Integrating the Australian judicial system*

The Honourable Justice Stephen Gageler AC†

The emergence of a national judicial system is a relatively recent development in the history of legal institutions in Australia. His Honour describes the sequence of transformative statutory and doctrinal changes in the process which has led to the existence of an integrated system of Australian courts, with the High Court at its apex administering a single coherent body of law comprising the common law of Australia. His Honour next describes how a range of non-doctrinal decision-making principles came to be formulated in the course of that development. The article concludes with a discussion about how a national judicial system can best operate as an integrated whole.

The title of this article — "Integrating the Australian judicial system" — is designedly in the present continuous tense. The purpose is to underscore its central theme: that the integration of the Australian judicial system is a work in progress. The article itself is in three parts. The first two are descriptive. The third is normative.

The point I want to emphasise in the first — descriptive and longest — part, is that the emergence of a truly national judicial system is a relatively recent development in the history of legal institutions in Australia. The development post-dates the ultimate abolition of appeals to the Privy Council. That occurred only in 1986. The development occurred substantially in the ensuing two decades. It occurred, not as the result of constitutional amendment or co-ordinated legislative restructuring, but rather as the result of a profound transformation in the self-perception of the national judiciary itself. The psychological and sociological aspects of that transformation I will not attempt to explain. What I will describe is the sequence of transformative doctrinal developments.

What I will describe in the second part is how a range of non-doctrinal decision-making principles came to be formulated in the course of that development. Those newly formulated principles sought to define

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the roles that courts in different parts, and at different levels, of the emergent national legal system were to have in its operation. Principles pertaining to the respective roles of courts at co-ordinate levels within the national judicial hierarchy in the development and maintenance of substantive legal doctrine came around the middle of the 1990s. Principles pertaining to the respective roles of courts at different levels of the national judicial hierarchy came to be added in the early 2000s. Some have since been revisited and rearticulated. Of their nature, all will inevitably be re-evaluated and adjusted or supplemented as the national judicial system continues to mature.

The final normative part is short and modest in ambition. The most I want to achieve is to begin a conversation about how best to think about those relatively new and evolving non-doctrinal decision-making principles. The most I want to suggest is that they are best thought about holistically and harmoniously. The conversation about how any given principle is best expressed and applied is likely to be most productive if the national judicial system is treated as a functional whole within which trial courts, intermediate appellate courts and the constitutionally designated national supreme court — the High Court of Australia — each have distinctive and complementary roles.

The emergence of a truly national judicial system

The story of the emergence of a truly national judicial system might well begin at any time after about 1890. For my purposes, the story can well enough begin in 1977.

I choose to begin in 1977 because the Family Court of Australia and the Federal Court of Australia had both just been established, and because it was the year in which Sir Garfield Barwick (styling himself not as "Chief Justice of the High Court" but as "Chief Justice of Australia") delivered the inaugural "State of the Australian judicature" address to what was then the 19th national convention of the Law Council of Australia.[1] Appended to the published version of the address were some statistics.[2] Sir Garfield had compiled these statistics himself with some assistance from officers of the courts. No one before him appears ever to have thought to count the judiciary in Australia as a single cohort. From Sir Garfield Barwick's

1 G Barwick, "The state of the Australian judicature" (1977) 51 *ALJ* 480 (Australian Legal Convention, Sydney, 8 July 1977).

2 ibid at 495–500.

statistics, it can be gleaned that, in 1977, the total number of State Supreme Court judges nationwide was a little short of 100. The Australian Capital Territory and the Northern Territory each also had a Supreme Court. Only the Supreme Court of NSW then had a Court of Appeal. It had been established just over 10 years before.

Each Supreme Court was, in 1977, aptly named in the sense that it was understood to have the last word in declaring the law, including the common law, in and for its own State or Territory, subject only to appeal to either the High Court or the Privy Council. The relationships between the bodies of law declared by Supreme Courts in and for different States and Territories was understood to be the stuff of private international law. Indeed, the orthodox understanding was that, in questions of jurisdiction and of private international law, each State was to be treated "as a distinct and separate country".[3] New South Wales was to South Australia as NSW was to South Africa or Nova Scotia.

