Australian courts.

Those legislated special leave criteria amounted to a legislative endorsement of the High Court moving to adopt a strategic approach to the performance of its function as an ultimate court of appeal. At the time of his swearing-in as a Justice of the High Court in 1989, McHugh was able to say uncontroversially that the principal function of the High Court as an ultimate appellate court was 'to evolve and settle the law for the

84 *Trade Practices Act 1974* (Cth).

85 *Administrative Appeals Tribunal Act 1975* (Cth); *Administrative Decisions (Judicial Review) Act 1977* (Cth).

86 D O'Brien, *Special Leave to Appeal* (Supreme Court of Queensland Library, 2nd ed, 2007), 1–4.

87 *Judiciary Act 1903* (Cth) s 35(2), as amended by the *Judiciary Amendment Act (No 2) 1984* (Cth).

88 *Federal Court of Australia Act 1976* (Cth) s 33(3), as amended by the *Federal Court of Australia Amendment Act 1984* (Cth).

89 *Judiciary Act 1903* (Cth) s 35A.

benefit for the nation' and that, unlike before 1984, 'almost every private law decision made by [the] Court [had] great significance for the people in Australia.'[90]

IV Legislative Innovations

The centrality of precedent and disputation to the operation of a common law system has never meant that stimulants to judicial development of legal principle have been confined to strands of reasoning gleaned from reports of decided cases or to spontaneous judicial responses to innovative arguments of counsel. Legislation of its nature provokes judicial reaction, be it positive or negative, if for no reason other than that legislation forms part of the law which must be interpreted and applied by courts.

The constraint on the development of common law by colonial judiciaries imposed through the fiat of the Privy Council in 1879 was not matched by any similar constraint on the development of statute law by colonial legislatures imposed through any action of the Imperial Parliament. To the contrary, the power typically conferred on a colonial legislature, to 'make laws for the peace, welfare, and good government of the colony in all cases whatsoever' was confirmed by the Privy Council in an appeal from the Supreme Court of New South Wales in 1885 to be a 'plenary power' – 'as large, and of the same nature' as that of the Imperial Parliament itself.[91]

By the *Colonial Laws Validity Act 1865* (Imp), the Imperial Parliament had earlier declared that no colonial law was to be void or inoperative on the ground of repugnancy to the law of England unless the colonial law was repugnant to the provisions of some Act of the Imperial Parliament extending to the colony.[92] The qualification, as applied to the Commonwealth Parliament and to State Parliaments, was effectively removed with the adoption in Australia in 1942[93] of the *Statute of Westminster 1931* (Imp). Any lingering British legislative hegemonic ambition for Australia came during the Mason era to be relinquished entirely in 1986 with the enactment of the *Australia Act 1986* (UK), commencement of which was timed to coincide with the commencement of the *Australia Act 1986* (Cth).

Whereas the Crown in England 'could do no wrong', and in any event could not be sued, colonial legislatures in Australia pioneered enactment of legislation which facilitated bringing civil claims against colonial governments and which ensured that the rights of the parties to proceedings brought against colonial governments would be as near as possible to the rights of parties in proceedings between subject and subject.[94] The colonial 'claims against the government' legislation was indicative of a major difference between the English and Australian perspectives on the relationship between the individual and the state which would play out in judicial decisions in the long term. The Privy Council, again on appeal from the Supreme Court of New South Wales, went

90 Ceremonial Sitting on the Occasion of the Swearing in of the Honourable Justice McHugh, High Court of Australia, 14 February 1989, 16–17.

91 *Powell v Apollo Candle Co Ltd (NSW)* (1885) 10 AC 282, 289, quoting *R v Burah* (1878) 3 App Cas 889.

92 *Colonial Laws Validity Act 1865* (Imp) ss 2 and 3.

93 *Statute of Westminster Adoption Act 1942* (Cth).

94 See generally P Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987) ch 6.

some way towards recognising that difference in 1887 in holding that colonial conditions supported an interpretation of the civil claims encompassed by the legislation to include claims for damages in tort. In distinguishing colonial conditions from those seen to justify retention of common law Crown immunity from suit in England, the Privy Council then condescended to say, 'that the local Governments in the Colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals and other works for the construction of which it is necessary to employ many inferior officers and workman'.[95]

Other significant subject-matters to become topics of colonial legislative innovation included land registration, land management, mining, criminal law and industrial relations. In relation to subject-matters concerning the regulation of commerce (such as partnership, company law, sale of goods, bills of exchange and intellectual property) or pertaining to personal status (such as bankruptcy, marriage and matrimonial causes), however, colonial legislatures tended to adhere more closely to English legislative precedent.

