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AUSTRALIA'S CONTRIBUTION TO THE COMMON LAW

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I am honoured by the invitation to address your distinguished Academy. The topic was suggested to me at the time of the invitation. I was happy to take up the suggestion but conscious that my response was likely to reflect a personal, although I hope not idiosyncratic, view. Any judge, or practitioner, or law teacher, asked to assess Australia's contribution to the common law is bound to be selective and subjective. As to selectivity, I have chosen to concentrate on aspects of the work of the High Court of Australia. There are many decisions of intermediate courts of appeal, and of individual judges, that qualify as important contributions to the law. Some of Australia's finest and most celebrated judges never sat on the High Court. Australia has produced eminent legal scholars and teachers. Australia's work in legislation and law reform has produced notable exports. The most familiar example is our Torrens system of land title, which has been taken up in other places including Singapore. I have confined my attention to the work of the High Court because that is an obvious place to look, and because it is a source of more than sufficient material for my purpose. As to

subjectivity, I am sure that aspects of the work of the High Court other than those I have chosen would be seen by many lawyers as more significant.

What amounts to a judicial contribution to the law is itself a question upon which opinions differ. There are some commentators who divide the judicial world into two parts, "progressive" and "conservative", and award congratulations according to the use of such labels. To those who admire "progressive" judges, a contribution is a decision that changes the law. The greater the change, the greater the contribution. To others, a contribution is a decision that reasserts established principle, although some change, preferably minimal or "incremental", is accepted. Opposing camps adopt slogans, designed, like medieval battle colours, for easy recognition of friends and enemies. A description of a change in the law as "radical" may be a signal for applause or hostility, according to taste. Yet most Australian judges accept Sir Frank Kitto's view that, in the waters of the common law, they have no more than riparian rights¹. They may disagree about what pollutes, or purifies, the waters, but they have a strong sense of custodianship of their common law heritage, and of the threats to that heritage posed by both the illegitimate use of power and unwillingness to develop the law where necessary.

My purpose is to illustrate the work of the High Court, by giving examples which show it acting sometimes creatively and sometimes traditionally, sometimes boldly and sometimes cautiously, but in all

cases consistently in the application of a judicial method that I believe to be in the mainstream of the common law tradition. I have selected certain areas of obvious importance, and a couple of leading High Court cases in each area, as examples of the work of the Court.

Before going to specific topics, I should mention, without elaboration, some features of the Australian legal landscape. At Federation, in 1901, the former self-governing Australian colonies became States of the new Commonwealth. Legislative, executive and judicial power was divided between Federal and State governments by a written Constitution. What the Constitution described as a Federal Supreme Court, to be called the High Court of Australia, was established in 1903. The High Court of Australia was to have two principal functions: to resolve disputes as to the meaning of the Constitution (many of which arise between Federal and State governments); and to decide appeals from State Supreme Courts and other Federal Courts. However, subject to a presently immaterial exception relating to certain constitutional cases, for most of the 20th century appeals still lay to the Privy Council, both from the High Court and direct from State Supreme Courts. Such appeals were gradually abolished, and finally came to an end in 1986. While such appeals lasted, decisions of the House of Lords, as well as the Privy Council, were regarded as authoritative in all Australian courts. It is only since 1986 that the High Court has been, for all purposes, at the apex of the Australian judicial system. There is now a single common law of Australia, ultimately determined by the High Court². In Australia, as in most common law jurisdictions, Federal and State

Parliaments now engage extensively in legislative intervention into all areas of the law, and much of the work of the Australian courts, including the High Court, consists of applying, and where necessary interpreting, statutes. This aspect of the High Court's work, like its role as a constitutional court, is largely outside the scope of this paper.

So long as appeals to the Privy Council continued, the capacity of the common law in Australia to differ from the common law as declared in the United Kingdom was very limited. Maintaining the uniformity of the common law was one of the principal functions of the Privy Council, and that uniformity was generally regarded in Australia, throughout most of the 20th century, as a strength. There came a time, in the 1970s, when the Privy Council accepted that the common law of Australia need not be the same as that of England³, but in practice, so long as Australian appeals could end up in London, there was little opportunity for the common law of Australia to strike out on a course of its own. Litigants could appeal directly from State Supreme Courts to the Privy Council, and thereby avoid the effect of an unfavourable precedent in the High Court. For example, the High Court in 1976 took a particular line in relation to recovery of damages in tort for relational economic loss⁴. In 1985, an appellant from the New South Wales Supreme Court bypassed the High Court and went straight to the Privy Council, which declined to follow the High Court's 1976 decision⁵. I appeared for the appellant in the last appeal from the High Court to the Privy Council, in 1980⁶. The Privy Council reversed the decision of the High Court on a point of contract law in a shipping case. It is hardly surprising that,

before appeals to the Privy Council came to an end, Australia's contribution to the common law rarely took the form of rebellion. Even so, rebellion happened occasionally. An example of that, on a point of major importance in the field of criminal law, is a convenient place to begin.