Appeals to the High Court in civil matters were, in 1977, still for the most part as of right, as they had been since 1903. The consequence was that, by 1977, the High Court had become burdened with low grade appeals to a degree that had become almost intolerable. Until the establishment of the Federal Court barely a year before, the High Court had also been labouring under the increasingly intolerable burden of needing to exercise original jurisdiction in a range of federal taxation and intellectual property matters. Appeals from the High Court to the Privy Council had been abolished in their totality in 1975. As at 1977, however, appeals from State Supreme Courts to the Privy Council continued in matters within State jurisdiction. That allowed for an amount of tactical gaming, about which I will say more.

Sir Garfield Barwick did not, in 1977, describe the state of the Australian judicature then as I am about to describe it. But the description that follows is not an unfair portrayal of it.

Australia was a nation made up of eight distinct and separate law areas each presided over by a separate and largely independent Supreme Court, only one of which had a permanent appellate division. Overlaying those eight distinct and separate State and Territory jurisdictions were the jurisdictions of two newly established federal courts each exercising specialist federal jurisdiction nationwide. The jurisdictional uncertainties

3 *Laurie v Carroll* (1958) 98 CLR 310 at 331.

attending the intersection of those specialist federal jurisdictions with the pre-existing State and Territory jurisdictions were yet to be worked out.

Overseeing overlapping parts of that complex and disaggregated structure were then two rival courts of final appeal. One of them, the High Court, was also a trial court, and was of no fixed address.

The other court of final appeal, the Privy Council, was an ad hoc tribunal, sitting as it had always sat in London, and still comprised predominantly of members of the Judicial Committee of the English House of Lords. Adding a further element of comic relief to that already absurd state of affairs, a member of the High Court who had also been appointed to the Privy Council would occasionally turn up in London on the hearing of an appeal from a decision of a State Supreme Court. The unannounced attendance would be to the chagrin of Australian counsel appearing in the appeal, part of whose anticipated pleasure in making the long journey to London at his client's expense would have been to get well away from the High Court.

For all of that, Sir Garfield Barwick was able to say, in 1977, that he had agreed to give the inaugural "State of the Australian judicature" address because it seemed to him that Australia was "slowly developing a sense of unity in the administration of the law":[4]

> Slowly, but [Sir Garfield was] inclined to think quite surely, there [was] developing an Australian judicial attitude towards the application of accepted doctrine and in the development of new doctrine.

The slow development Sir Garfield noted in 1977 was about to speed up dramatically.

Two legislative events were accelerants. The first was an amendment in 1984 to the *Judiciary Act* 1903 (Cth).[5] Sir Garfield had not supported the amendment, but it was championed by his successor in the office of Chief Justice, Sir Harry Gibbs. The amendment 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 or from any final decision of the Federal Court.[6] The same amendment introduced criteria to inform the discretion of the High Court to grant or

4 Barwick, above n 1 at 480.

5 *Judiciary Amendment Act (No 2)* 1984 (Cth).

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

withhold special leave.[7] Those criteria presaged that cases coming before the High Court on appeal would thereafter be confined to two broad categories: those which raised questions of law of public importance; and those in which the interests of justice required consideration by the High Court. The legislative contemplation then expressed was that 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.

The second accelerant legislative event was that which cemented the position of the High Court as *the* singular final appellate court. It was the commencement on 3 March 1986 at 5.00am Greenwich Mean Time of the *Australia Act* 1986 (Cth), which emphatically and irrevocably declared that no appeal would lie from that moment forward to the Privy Council "from or in respect of any decision of an Australian court".[8] Nine months later, five members of the High Court took the opportunity to recant earlier statements of colonial servility and to declare that decisions of courts in the UK were no longer to be treated as binding on Australian courts.[9] Two months later, Sir Anthony Mason succeeded Sir Harry Gibbs in the office of Chief Justice. On his swearing-in, Mason CJ referred to the abolition of appeals to the Privy Council as "a landmark in our legal history" as a result of which the High Court then had "exclusive final responsibility for declaring what is the law in Australia". The "obligation" of Australian courts, he then explained, was "to shape principles of law that are suited to the conditions and circumstances of Australian society".[10]

And so it was that, by the end of the 1980s, there had come to exist within Australia a judicial system which was distinctly national in the sense that all parts of the judiciary in Australia had been completely severed from all vestigial imperial ties. Integration of that recently nationalised judicial system into a functioning national judicial system was still to come.