Following federation, save for a short-lived attempt by the Commonwealth Parliament to implement American-style anti-trust measures,[96] the effectiveness of which was altogether altered by a decision of the Privy Council in 1913,[97] the same pattern of innovation in relation to some subject-matters and of adherence to English legislative precedent in relation to others continued, with the legislative subject-matters being divided between the Commonwealth and the States. Only in the late 1950s and early 1960s, when Sir Garfield Barwick became Commonwealth Attorney-General, and following a long campaign by feminist advocates for more accessible divorce laws, did the Commonwealth Parliament depart in any significant respect from English legislative precedent on the subject-matter of marriage[98] and matrimonial causes.[99] It was also not until around the same time that the Commonwealth dared to venture again into the subject-matter of restrictive trade practices.[100]

During the period of the Whitlam Government of the early 1970s, when Murphy was Attorney-General, both of those subject-matters were revisited as topics of Commonwealth legislation, to be radically expanded and reconceived. Matrimonial causes were enlarged into family law.[101] Restrictive trade practices were enlarged into competition and consumer law,[102] imposing legislated norms of commercial conduct having no precedent and no analogue in the statute law of England. Complementary fair-trading legislation soon followed in the States. An Australian Law Reform Commission was created during the same period,[103] following which a range of similar

95 *Farnell v Bowman* (1887) 12 App Cas 643, 649.
96 *Australian Industries Preservation Act 1906* (Cth).
97 *Attorney-General* (*Cth*) *v Adelaide Steamship Co Ltd* (1913) 18 CLR 30. See S Gageler, 'Chapter IV: The Inter-State Commission and the Regulation of Trade and Commerce under the Australian Constitution' (2017) 28 *Public Law Review* 205, 210–13.
98 *Marriage Act 1961* (Cth).
99 *Matrimonial Causes Act 1959* (Cth).
100 *Trade Practices Act 1965* (Cth).
101 *Family Law Act 1975* (Cth).
102 *Trade Practices Act 1974* (Cth), later renamed the *Competition and Consumer Act 2010* (Cth).
103 *Law Reform Commission Act 1973* (Cth).

law reform bodies were brought into existence in the States. Their reason for being was to pursue an agenda of legislative reform. They did it with gusto.

National legislative reform continued apace in the late 1970s and into the 1980s under the Fraser Government, notably with the introduction of a package of administrative law reforms,[104] with which the establishment of the Federal Court was in part associated, based on the earlier recommendations of the Kerr Committee[105] of which Mason had been a member in the late 1960s, and with the introduction of legislated rules of statutory interpretation mandating attention to legislative purpose[106] and facilitating recourse to extrinsic materials.[107] Uniform Commonwealth and State corporations and securities legislation was introduced in 1979,[108] replacing State and Territory companies legislation most recently enacted in 1961, which until 1979 had largely mirrored the English companies legislation. A new era of cooperative Commonwealth and State legislative reform had arrived.

Beyond the climate of legal change this nationwide legislative activity helped to create were three more specific flow-on effects for the transformation of judge-made law that was soon to occur in the High Court.

First, the Australian legislative reform of areas of law previously exclusively the province of common law (understood by reference to English curial precedent) or of statute law (drafted by reference to English legislative precedent and interpreted by reference to English curial precedent) undermined the policy of uniformity which for a century had been said to justify common law in Australia mirroring common law in England. More important than that the common law in Australia should develop to match developments in England or anywhere else was that the common law in Australia should develop to suit Australian conditions.

Second, much of the statutory reform of areas of law previously left to common law took the form of supplementation rather than displacement of common law. Legislative supplementation allowed the common law that remained to be considered and reconsidered in a new statutory light. Nowhere was that phenomenon more pronounced than in the area of administrative law where common law concepts were legislatively borrowed, leading to them being isolated and re-examined judicially as an exercise in statutory interpretation only then to be reinserted into common law reasoning in a reinvigorated form. The development of the common law concept of 'natural justice' is a prime example,[109] as is the development of common law principles of judicial review more generally.[110]

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104 *Administrative Appeals Tribunal Act 1975* (Cth); *Ombudsman Act 1976* (Cth); *Administrative Decisions* (*Judicial Review*) *Act 1977* (Cth); *Freedom of Information Act 1982* (Cth).

105 Commonwealth Administrative Review Committee, Commonwealth Government, *Commonwealth Administrative Review Committee Report* (1971) ('Kerr Committee Report').

106 *Acts Interpretation Act 1901* (Cth) s 15AA, introduced by the *Statute Law Revision Act 1981* (Cth).

107 *Acts Interpretation Act 1901* (Cth) s 15AB, introduced by the *Acts Interpretation Amendment Act 1984* (Cth).

108 *National Companies and Securities Commission Act 1979* (Cth).