Criminal Law

In Australia, serious indictable offences are normally tried by jury, as in England. Although, in various jurisdictions, there has been extensive legislation in the area of criminal law, and some States have criminal codes, the common law remains important. I propose to give two examples of Australian departure from English decisions on issues of large theoretical and practical significance.

At common law, murder is unlawful homicide with malice aforethought⁷. The act of the accused causing the death of the victim (so far as presently relevant) is done with intent to kill or inflict grievous bodily harm. Instructions given to juries on the question of proof of intent to kill or inflict grievous bodily harm became complicated by the popularity of an idea that an accused person may be presumed to have intended the natural and probable consequences of his or her actions. The notion of presumption has different meanings, according to context. A presumption may be prima facie, or conclusive; weak or strong. There is a difference between telling a jury about a presumption and explaining that, in particular circumstances, an inference of fact is open. The idea

was resisted in the High Court. In 1952, in *Stapleton v The Queen*⁸, the Court said: "[t]he introduction of the maxim or statement that a man is presumed to intend the reasonable consequences of his act is seldom helpful and always dangerous". Yet in 1961, in *Director of Public Prosecutions v Smith*⁹, the House of Lords approved directions to a jury referring to the supposed presumption. This confusion of the subjective notion of intention with an apparently objective test involving a questionable presumption caused problems for Australian trial judges, who were accustomed to treating decisions of the House of Lords as binding. The High Court, in 1963, instructed them not to follow the House of Lords. In *Parker v The Queen*¹⁰ Dixon CJ, said of *Smith*:

"I think it forces a critical situation in our (Dominion) relation to the judicial authority as precedents of decisions in England. Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied *Smith's Case* I think that we cannot adhere to that view or policy. There are propositions laid down in the judgment which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring myself to accept ... I wish there to be no misunderstanding on the subject. I shall not depart from the law on the matter as we had long since laid it down in this Court and I think *Smith's Case* should not be used as authority in Australia at all.

I am authorized by all the other members of the High Court to say that they share the views expressed in the foregoing paragraph."

In England, *Smith's Case* was overtaken by legislation, but in 1987, in an appeal from the Isle of Man, the Privy Council held that the House of Lords in *Smith* had taken an erroneous view of the common law¹¹. In *R v Woollin*¹², Lord Steyn said that it is now clear that, in *Smith*,

the criminal law was set on a wrong course. Australia refused to take that course at a time in its legal history when such a refusal was striking.

Another example of the criminal law in Australia taking a different direction concerns the concept of dishonesty. Australian courts have declined to follow the 1982 Court of Appeal decision in *R v Ghosh*¹³, which seemed to have been accepted in 2002 by the House of Lords, in the civil context of dishonesty in relation to fiduciary duties, in *Twinsectra Ltd v Yardley*¹⁴. The High Court in 1998¹⁵, and again in 2003¹⁶, insisted that dishonesty is to be judged according to the standards of ordinary, decent people. The proper course for a trial judge, when dishonesty is an element of an offence, is to identify the knowledge, belief or intent which is alleged to render the accused's conduct dishonest and to instruct the jury to determine whether the accused had that knowledge, belief or intent, and, if so, whether according to the standards of ordinary, decent people such knowledge, belief or intent was dishonest. It is not necessary that the accused should have realised that his or her behaviour was dishonest according to those standards. Being morally obtuse is not an advantage.

In May 2007, in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*¹⁷, the Court considered the principles of equitable liability for knowing assistance in a dishonest and fraudulent design on the part of trustees stated in *Barnes v Addy*¹⁸. The Court said¹⁹:

"As a matter of ordinary understanding, and as reflected in the criminal law in Australia, a person may have acted dishonestly, judged by the standards of ordinary,

decent people, without appreciating that the act in question was dishonest by those standards."