There had been moves in the 1980s to bring about structural integration of the judicial system in Australia either through constitutional amendment or through nationally co-ordinated legislative action. The idea of structural

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7 ibid, s 35A.

8 *Australia Act* 1986 (Cth), s 11(1).

9 *Cook v Cook* (1986) 162 CLR 376 at 390.

10 A Mason, "Swearing in of Sir Anthony Mason as Chief Justice of the High Court", (1987) 162 CLR ix at x.

integration through constitutional amendment was extensively canvassed but ended up coming to nought. The idea of a lesser measure of structural integration through co-ordinated legislative action was tried, but for constitutional reasons ended up failing. I will trace the rise and fall of those two ideas briefly.

The Australian Constitutional Convention had, in 1983, resolved to recommend an amendment to the Constitution to integrate federal courts and State Supreme Courts into a single national system of courts.[11]

The national system envisaged would have had a trial level and an appellate level, both sitting below the High Court. The Convention referred the matter to a judicature sub-committee of one of its standing committees. The judicature sub-committee took a different view. It recommended instead the cross-vesting of jurisdiction at trial level among federal courts and State and Territory Supreme Courts, together with the creation of an Australian Court of Appeal sitting below the High Court.

The Australian Constitutional Convention, in 1985, pulled back from endorsing the creation of an Australian Court of Appeal, but did resolve in favour of the cross-vesting of jurisdiction at trial level.[12] Legislation to achieve that result was afterwards designed by the Special Committee of Solicitors-General and enacted by the Commonwealth, the States and the Northern Territory in 1987. Writing about it with Gavan Griffith QC and Dennis Rose in the *Australian Law Journal* in 1988, I described the cross-vesting scheme as "a radical exercise in co-operative federalism designed to eliminate jurisdictional limitation in superior courts within Australia, absent constitutional amendment, and without disturbing the integrity of the separate court structures".[13] It seemed to us to be a good idea at the time. And it seemed to work well in practice for about a decade. Alas, it was not universally seen to work in theory. The core component of the scheme, the vesting of State jurisdiction in federal courts, was always understood to be constitutionally controversial. After narrowly withstanding constitutional challenge in the High Court in 1998,

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11 Australia, Constitutional Convention, *Proceedings of the Australian Constitutional Convention*, 1983, South Australia, Vol I at 317.

12 Judicature Sub-Committee, "Report to Standing Committee on an integrated system of courts" in Australia, Constitutional Convention, *Proceedings of the Australian Constitutional Convention*, 1985, Brisbane, Vol II at 14; Australia, Constitutional Convention, *Proceedings of the Australian Constitutional Convention*, 1985, Vol I at 422.

13 G Griffith, D Rose and S Gageler, "Further aspects of the cross-vesting scheme" (1988) 62 *ALJ* 1016 at 1016.

that component of the scheme was to meet its constitutional quietus in a renewed challenge following a change in the composition of the High Court in 1999.

The "Australian Judicial System" had also been one of the main topics of inquiry by the Constitutional Commission established by the Hawke Government in 1986. The Constitutional Commission was a large and visionary project undertaken by large and visionary personalities. Its chair was the constitutional colossus, Sir Maurice Byers QC. Its other distinguished members were the Honourable Edward Gough Whitlam, Sir Rupert Hamer, Professor Enid Campbell and Professor Leslie Zines. In its inquiry into the topic of the judicial system, the Constitutional Commission had been assisted by a specialist Advisory Committee which was chaired by David Jackson QC and which included Professor James Crawford and Justice William Gummow, then on the Federal Court.