109 Section 5(1)(a) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). See *Kioa v West* (1985) 159 CLR 550; *Annetts v McCann* (1990) 170 CLR 596; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

110 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

Third, the existence of uniform national legislation needing to be interpreted and applied by federal courts as well as by courts in each State led naturally to the conception of those courts forming part of a national judiciary. In 1990, in the context of an appeal from a decision of the Full Court of the Supreme Court of Queensland which had departed from one of its own decisions concerning the construction of a provision of a State statute, the High Court made plain that the extent to which the Full Court of a Supreme Court regarded itself as free to depart from its own previous decisions was a matter of practice for the Supreme Court to determine for itself.[111] In 1993, in the context of an appeal from a decision of the Full Court of the Supreme Court of Western Australia which had refused to follow a decision of the Full Court of the Federal Court concerning the construction of a provision of uniform corporations legislation, the High Court led by Mason CJ propounded the proposition that 'uniformity of decision in the interpretation of uniform national legislation ... is a sufficiently important consideration to require that an intermediate appellate court – and all the more so a single judge – should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong'.[112] That discipline having been introduced, it was but a short step for Gaudron J three years later to postulate the existence of a national 'integrated judicial system' having the High Court at its apex,[113] a notion soon afterwards taken up and developed in a range of substantive contexts.[114]

The discipline in favour of national judicial consistency introduced by the High Court in 1993 would later be expanded to become a discipline in favour of national judicial conformity that, for a time, would have a dampening effect on the contribution of intermediate appellate courts to national legal development not entirely dissimilar to the effect that the policy in favour of Imperial uniformity introduced by the Privy Council in 1879 had had on the High Court itself.[115] In the Mason era, the 'tension between the tiers'[116] which would come to be experienced in attempting to find an appropriate long-term balance between judicial consistency and judicial law-making at differing levels within the newly integrated Australian judicial system was a difficulty to be addressed in the future.

V Australian Legal Publishing

In 1946, Mason had formed part of a large cohort of mature age students who had commenced legal studies in the aftermath of World War II. From then until the commencement of the Mason era, the number of university law students in Australia

111 *Nguyen v Nguyen* (1990) 169 CLR 245, 250, 251, 268–9.
112 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492.
113 *Kable v DPP (NSW)* (1996) 189 CLR 51, 102–3.
114 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 534 [65]; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 363 [81].
115 See generally A Glover, 'What's Plainly Wrong in Australian Law? An Empirical Analysis of the Rule in *Farah*' (2020) 43 *University of New South Wales Law Journal* 850.
116 K Mason, 'The distinctiveness and independence of intermediate courts of appeal' (2012) 86 *Australian Law Journal* 308, 309.

more than tripled and the number of practitioners in the Australian legal profession increased six-fold.[117]

With that expansion in the profession and the academy came an increase in the production of and demand for Australian legal publishing. With few exceptions,[118] legal publications in Australia before the 1970s were derivative. Legal texts in Australia were by and large limited to standard English texts and to a few lightly edited antipodean versions of standard English texts. Legal journals in wide circulation within the judiciary and the legal profession in Australia were limited to the *Law Quarterly Review* and the *Australian Law Journal*.

Beginning in the early-1970s, that changed. Original Australian academic and professional publications began to appear. Early among them were Dennis Pearce's *Statutory Interpretation in Australia*[119] and *Delegated Legislation in Australia and New Zealand*.[120] In his foreword to the first, Sir Garfield Barwick noted that it was 'unique amongst books on legal interpretation' in that '[i]t brings to notice, and into due relationship with English case law, the decisions of the courts of Australia involving the interpretation of legislation'.[121] In his foreword to the second, Sir Anthony wrote:[122]

> We are now emerging from the Age of Darkness in which our reliance on overseas textbooks was relieved only by the desultory appearance of an indigenous and indigestible practice book, invariably cast in the iron-clad mould of annotations to a statute and by the publication of Australasian supplements to English textbooks, in which the local law is expressed as if it were a mere appendage to the corpus of English law.
>
> Our knowledge and our thinking have been conditioned by what text-writers have had to say about the law of the United Kingdom. Overseas authors have given scant attention to judicial decisions in Australia and New Zealand and none at all to Australasian statute law. The dearth of authentic textbooks of local origin has not only led to an inadequate recognition of our contribution to the law, it has handicapped its development. Nowhere is this more evident than in administrative law which has no long history behind it and has great potential for growth ahead of it.

Together with a rapid expansion of the range of Australian legal periodicals, other original, quality Australian legal texts and collections of writings soon appeared. Publication of many of them was facilitated by Kingsley Siebel who worked at Butterworths and by Chris Holt who worked at Butterworths and Law Book Company and who went on later to co-found The Federation Press.

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117 See D Weisbrot, 'Recent Statistical Trends in Australian Legal Education' (1990) 2 *Legal Education Review* 219.

118 Notably A Wynes, *Legislative, Executive and Judicial Powers in Australia* (first published by Law Book Co in 1936); D Benjafield and H Whitmore, *Principles of Australian Administrative Law* (published by Law Book Co in 1962, and first published as W Friedmann, *Principles of Administrative Law* by Melbourne University Press in 1950); J Baalman, *The Torrens System in New South Wales* (first published by Law Book Co in 1951); J Fleming, *The Law of Torts* (first published by Law Book Co in 1957); K Jacobs, *The Law of Trusts in New South Wales* (first published by Butterworths in 1958); and Z Cowen, *Federal Jurisdiction in Australia* (first published by Oxford University Press in 1959).