Equity

Reference to a recent decision on equitable remedies provides a convenient introduction to current Australian doctrine, which reflects a certain caution in accepting some general theories that have been more popular elsewhere.

Estoppel was a subject of early consideration in the High Court. Australian judgments on estoppel from the 1930s²⁰ were later accepted in England as major contributions to equity jurisprudence. The decisions were described by Denning LJ in 1957²¹ as containing a formulation of the principle of estoppel by conduct that was "the most satisfactory that [he knew]". The principle was that the basis of estoppel is that it would be unfair or unjust to allow a party to depart from a particular state of affairs which another has taken to be correct²².

The use of the concept of unconscionability as a basis for equitable relief was established in a series of cases concerning the unconscientious use by one party to a transaction of some special disadvantage of the other party, the essence of such disadvantage being the inability of the other party to make a judgment as to his or her best interests. The kind of special disadvantage or disability in question covered cases such as the following. In *Wilton v Farnworth*²³ a person who was "markedly dull-witted and stupid" was persuaded to assign

property without having any idea of what he was doing. In *Blomley v Ryan*²⁴ the defendant took advantage of the plaintiff's alcoholism. In *Commercial Bank of Australia Ltd v Amadio*²⁵ guarantors with a limited understanding of English were pressed by their son to enter in haste into a transaction they did not understand.

In *Amadio*, Deane J, in a passage that has been influential in later Australian decisions and in New Zealand²⁶, said²⁷:

"Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. The adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief against unconscionable dealing may take a wide variety of forms and are not susceptible to being comprehensively catalogued."

One distinctive feature of Australian legal history has made a mark on our equity jurisprudence. Until 1970, Australia's largest, and by far its most litigious, jurisdiction, New South Wales, did not adopt the United Kingdom's Judicature Act system but, instead, in its court structure continued to administer law and equity separately. Notions of "fusion" were resisted, and emphasis was placed upon distinctions that were regarded in England as having been swept away. There has been a similar resistance to certain all-embracing theories of unjust enrichment in the context that may be described for convenience as restitutionary remedies.

In consequence of the division of legislative power under its Constitution, Australia has a long history of challenges to the validity of taxes imposed by Federal or State governments on the ground that they exceed legislative power or infringe some constitutional prohibition. One of the most notorious areas for such disputes was that created by s 90 of the Constitution, which gives the Federal Parliament exclusive power to impose duties of excise. Much judicial effort has been directed towards deciding whether particular State taxes amounted to invalid duties of excise²⁸. Naturally, when taxes have been declared invalid, taxpayers have sued to recover overpaid taxes.

Claims to recover mistaken overpayments of money arise in other areas as well. A principle of common law long thought to stand in the way of many such claims rested on the supposed distinction between payments under mistake of fact and payments under mistake of law. In 1992, the High Court decided that there was no general rule precluding recovery of moneys paid under mistake of law. It was only in the 19th century that a distinction had been made in this context between mistakes of fact and law²⁹. After 1802³⁰, the rule of the common law was taken to be that money paid with full knowledge of the facts was voluntarily paid and could not be recovered. In *David Securities Pty Ltd v Commonwealth Bank of Australia*³¹ the High Court, after referring to widespread criticism of the rule, said:

"If the ground for ordering recovery is that the defendant has been unjustly enriched, there is no justification for drawing distinctions on the basis of how the enrichment was gained, except in so far as the manner of gaining the enrichment bears upon the justice of the case."

However, the plurality judgment³² warned against the view "that in Australian law unjust enrichment is a definitive legal principle according to its own terms", and said that it is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair or unconscionable. "Instead, recovery depends upon the existence of a qualifying or vitiating factor such as mistake, duress or illegality."

More recently, a present member of the Court, Gummow J, returned to the theme³³:

"[There should be] caution in judicial acceptance of any all-embracing theory of restitutionary rights and remedies founded upon a notion of 'unjust enrichment'. To the lawyer whose mind has been moulded by civilian influences, the theory may come first, and the source of the theory may be the writing of jurists not the decision of judges. However, that is not the way in which a system based on case law develops; over time, general principle is derived from judicial decisions upon particular instances, not the other way around.

...