The Advisory Committee recommended that there should be no structural change.[14] Manifesting independence of thought and proclivity for expression of individual viewpoints, which is at times a strength and at times a weakness in our legal tradition, the Advisory Committee made that recommendation by majority, and for reasons which differed between members of the majority.[15] To its credit, the Constitutional Commission sifted its way through all of those differing views to arrive at a reasoned unanimous position of its own.

In its Final Report delivered in 1988, the Constitutional Commission agreed with the recommendation of the majority of the Advisory Committee.[16] The Constitutional Commission unanimously took the view that one Parliament and one government should be politically responsible for the establishment, maintenance, organisation and jurisdiction of, and appointments to, any one court. The reason the Constitutional Commission gave for taking that view was at once principled and pragmatic, reflecting the wisdom and experience of its members. The problem, as they saw it, was that:[17]

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14 Commonwealth Parliament, *Australian Judicial System*, Report of the Advisory Committee to the Constitutional Commission, 1987, pp xi, 34–39.

15 ibid, pp 39–41, 43.

16 Australia, Constitutional Commission, *Final Report of the Constitutional Commission*, Australian Government Publishing Service, 1988, Vol I, pp 369–371.

17 ibid, p 369.

> Any attempt to remove the court from a particular governmental system would mean the creation of an institution which would involve the participation of all Australian Governments, with none directly and fully responsible. This would inevitably fetter boldness and innovation and foster conservatism and inertia.

The upshot of a decade of constitutional deliberations was therefore that by the end of the 1980s it had become clear that integration of the Australian judicial system was not going to occur through wholesale structural change. The creation from the early 1990s of courts of appeal in Territories and States other than NSW would follow a pattern which would soon make it meaningful to refer to the existence of intermediate courts of appeal within Australia. But the following of that pattern would not involve implementation of any grand national design. There was none. Integration of the Australian judicial system would instead eventually be achieved through a change of judicial mindset reflected in doctrinal developments generated within the judicial system itself.

Two doctrinal developments can be seen in retrospect to have been milestones. One was a development in constitutional doctrine. The other was a development in common law doctrine. The two developments were subtly related.

The development in common law doctrine began in *Lange v Australian Broadcasting Corporation*[18] in 1997 and was substantially completed two years later in *Lipohar v The Queen*.[19] The development involved recognition of the common law *within* and *throughout* Australia as a single body of legal doctrine — the common law *of* Australia — which all courts in Australia were then and henceforth to be understood as having a role in administering.

Three members of the High Court in *Lipohar* explained the advent of the common law *of* Australia to be a corollary of the application of standard common law methodology by all Australian courts within a nationwide system in which the High Court had, in 1986, finally become the sole court of final appeal from each of them. "To assert that there is more than one common law in Australia or that there is a common law of individual States", they said, "is to ignore the central place which precedent has in

18 (1997) 189 CLR 250.

19 (1999) 200 CLR 485.

both understanding the common law and explaining its basis".[20] They continued:[21]

> [The High] Court is placed by ... the Constitution at the apex of a judicial hierarchy to give decisions upon the common law which are binding on all courts, federal, State and territorial. Different intermediate appellate courts within that hierarchy may give inconsistent rulings upon questions of common law. This disagreement will indicate that not all of these courts will have correctly applied or declared the common law. But it does not follow that there are as many bodies of common law as there are intermediate courts of appeal.
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> …
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> Until the High Court rules on the matter, the doctrines of precedent which bind the respective courts at various levels below it in the hierarchy will provide a rule for decision. But that does not dictate the conclusion that until there is a decision of the High Court the common law of Australia does not exist, any more than before 1873 it would have been true to say that there was not one English common law on a point because the Court of King's Bench had differed from the Court of Common Pleas.

That new understanding of the common law within Australia being a single coherent body comprising the common law of Australia would in due course be explained to encompass all judge-made law, including principles of equity and including judge-made principles of statutory interpretation.