119 D Pearce, *Statutory Interpretation in Australia* (Butterworths, 1974).

120 D Pearce, *Delegated Legislation in Australia and New Zealand* (Butterworths, 1977).

121 Pearce, above n 119, v.

122 Pearce, above n 120, vii.

Four publications in particular influenced the work of the High Court during the Mason era. The first in time was Roddy Meagher, Bill Gummow and John Lehane's, *Equity: Doctrines and Remedies*, published in 1975.[123] Following in 1977 was the significantly revised fourth edition, by Meagher and Gummow, of *Jacobs' Law of Trusts in New South Wales,* renamed *Jacobs' Law of Trusts in Australia.*[124]

Understanding the significance of those two publications is assisted by a little history. New South Wales escaped the legislative fusion of the administration of law and equity that occurred in England in the last quarter of the 19th century and that occurred not long afterward in most other common law jurisdictions. Only in 1972[125] did the Supreme Court of New South Wales take what Jacobs described as 'the great leap forward to 1870'.[126] Until then, equity had been administered in New South Wales as a separate body of principle, subtly mitigating and supplementing less flexible common law rules. There it had been administrated on the 'equity side' of the Supreme Court. A 'commercial list' had been established by legislation in 1903,[127] allowing for the trial of commercial causes on the 'common law side' of the Supreme Court to be by judge alone rather than by the then civil jury standard. But the preferred forum for the trial of commercial causes by judge alone had been and remained on the equity side. To ensure the 'equity' needed for a trial on the 'equity side', a claim to equitable relief would be added to a claim for common law damages.

Commercial legal practitioners and judges in New South Wales knew equitable principle well, were creative in its manipulation and were adept at its application.[128] Some of the best of those equity-commercial practitioners and judges followed in the footsteps of Sir Frederick Jordan, who had been Chief Justice of New South Wales in the 1930s and 1940s, in teaching equity part-time at Sydney University. They included Mason (who like each of Meagher, Gummow and Lehane had lectured in equity at Sydney University) and Deane (who had tutored in equity at Sydney University when Mason was lecturer and when Gummow and Gaudron were students). Outside New South Wales, the distinctiveness of equity had waned.

Meagher, Gummow and Lehane's publications presented a comprehensive, principled, audacious and highly readable distillation of equitable doctrines and remedies from that uniquely New South Welsh perspective. Unlike contemporary English texts on equity, which tend to commence with an apology for the subject even continuing to exist,[129] Meagher, Gummow and Lehane's treatment of the subject was muscular and zealous. They presented a confident and distinctively Australian version of complex

123 R Meagher, W Gummow and J Lehane, *Equity: Doctrines and Remedies* (Butterworths, 1st ed, 1975).

124 R Meagher and W Gummow, *Jacobs' Law of Trusts in Australia* (Butterworths, 4th ed, 1977).

125 P Taylor, 'Three Decades of Change in the Supreme Court: Embracing the Overriding Purpose' in G Lindsay and C Webster (eds), *No Mere Mouthpiece*: *Servants of All*, *Yet of None* (LexisNexis, 2002) 172, 172–176.

126 Sir Anthony Mason, 'The portrait of Sir Kenneth Jacobs' (2011) *Bar News* 70, 72.

127 *Commercial Causes Act 1903* (NSW) s 4.

128 See M Gleeson, 'The Value of Clarity' in M Andenas and D Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford University Press, 2009), 107, 109; P Young, C Croft and M Smith, *On Equity* (Lawbook Co, 2009), [1.550]; P Finn, 'Common Law Divergences' (2013) 37 *Melbourne University Law Review* 509, 515–16.

129 See, eg, J McGhee (ed), *Snell's Equity* (Sweet and Maxwell, 31st ed, 2005), v.

legal principles not easily systematised and, outside New South Wales, not generally well understood.

The publications contained nothing not already perfectly well known to members of the High Court. The appearance of the publications, however, encouraged and invigorated an infusion of equitable principles into the doctrinal developments that occurred during the Mason era, and that was to continue apace with the appointment of Gummow to the High Court soon afterward.

Kirby has suggested, and I agree, that equity's influence during the Mason era went beyond legal doctrine to judicial attitude.[130] The traditional preference of equity for standards over rules and the traditional acknowledgement of the law-making function of courts in the administration of equity came to inform the Mason era judicial approach to the development of Australian law more broadly. In a foreword to a new Australian book on the principles of equity published soon after his retirement, Sir Anthony wrote:[131]

> [M]uch of the work of the High Court of Australia in recent years exhibits the historical characteristics of equity. … [E]quity judges were not subscribers to the quaint common law fiction that the rules of law have survived from time immemorial and that judges merely find and declare the pre-existing law. ... [E]quitable doctrines and principles were 'established from time to time – altered, improved and refined from time to time'.