Unless, as this Court indicated in *David Securities Pty Ltd v Commonwealth Bank of Australia*, unjust enrichment is seen as a concept rather than a definitive legal principle, substance and dynamics may be restricted by dogma. In turn, the dogma will tend to generate new fictions in order to retain support for its thesis. It also may distort well settled principles in other fields, including those respecting equitable doctrine and remedies, so that they answer the newly mandated order of things ... There is support in Australasian legal scholarship for considerable scepticism respecting any all-embracing theory in this field, with the treatment of the disparate as no more than species of the one newly discovered genus."

Contract

From the field of contract law, I have chosen three examples of areas where the High Court's jurisprudence has been influential.

In 1933, Dixon J, in *McDonald v Dennys Lascelles Ltd*³⁴, wrote a leading judgment clarifying the consequences of acceptance of a repudiatory breach of contract and drawing attention to the need to avoid confusing two different kinds of rescission: one on the ground of some vitiating element in the contract; the other by acceptance of repudiatory breach. It is now common in Australia to refer to the second as termination for breach. The case concerned a contract for the sale of land, with the purchase price payable in instalments, and a guarantee of the obligations of the purchaser. The purchaser defaulted and the vendor rescinded (that is, terminated). The issue concerned the guarantor's obligations in respect of unpaid instalments, but the judgment addressed a wider question. Dixon J explained³⁵:

"When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach."

In 1980, in *Johnson v Agnew*³⁶ Lord Wilberforce, speaking for the House of Lords, referred to the English authorities on the question as "weak and unconvincing in principle" and preferred the Australian authorities, which he said offered "a more attractive and logical approach from another bastion of the common law"³⁷. He referred also to a later High Court decision, *Holland v Wiltshire*³⁸, as stressing the need to avoid confusing the consequences of discharge for breach with those of rescission for some invalidating cause. English authority in the Court of Appeal, said Lord Wilberforce, "cannot stand against the powerful tide of logical objection and judicial reasoning"³⁹.

The second example concerns the effect of a contract entered into upon a common but mistaken assumption of fact. English authority, as in *Bell v Lever Bros Ltd*⁴⁰, analysed the problem in terms of potential nullification of consent to be contractually bound. In *McRae v Commonwealth Disposals Commission*⁴¹, the High Court took a different approach, analysing the problems in terms of construction of the contract. A contract was entered into for the sale and purchase of a ship believed to be lying as a wreck at a certain location. In truth no such vessel was to be found there. The vendor argued that the contract was void, but the High Court held the purchaser was entitled to damages because, on the proper construction of the contract, the vendor had promised that there was an oil tanker at the locality given. This approach to the question was widely regarded as preferable to becoming involved in difficult distinctions between mistakes about

existence of subject-matter, and mistakes about quality⁴². On the other hand, later English authorities appear to adhere to the approach in *Bell v Lever Bros*, or alternatively to look to frustration, although acknowledging that the first question to ask in a given case may be a question of construction⁴³. The present Lord Chief Justice, in 2003, after referring to *McRae*, said that there is room for a doctrine of common mistake, and that it "fills a gap in the contract where it transpires that it is impossible of performance without the fault of either party and the parties have not, expressly or by implication, dealt with their rights and obligations in that eventuality."⁴⁴ In brief, the English courts have not accepted that a search for the meaning of the contract is the whole solution to the problem of common mistake, but the idea that in such cases it is necessary to consider whether there has been an allocation of risk to be found in the express or implied terms of the contract has become orthodox.

I will not develop the third example, but it should be mentioned. On the law of privity of contract, and the rights of third parties, judgments in the High Court in *Coulls v Bagot's Executor and Trustee Co Ltd*⁴⁵ and *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*⁴⁶ have been referred to with approval by the House of Lords⁴⁷, and the Supreme Court of Canada⁴⁸. In 1996 the Privy Council⁴⁹, in the context of a commercial issue, adverted to the possibility of recognising "a fully-fledged exception to the doctrine of privity of contract", and said that "[i]t is not far from their Lordships' minds that, if the English courts were minded to take that step, they would be following in the footsteps of the

Supreme Court of Canada ... and, in a different context, the High Court of Australia"⁵⁰.