The complementary development in constitutional doctrine began slightly earlier in *Kable v Director of Public Prosecutions (NSW)*[22] in 1996 and was not substantially completed until *Kirk v Industrial Court (NSW)*[23] in 2010. The development involved recognition of constraints on the permissible structure and jurisdiction of State Supreme Courts implied from the place that State Supreme Courts were, by then, seen to occupy within what Ch III of the Constitution refers to in the singular as "The Judicature". Indeed, it was in *Kable* that judicial reference was first made to a nationally integrated judicial system. The phrase was coined by Gaudron J who referred to "the integrated judicial system for which Ch III provides".[24]

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20 *Lipophar*, ibid at [44].

21 ibid at [45]–[46].

22 (1996) 189 CLR 51.

23 (2010) 239 CLR 531.

24 *Kable*, above n 22, at 103.

Her Honour postulated that State courts, in virtue of their capacities to be made repositories of federal jurisdiction, have "a role and existence which transcends their status as courts of the States".[25]

The further constitutional implication recognised nearly 15 years later in *Kirk* was founded on an understanding of the supervisory jurisdiction of each State Supreme Court combining with the constitutionally entrenched appellate jurisdiction of the High Court to provide a singular constitutional safeguard of the rule of law by which all governmental power throughout Australia, whatever its source, is limited in its scope and moderated in its exercise. Referring to the singular common law of Australia, six members of the High Court said in *Kirk*:[26]

> The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia. That is, the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are set by this Court. To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint. It would permit what [Professor Louis] Jaffe described as the development of "distorted positions".

The Australian judicature, as it has seemed since *Kirk* in 2010, is thus a very long way from the Australian judicature as it seemed when I chose to start the story in 1977. Not only has the notion of the existence of an integrated system of Australian courts with the High Court at its apex administering a single coherent body of law comprising the common law of Australia come to be orthodox. The integration is understood to have constitutional underpinnings. Whatever doctrinal principles Australian courts now develop, they now develop together.

The formulation of appropriate decision-making principles

I previously drew attention to how the emergence of a singular common law of Australia was explained in *Lipohar* to be a corollary of the application of standard common law methodology by courts linked together by reason

25 ibid.

26 *Kirk*, above n 23, at [99].

of the judgments of each being appealable ultimately exclusively to the High Court. Explaining that methodology, the joint judgment in *Lipohar* drew on a judicial observation which had been made by Barwick CJ just a year before this story began in 1976.

Chief Justice Barwick's observation was to the effect that the "ultimate foundation" of a judicial exposition of a principle of law being treated as binding precedent is "that a court or tribunal higher in the hierarchy of the same juristic system, and thus able to reverse the lower court's judgment, has laid down that principle as part of the relevant law".[27] Although nothing was made of it in *Lipohar*, Barwick CJ had, in the same passage, gone on to observe that "[o]utside the area of binding precedent, there is an area where comity or respect for the high standing of a court outside that juristic unit dictates that the views of such a court in general be accepted unless the court is clearly convinced of the erroneous nature of the decision or reasoning of that other court, and there are sufficient reasons for departing from that decision or that reasoning."[28]

The analytical distinction drawn by Barwick CJ had some utility. The distinction is between a strict principle of binding precedent operating between courts situated vertically in an appellate hierarchy, and a looser principle of non-binding precedent operating between courts situated horizontally in different parts of the same legal system charged with administering the same body of law.

As to the principle of binding precedent applicable between courts aligned on the vertical axis, it is interesting to note that Barwick CJ's conception of precedent being binding arising whenever a higher court "has laid down a principle as part of the relevant law" readily enough encompasses the "seriously considered dicta" which the High Court came to say was to be treated as binding in 2007 in *Farah Construction Pty Ltd v Say-Dee Pty Ltd*.[29] At least, that is so where a court higher in the appellate hierarchy has made clear its intention to seize an opportunity to clarify or restate a legal principle of general importance for the guidance of lower courts. Provided the court higher in the appellate hierarchy can be trusted to exercise proper

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27 *Lipohar v The Queen* (1999) 200 CLR 485 at 506 [46] quoting *Favelle Mort Ltd v Murray* (1976) 133 CLR 580 at 591.