Later would occur a contest for the heart of a decentralised and increasingly internationalised common law. The contest would for a time escalate into the 'equity wars':[132] an unedifying feud of Lilliputian proportions between Little-endian commercial-equity practitioners and judges in New South Wales[133] and Big-endian adherents to the academic neo-roman law philosophy of Peter Birks at Oxford University.[134] In the Mason era, all that unpleasantness was well in the future.

The next in time of the original Australian legal writings to be particularly influential on the work of the High Court during the Mason era was Leslie Zines' *The High Court and the Constitution*, the first edition of which was published in 1981.[135] Departing from the traditional black-letter approach to the writing of legal texts in favour of an historical and sociological exposition of the doctrines, techniques and attitudes adopted over time by the High Court in constitutional adjudication, the book was keenly read within the institution it critiqued. Sir Anthony and Zines were also

130 M Kirby, 'The Mason Court: A Study of Change and Judicial Technique' in M Kirby, *Through the World's Eye* (Federation Press, 2000) 111, 120.

131 P Parkinson (ed), *The Principles of Equity* (LBC Information Services, 1996), vi, quoting *Re Hallett's Estate* (1879) 13 Ch D 696.

132 K Mason, *Lawyers Then and Now* (Federation Press, 2012), 174–82. See also M Kirby, 'Equity's Australian Isolationism' (2008) 8 *Queensland University of Technology Law and Justice Journal* 444, 466–9; Finn, above n 128, 512.

133 See, eg, *Brambles Holding Ltd v Bathurst City Council* (2001) 53 NSWLR 153, 155 [2], 183 [93].

134 See, eg, P Birks, 'Meagher, Gummow and Lehane's Equity Doctrines and Remedies' (Book Review) (2004) 120 *Law Quarterly Review* 344; A Burrows, *The Law of Restitution* (Oxford University Press, 3rd ed, 2011), 35–43.

135 L Zines, *The High Court and the Constitution* (Butterworths, 1981).

close personal friends.[136] In a lecture at the University of Virginia in 1985, Sir Anthony distanced himself from the well-known statement made by Dixon on the occasion of his swearing in as Chief Justice that '[t]here is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism'.[137] Sir Anthony said that 'it is impossible to interpret any instrument, let alone a constitution, divorced from values' and that '[t]he ever present danger is that "strict and complete legalism" will be a cloak for undisclosed and unidentified policy values'.[138] In expressing that approach, he was reflecting the influence of Zines.

Then there came a series of published papers given at invitation-only roundtable seminars at the Australian National University organised by Professor Paul Finn between 1984 and his own appointment to the Federal Court 11 years later.[139] Commencing with equity, the series went on to explore emerging issues in commercial relations, contracts, torts, restitution, damages and government. [140] More important than the topics covered was the periodic bringing together of members of the Australian legal academy, the Australian legal profession and the Australian judiciary in a recognisably Australian creative endeavour.[141] Finn's particular contribution to that endeavour, reflected also in his contemporary writings,[142] was to point out the moral dimension of the doctrinal choices in play. Finn chronicled and contributed to the 'Australianisation' of the common law in Australia then occurring.[143]

VI The Justices

That brings me, neither last nor least, to the Justices. The human element of legal and institutional change is often under-appreciated, but the backgrounds, life perspectives and relationships of those on the Bench have a significant impact on the rate and direction of development. This was certainly true of the Mason era. Unlike members of a law

136 Sir Anthony Mason, Foreword, in J Griffiths and J Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (Federation Press, 2020) v, v.

137 (1952) 85 CLR ix, xiv.

138 Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 5, reproduced in G Lindell (ed), *The Mason Papers* (Federation Press, 2007) 110, 114.

139 R Cranston, 'A Legal Life' in T Bonyhady (ed), *Finn's Law: An Australian Justice* (Federation Press, 2016) 5, 18.

140 P Finn (ed), *Essays in Equity* (Law Book Co, 1985); P Finn (ed), *Equity and Commercial Relationships* (Law Book Co, 1987); P Finn (ed), *Essays on Contract* (Law Book Co, 1987); P Finn (ed), *Essays on Torts* (Law Book Co, 1989); P Finn (ed), *Essays on Restitution* (Law Book Co, 1990); P Finn (ed) *Essays on Damages* (Law Book Co, 1992); P Finn (ed), *Essays on Law and Government, Vol 1* (Law Book Co, 1995); *Essays on Law and Government, Vol 2* (Law Book Co, 1996).

141 A Mason, 'Foreword' in P Finn, *Fiduciary Obligations*: *40th Anniversary Republication with Additional Essays* (Federation Press, 2016) v, v.