Tort

Australia, like all other common law jurisdictions, has experienced the relentless progress of the tort of negligence. Lord Atkin's formulation, in *Donoghue v Stevenson*⁵¹, of an over-arching principle to decide when a defendant will be made liable for damage caused to another through failure to take reasonable care was a triumph of common law jurisprudence. Yet its full implications are still being worked out. *Donoghue v Stevenson* was decided in the House of Lords by a 3-2 majority. The dissenting judgments may now be of historical interest only, but part of that interest lies in the fact that they foresaw difficulties some of which remain unresolved⁵². *Donoghue v Stevenson* was a product liability case, concerning personal injury to a consumer. The common law has not had much difficulty with recognising a general duty to take reasonable care to avoid inflicting personal injury. Yet the law is concerned not merely with the rights of plaintiffs but also with the responsibility of defendants. The circumstances in which one person's careless act or omission may cause some kind of harm to another are so variable and extensive that to subject people to potential liability for all the foreseeable consequences of carelessly inflicted harm would impose an intolerable burden. Hence, the law searches for controlling factors which provide a rational definition of the extent of one citizen's obligation to take care not to injure another. Consistently with Lord Atkin's formula

there were a number of such controls: duty of care; reasonable foreseeability of harm; remoteness of damage. He was dealing with a case of an act causing physical injury. What of cases, not of acts, but of omissions? The common law has never recognised, for example, a general duty to rescue others from danger. Liability for acts and omissions is not co-extensive. What of cases, not of physical conduct, but of spoken or written words? The careless imparting of advice or information is a common cause of harm, and the circumstances in which that occurs are various, ranging from business or professional advice to social or family settings. It was not until *Hedley Byrne & Co Ltd v Heller & Partners Ltd*⁵³, that the House of Lords took the step of recognising liability for negligent, as distinct from fraudulent, advice or information, and even then the principles required further refinement. The common law, including the common law of Australia, is still struggling with the principles according to which carelessly inflicting financial harm will be actionable⁵⁴. The conceptual problems are formidable. The circumstances in which one person's conduct might cause foreseeable economic loss to another, and the difficulty of distinguishing between direct and indirect loss, weigh against imposing a duty to avoid causing financial harm as general and extensive as the duty to avoid causing physical injury. Competition law in some respects permits and even obliges businesses to act in ways that are likely to cause financial harm to their competitors. How could competition law be reconciled with a general duty to avoid causing foreseeable economic harm? Furthermore, especially in the area of economic harm, but also potentially in other areas, allocation of risk is often effected by contract,

and in the case of some forms of relationship it is fairer and more efficient to leave the solution to the law of contract.

It is not self-evident that legal progress dictates an ever-widening imposition of liability upon defendants. In some fields, such as liability for physical damage caused by motor vehicle accidents or workplace injuries, schemes of compulsory insurance have fostered an assumption that the proper role of the law is to compensate injured plaintiffs, and that a legal principle that operates in favour of defendants is regressive. A similar assumption is at work in other areas where insurance, although not compulsory, is readily available and the cost of it predictable. Yet, as the boundaries of liability in negligence are being extended, it is evident that not all potential liability is readily insurable, and some forms of potential liability impose unacceptable burdens on individuals, or on the public purse. The obligations that the law imposes upon potential defendants are as important as the rights the law confers upon potential plaintiffs.

In the last 10 years, a number of decisions of the High Court of Australia have reflected a resistance to the assumption that all expansions of liability in negligence are legally progressive. One manifestation of that resistance is in the current High Court's unwillingness to adopt a single comprehensive test for determining whether there exists, between the parties, a relationship sufficiently proximate to give rise to a duty of care of the kind necessary for actionable negligence. In a series of decisions, the Court has said that

the three-stage approach of the House of Lords in *Caparo Industries Plc v Dickman*⁵⁵ to the determination of a duty of care does not represent the law in Australia⁵⁶. The reasons for declining to follow that approach were explained in *Sullivan v Moody*⁵⁷. They reflect caution, rather than any radical difference in legal theory. In this field, the emphasis in Australia has been on incremental development of principle, although it may be remarked that the expression "incremental development" carries the unfortunate implication that all change ought to be in the direction of expanding liability.

One concept that has been emphasised by the current High Court is that of legal coherence. In *Sullivan v Moody*, the fathers of children who had been examined by medical practitioners and social workers employed by a government authority for evidence of sexual abuse sued those persons, and the government, for damages for negligence in the conduct of examinations which resulted in reports that the children had been sexually abused. The plaintiffs alleged that as a result of the negligent examination, diagnosis, and reporting they had suffered shock, distress, psychiatric injury and consequential personal and financial loss. Their claims were struck out. The High Court held that it would be inconsistent with the proper and effective discharge of the professional or statutory responsibilities of those involved in investigating and reporting upon allegations of sexual abuse for them to be subject to a legal duty to take care to protect persons who were suspected of being the sources of the harm. The emphasis on the need for coherence in the law, so that people are not subjected to tortious responsibility

inconsistent with duties, rights or freedoms declared by statute or common law, has been significant in recent years in keeping the tort of negligence within reasonable bounds.