28 *Favelle Mort Ltd*, ibid at 591.

29 (2007) 230 CLR 89 at [134]. Cf *Sellars v R* [1980] 1 SCR 527 at [4] and *R v Henry* [2005] 3 SCR 609 at [55]–[57], discussed in N Duxbury, *The intricacies of dicta and dissent*, Cambridge University Press, 2021, pp 103–104.

self-restraint, the systemic benefits of the court having the capacity to do so seem to me to outweigh the potential detriments.

As to the principle of non-binding precedent applicable between courts aligned on the horizontal axis, the language of comity was no doubt perfectly apt at the time Barwick CJ used it when State Supreme Courts still reigned supreme over systems of law which were treated as between each other as if they were those of separate countries. Comity conveys a mutuality of respect among equals. What comity does not quite convey is the critical contemporary notion of equals within the one system of law working together in a co-ordinated fashion to achieve a common goal.

That notion of working together in a co-ordinated fashion within a national system for the good of the national system was what I think was sought to be captured in the proposition propounded by the High Court in *Australian Securities Commission v Marlborough Gold Mines Ltd*[30] in 1993 that "[u]niformity 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". The proposition was generalised in *Farah Construction* in 2007. "Since there is a common law of Australia rather than of each Australian jurisdiction", it was then said, "the same principle applies in relation to non-statutory law".[31]

Just what it means to be convinced that an interpretation adopted by another court is plainly wrong has been the subject of rich and nuanced analysis in intermediate appellate courts beginning in the two years after *Farah Construction* with the decisions of the Courts of Appeal of Victoria and NSW in *RJE v Secretary to the Department of Justice*[32] and *Gett v Tabet*[33] respectively.

There is more to the relationships between courts within an integrated system than is captured in the applicable principles of precedent. Other relational principles are necessarily in play. Like the principles of

30 (1993) 177 CLR 485 at 492.

31 *Farah Construction*, above n 29, at [135].

32 (2008) 21 VR 526. See, especially, at [104], cited in *Hill v Zuda* (2022) 96 ALJR 540 at [25].

33 (2009) 254 ALR 504. See, especially, at [274]–[301]. See, also, a recent discussion by the Full Court of the Federal Court in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* (2021) 287 FCR 181 at [2]–[12].

precedent, they are not strictly principles of law but rather principles of practice which derive their normative force from common acceptance.[34] That is so despite them being from time to time expounded by courts in rule-like form. Like the principles of precedent, they are principles that concern how decisions are made.

There are, then, the principles that guide when any individual court will revisit and reconsider one of its previous decisions. The High Court laid down certain principles for its own guidance in *John v Federal Commissioner of Taxation*[35] in 1989. The High Court said the following year, however, that it regarded the extent to which any intermediate appellate court would treat itself as free to depart from its own previous decisions as a matter of practice for that intermediate appellate court to determine for itself.[36] Whether the approach of an intermediate appellate court to one of its own decisions can remain quite so much a matter of local choice in light of the approach now required to be taken to a decision of another intermediate appellate court might be thought to be open for discussion.

There are next the principles that inform the grant of leave or special leave to appeal from one court to another. To some extent, they are legislated. To some extent, they have been articulated in reasons for judgment. To a greater extent, they are implicit in practices that have developed and that continue to develop. As early as 1991, a unanimous High Court recognised that the special features of the legislated criteria for its own granting or withholding of special leave to appeal gave "greater emphasis to its public role in the evolution of the law than to the private rights or interests of the parties to the litigation".[37] One of the systemic advantages of having a court of final appeal sitting strategically above the fray is the ability of that court to cut through the muddle that will from time to time come to exist through the accumulation of irreconcilable precedents in one or more intermediate courts of appeal. Another is the ability on occasions to rewind a sequence of decision-making in intermediate appellate courts to correct what can be seen with the benefit of hindsight to have been a wrong turn at an earlier stage. One of the systemic advantages that an intermediate

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34 See R Cross and J Harris, *Precedent in English Law*, 4th edn, Clarendon Press, 1991, p 99; N Duxbury, *The Nature and Authority of Precedent*, Cambridge University Press, 2008, pp 16, 21.