142 See, eg, P Finn, 'Commerce, the Common Law and Morality' (1989) 17 *Melbourne University Law Review* 87.

143 P Finn, 'Statutes and the Common Law' (1992) 22 *University of Western Australia Law Review* 7, 13, referring to J Toohey, 'Towards and Australian Common Law' (1990) 6 *Australian Bar Review* 185. See too D Meagher, 'One of My Favourite Law Review Articles: Paul Finn's "Statutes and the Common Law" (1992) 22 *University of Western Australia Law Review* 7' (2006) 35 *University of Queensland Law Journal* 135.

firm or a set of chambers, members of a collegiate court do not choose each other. Nor, beyond that encompassed within the judicial oath, do they come together professing a shared ideology. The strength of a collegiate court, as Benjamin Cardozo pointed out in the early 1920s[144] and as modern behavioural theory tends to confirm,[145] lies in the capacity for intelligent and independent individuals focused intensely on resolving the same problem to achieve the result that 'out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements'. The vicissitudes of judicial life and the vagaries of executive appointment mean that the institutional capacity of a collegiate court is rarely utilised to the optimal extent.

Twice before in its history did the High Court come close. Once was in the formative period of the first decade of its existence. To the extent that its performance during that period was less than optimal, the underperformance was attributable in the first half of that decade to the intellectual dominance of Sir Samuel Griffith and in the second half to animosity towards Sir Isaac Isaacs. The other time was the classical period (or 'Golden Age'[146]) of the second half of the 1950s when Sir Owen Dixon as Chief Justice was joined by Sir Wilfred Fullagar, Sir Frank Kitto, Sir Douglas Menzies and Sir Victor Windeyer.

By the early 1980s, Sir Anthony had been a member of the High Court for about a decade. When he was joined by Brennan and Deane, a meeting of minds occurred that created the potential for the High Court as an institution to capitalise on the structural changes then unfolding. Each brought to his role as a Justice an exceptional measure of intellect and industry as well as a wealth of relatively diverse professional and judicial experience. Each was a confident leader of the profession. Together, they developed a working relationship free of rivalry and based on mutual respect. When those critical three Justices were joined in 1987 by John Toohey and Mary Gaudron, and not long afterwards by McHugh, the weight of numbers permitted pent-up institutional potential to be realised.

All key members of the High Court during the Mason era shared a strong sense of national identity. Save for Deane, who had studied in the Netherlands and in Ireland, the education and professional experience of all of them had been exclusively in Australia. All of them shared a common vision of the High Court as a national supreme court having the unique responsibility to develop a common law for Australia. All of them understood that national responsibility in an international context, being prepared to draw inspiration and to learn from the experience of other national legal systems, especially other common law systems, and also from doctrines of international law. All of them were candid about the institutional choices they collectively faced.

Beyond that shared understanding of institutional purpose and institutional agency, the strength of the High Court once Sir Anthony became Chief Justice lay in Mason CJ fitting comfortably into the role of first among equals. No member of the

144 B Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921), 177.

145 See S Gageler, 'Why Write Judgments?' (2014) 36 *Sydney Law Review* 189.

146 B Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987), 177, quoting Baron Denning, 'Fifth Wilfred Fullagar Memorial Lecture: Let Justice Be Done' (1975) 2 *Monash University Law Review* 3, 3.

Court exercised intellectual dominance over any other. No member was inclined to conform his or her views to the views of any other. Freedom of individual thought and expression was expected and respected. That freedom was nevertheless combined with a willingness to compromise to achieve common positions in cases where the interests of justice favoured an unusual measure of certainty. Entrenched positions were adopted by some members on some topics. Ongoing debates about the utility of the concept of 'proximity' in the formulation of a duty of care in negligence[147] and about the nature and constitutionally permissible scope of defence force discipline[148] are examples. Entrenched positions were, however, the exception.

Nowhere were the traits that gave the Mason Court its strength more fully displayed than in the two cases which epitomised the Mason era. Most famous now is *Mabo v Queensland (No 2)*.[149] Of the six members who comprised the majority of the High Court, two (Brennan and Toohey JJ) wrote stand-alone judgments, two (Deane and Gaudron JJ) wrote jointly, and two (Mason CJ and McHugh J) chose to write a short introductory concurrence agreeing with the judgment of Brennan J and summarising the holding in the case 'that the common law of this country recognises a form of native title'[150] in a manner agreed to by all six members of the majority. In the result, it is the reasoning of Brennan J with which the outcome in the case has come to be associated. At a critical juncture in reasoning to the exposition of a uniquely Australian common law doctrine of native title, Brennan J said:[151]

> In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. Australian law is not only the historical successor of, but is an organic development from, the law of England. Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies. It is not immaterial to the resolution of the present problem that, since the *Australia Act 1986* (Cth) came into operation, the law of this country is entirely free of Imperial control. The law which governs Australia is Australian law.

The other of the two cases which epitomised the Mason era was *Cole v Whitfield*.[152] Ironically, because of the magnitude of the success of the decision in that case in replacing muddled and troublesome constitutional doctrine with a clear and workable constitutional rule now seldom litigated,[153] the case is less celebrated now than it deserves to be. Sir Anthony has justifiably identified it as 'the most important constitutional

147 *Jaensch v Coffey* (1984) 155 CLR 549; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *Gala v Preston* (1991) 172 CLR 243.

148 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.

149 (1992) 175 CLR 1.

150 Ibid 15.

151 Ibid 29.

152 (1988) 165 CLR 360.

153 S Gageler, 'The Section 92 Revolution' in J Stellios (ed), *Encounters with Constitutional Interpretation and Legal Education: Essays in Honour of Michael Coper* (Federation Press, 2018) 26, 28.

decision in my time'.[154] A major change in the interpretation of the Constitution was expressed in clear and decisive language in a single judgment in which all members of the Court joined. The judgment was expressed in the characteristically confident, collective and active voice of the era: 'we' now decide.

Joint judgments, although more frequent in the Mason era than in any previous period in the history of the High Court other than the two I have mentioned, were not a defining characteristic of the Mason era. 'The desire to deliver a joint majority judgment was not carried to the point where there was an expectation that a Justice would participate in a joint judgment or where there was pressure on him [or her] to do so'.[155] Remarkable about many important cases of the era is that the critical strand of reasoning which came to be picked up and adopted or further developed in later cases appeared in its original form as but one of several strands of reasoning expressed in several carefully reasoned judgments.

VII The High Court Building

Finally, there was the High Court building. From the time of its establishment in 1789, the Supreme Court of the United States was required by statute to sit as a Full Court only at the seat of national government.[156] For a very long time, the Supreme Court sat in the basement of the Capitol Building in Washington. During the formative period of the early Chief Justiceship of John Marshall, the Justices lodged together at the same boarding house. The Supreme Court of Canada, from the time of its establishment in 1875, was similarly required by statute to sit always at the seat of government.[157] The Justices even now are required by statute to reside within a specified distance of Ottawa.[158] The High Court of Australia, from the time of its establishment in 1903 until the opening of the High Court Building in Canberra in 1980, had no fixed address. The Constitution required that there be a High Court[159] and that there be a seat of government.[160] Neither the Constitution nor any statute required that the seat of the High Court be at the seat of government.

The practice of the High Court, established under the Chief Justiceship of Griffith, was for the Justices to maintain chambers in their home cities and for the High Court to travel as a Full Court on annual circuits to State capitals where Justices would typically be accommodated in State Supreme Court buildings with the gracious consent of State Supreme Court judges who were temporarily displaced.[161] Purpose-built buildings were constructed for the High Court at Taylor Square in Sydney in 1923 and in Little Bourke Street in Melbourne in 1928. Split in that way, the High Court as a national institution

154 Sir Anthony Mason, 'Reflections on the High Court of Australia' (1996) 20 *Melbourne University Law* 273, 273.

155 Sir Anthony Mason, 'The High Court of Australia – Reflections on Judges and Judgments' (2013) 16 *Southern Cross University Law Review* 3, 10.

156 *Judiciary Act of 1789* (US) s 1.

157 *Supreme and Exchequer Courts Act*, SC 1875, c 11.

158 *Supreme Court Act*, RSC 1985, c S-26, s 8.

159 Constitution s 71.

160 Ibid s 125.

161 See S Gageler, 'When the High Court Went on Strike' (2017) 40 *Melbourne University Law Review* 1098.

had no single national physical presence. The practice of sitting on circuit in State capitals had the upside of maintaining contact with State judiciaries and State-based legal professions. The absence of a seat of the High Court had the downside of failing to foster a national institutional identity.

During his final years as Chief Justice, Sir Garfield Barwick set out to change all of that. His ambition was to see the High Court housed in a single dedicated building to be located within the parliamentary triangle on the southern shore of Lake Burley Griffin in Canberra. He wanted the High Court finally to have a seat and he wanted the seat of the High Court to be at the seat of government. His ambition extended to the holder of the office of Chief Justice being provided with Lanyon Homestead as his official residence and to the other Justices being housed in an adjacent compound. When his building project came to be embraced by the Commonwealth Government during the administration of Malcom Fraser, he involved himself closely and personally at every stage of seeing the project to completion. He was intimately involved in the choice of the brutalist architecture, the supervision of the construction, the interior design and the commissioning of the artwork.

Within a year of the opening of the High Court building in Canberra in 1980, his project complete and his health failing, Sir Garfield resigned from the office of Chief Justice. Fittingly, two portraits of him hang in the High Court building. One is an official portrait by Brian Dunlop of Sir Garfield in his judicial robes. It hangs in Court Room No 3 along with portraits of his successors in the office of Chief Justice. The other is a portrait by Ted Markstein which is based on a portrait of an Italian gentleman by Titian. It hangs in the Public Hall. It has an architectural motif and a renaissance air.

Barwick's efforts to establish a permanent presence for the High Court in Canberra were mutedly supported by his brethren. His efforts to establish permanent homes for the Justices there were not. Led by Gibbs, they were collectively opposed. Only Brennan and Murphy ever came to live permanently in Canberra.

Following the opening of the building in Canberra, the pattern came to be established for the Full Court to sit for two weeks of the month in 10 months of the year. The Full Court would still go on circuit most years to most State capitals. But it would no longer go on circuit to Sydney or Melbourne and it would not sit in Sydney or Melbourne other than to hear special leave applications. Except when it went on circuit to other State capitals, the High Court sat in Canberra.