35 (1989) 166 CLR 417 at 438–439.

36 *Nguyen v Nguyen* (1990) 169 CLR 245 at 250, 251, 268–269.

37 *Smith Kline & French Laboratories (Aust) Ltd v The Commonwealth* (1991) 173 CLR 194 at 218.

court of appeal, very much in the fray, tends to have over a court of final appeal is a more immediate appreciation of practical issues arising in trial courts and of the practical consequences of various potential resolutions. That advantage, as I see it, is most pronounced in matters of procedure and in areas of trial court practice that are high volume, and in areas of law in which legal doctrine needs to keep pace with rapidly changing commercial practice.

There are then the principles that govern the standard of review that will be adopted on an appeal. Any appeal, it has repeatedly been said, is a mechanism for the correction of "error".[38] But an "error" warranting appellate "correction" can rarely be equated simplistically and derogatively with a "blunder" or a "slip up". More than once in my decade or so on the High Court, I have found myself taking and expressing the view that one intermediate appellate court did exactly the right thing in following another intermediate appellate court but that the legal doctrine expounded by the first and adopted and applied by the second was in some way deficient. In those, and other, circumstances in which I find myself in the majority on the High Court, I have what Jackson J of the Supreme Court of the US famously referred to as the infallibility of finality.[39] That finality of institutional infallibility I am, of course, happy to embrace. It does not entail an entitlement to treat the makers of a decision with which I disagree as in any way at fault.

There are then the principles that govern what a court should do in anticipation of the possibility of an appeal to a higher court. In 2008, in *Kuru v New South Wales*,[40] the High Court suggested that an intermediate appellate court should generally deal with all grounds of an appeal to it, not just those identified as dispositive, on the basis that to do so would better enable the High Court itself on any appeal to consider all the issues between the parties rather than remitting the matter for further consideration. In 2019, in *Boensch v Pascoe*,[41] we drew back from the generality of that suggestion. We drew attention to the systemic importance of what we described as a principle of "judicial economy" according to which "an appellate court should confine itself to determining only those issues which it considers to be dispositive of the justiciable

38 See *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at [29]–[34]; *Norbis v Norbis* (1986) 161 CLR 513 at 518.

39 *Brown v Allen* (1952) 344 US 443 at 540.

40 (2008) 236 CLR 1 at [12].

41 (2019) 268 CLR 593 at [7]–[8].

controversy raised by the appeal before it". "Judicial economy", the court said, "promotes judicial efficiency in a common law system not only by narrowing the scope of the issues that need to be determined in the individual case but also by ensuring that such pronouncements as are made by appellate courts on contested issues of law are limited to those that have the status of precedent". "Within the integrated Australian legal system", it was said, "the mere potential for an appeal to be brought, by special leave, to the High Court provides no reason for an intermediate court of appeal to sacrifice those efficiencies".

Making it all work

That brings me finally, and briefly, to the normative part of this story. Every court in Australia has an institutional aspiration to facilitate the just resolution of justiciable controversies both "according to law"and "as quickly, inexpensively and efficiently as possible".[42]

For a national judicial system to operate best as an integrated whole in the development and maintenance of substantive legal doctrine, the aspiration to be just, timely and efficient which exists within courts should in principle be translated to the national judicial system as a whole. We should recognise as our common goal the development and maintenance of a substantive body of legal doctrine in and for Australia that is the best version of itself that collectively we can make it. We should recognise that courts at all levels of the system have a role in achieving that goal. We should recognise that those roles are not in all respects the same. We should recognise that not everything about those differing roles can or should be reduced to a rule. And we should be prepared to revise those decision-making principles we have reduced to rule-like form whenever we become convinced that we can do better.

42 An aspiration that is expressed in various statutes in broadly similar language. See, eg, *Federal Court of Australia Act* 1976 (Cth), s 37M(1); *Civil Procedure Act* 2005 (NSW), s 56(1); *Civil Procedure Act* 2010 (Vic), s 7(1).