The opening of the building in Canberra had three quite specific tangible benefits for the High Court as an institution. By the beginning of the Mason era, those benefits were combining to produce intangible improvements to its internal functioning and in consequence to its work-product.

The first was the coming together during Full Court sitting periods of all Justices with their staff in personalised permanent chambers arranged around a central library area on a single floor of the building – level nine. The floor plan created a sense of common purpose. It also created opportunities for casual and serendipitous contact on which the collegiality of any workplace so very much depends. The level nine floor plan was more significant in those respects than were the dining room and sitting room on level 10, neither of which received much use.

The second was the establishment across two more floors of the building – levels six and seven – of a new library containing a vast array of primary and secondary legal sources from a range of common law jurisdictions. The bookshelves in the chambers of each individual Justice continued to be stocked with the *Commonwealth Law Reports* and, as standard-issue, with the so-called 'rainbow series' of authorised reports of decisions of English courts. Other Australian law reports were close to hand, as they had been before the move to Canberra.

What was different was that, through the new library, for the first time in the history of the High Court, all Justices had immediate access to law reports and academic and professional writings from Canada, New Zealand and the United States. Facilitating access were professional librarians and even a legal research officer. These were still the days of manual library cards, legal indexes, and legal digests. Legal information was painstakingly extracted by pursuing ideas rather than searching for words. The sources of legal ideas, and with them the sources of legal inspiration, were vastly but manageably increased. The brain-numbing explosion of un-curated legal data that came with the advent of the internet to clutter legal discourse and to impede concision of legal thought was in the future.

When Mason CJ recorded in his swearing-in speech in 1987 that '[i]n stating the common law for Australia, we now place closer attention to the common law as is reflected in the judicial decisions and academic writings of other countries',[162] he was referring to a practice made possible by the establishment of the library seven years before.

The third tangible benefit of the building in Canberra was a dedicated conference room located on level nine. In the conference room was a large purpose-built round wooden conference table constructed with seven leaves to seat seven Justices. Judicial conferencing had occurred during the Chief Justiceship of Sir Owen Dixon but had fallen into disuse afterwards. Against that background Mason CJ instituted a practice of holding regular, formal judicial conferences. The conferences were held monthly around the table in the conference room towards the end of each two-week sitting period. Views were exchanged about the cases heard in the sitting period. Judgment writing responsibilities were assigned or volunteered. Updates were given on the preparation of judgments from previous sittings. The practice contributed to the formation of consensus on novel and contentious legal issues as well as to a more collaborative approach to judgment writing.

Another use of the conference room was for the holding of business meetings. Timed to pave the way for the opening of the High Court building in Canberra was commencement of the *High Court Act 1979* (Cth). The *High Court Act* formally declared that 'the seat of the High Court shall be at the seat of Government in the Australian Capital Territory'[163] and also gave to the court administration of its own affairs.[164] The Justices collectively had thereby taken on the extra-judicial role of acting as the board of management of a newly autonomous national government organisation. In time that role would become a source of friction with executive government as the High Court

162 (1987) 162 CLR x, ix.
163 *High Court Act 1979* (Cth) s 14.
164 Ibid s 17.

became drawn into the competition for funding that typically forms part of the annual fiscal cycle. For the time being, however, the new administrative role served only to enhance institutional independence. These were halcyon days.

VIII The Enduring Legacy

As much as the Mason era was a period of development, it was a period of transition. Whether or not my identification of the factors that contributed to the Mason era transformation of Australian law is accurate, hindsight makes it difficult now not to see that transformation as having been inevitable. Like 'the recession we had to have' in 1990 in order to 'retool' the national economy, the Mason era was the period of transition we had to have in order to reorientate the national judicial system.

The rate of development of legal principle that occurred in the Mason era was not sustained, nor did it need to be. The Mason era was followed by a necessary period of consolidation under the Chief Justiceship of Brennan. Following that was a sustained period of incrementalism, much of it self-consciously aligned to the Dixonian ideal.[165]

Though refined and to some extent confined by the High Court in later periods, none of the major developments in legal doctrine that occurred during the Mason era have been abandoned. None are any longer regarded as controversial. The changes to legal doctrine endured, and legal doctrine as then changed provided a foundation for subsequent developments.

More significant than any doctrinal change was the change wrought to the structure of the legal system in Australia. Australia now has, as it did not have before, a single, integrated, national system of courts administering a distinctively Australian body of jurisprudence with cognisance of law as administered in other national legal systems but with deference to none. 'The common law in Australia', French CJ said, 'is the common law of Australia'.[166] And that, in a sentence, is the enduring legacy of the Mason era.

165 Eg, M Gleeson, 'Judicial Legitimacy' in H Dillon (ed), *Advocacy and Judging*: *Selected Papers of Murray Gleeson* (Federation Press, 2017) 93, 98.

166 *Paciocco v Australian & New Zealand Banking Group Ltd* (2016) 258 CLR 525, 539 [9].