It would be misleading, however, to give the impression that Australia's principal contribution to tort law in recent years has been caution. The High Court has extended liability for what is sometimes, perhaps inappropriately, called nervous shock. In *Tame v New South Wales*⁵⁸, a 2002 decision, it was held that a defendant may owe a duty to take reasonable care to avoid psychiatric injury to a plaintiff, notwithstanding that such injury did not involve a "sudden shock" and was not caused by direct perception of death or injury to the primary victim or of its immediate aftermath.

A rather distinctive Australian development of the common law (although a change that was effected by legislation in some other jurisdictions) was the rejection, during the 1980s, of the approach to occupiers' liability which divided entrants onto land into various categories and defined the content of the occupier's duty according to the category to which the entrant was assigned. There was a degree of artificiality about the differences between those categories. In *Australian Safeway Stores Pty Ltd v Zaluzna*⁵⁹, the High Court declined to follow the decision of the House of Lords in *London Graving Dock Co Ltd v Horton*⁶⁰, and held that an occupier's liability to an entrant was to be determined, having regard to all the relevant circumstances, by the application of the general principles of the law of negligence and not by

reference to special categories of entrant. Nevertheless, as the Court's recent decision in *Thompson v Woolworths (Qld) Ltd*⁶¹ illustrates, measuring an occupier's obligation to an entrant by reference to the flexible standard of reasonable care, as part of the general law of negligence, does not deny the potential relevance of the kinds of circumstance that were previously dealt with by inflexible categorisation. To reject the categorisation is not to reject the need to consider such circumstances when deciding what reasonableness requires of an occupier in his or her relations with those who enter upon land. In a number of recent cases⁶², members of the Court have stressed that reasonableness, according to prevailing community standards, does not require occupiers either to remove, or to warn of, all potential hazards. There is no such thing as a risk-free dwelling. Indeed, many people can only afford to live in dwellings that are in an imperfect state of repair. Australian householders do not erect signs at the entrance to their dwellings warning entrants of all the potential hazards they might encounter if they fail to take reasonable care for their own safety. A reasonable response to some risks is to expect other people to be careful. Potential liability of governments and public authorities for hazards associated with enjoyment of public recreational areas has been an abundant source of litigation in Australia. Recreational and sporting activities are often known to be dangerous; the risk may add to the enjoyment. It is essential to keep in mind that the central concept in the law of negligence is that of reasonableness. There is a difference between taking reasonable care and assuming the obligations of an insurer.

Many years before the decision in *Zaluzna*, the law of Australia had departed from English common law in relation to one particular aspect of occupiers' liability in negligence - the duty of care owed to innocent trespassers. Such trespassers were often children, who presented an awkward problem. As a general rule, an occupier was regarded as being liable to a trespasser only for some act done with deliberate intent to harm or at least with reckless disregard for safety⁶³. In order to avoid the harshness of this rule, courts tended to classify some innocent intruders, especially children responding to an allurements, as entering pursuant to an implied licence. In 1960, in *Commissioner for Railways (NSW) v Cardy*⁶⁴, the High Court said this approach could no longer command intellectual assent, and that the problem was to be addressed by the application of basic principle. The Privy Council disapproved of *Cardy*⁶⁵, but later the House of Lords, upon further consideration, adopted an approach similar to that which had been taken in Australia and described the Privy Council's decision as "a step backwards"⁶⁶. The Supreme Court of Canada also rejected to implied licence fiction⁶⁷. As has already been noted, the further development of the Australian law in *Zaluzna* subsumed the particular issue of trespassing.

Before leaving the law of tort, I should refer to two High Court decisions of the last seven years which have altered the Australian choice of law rules applicable to tort actions which have connections with two or more jurisdictions, or law areas. This is a common problem

in Australia because of our Federal system. State and Territory legislation affecting the outcome of tort litigation varies. For example, some States and Territories have legislated to limit damages that may be awarded in cases of personal injury. Motor vehicle or work-related injuries may arise from activities that have cross-border aspects. Choice of law principles of the common law determine which substantive law will be applied by the court of the forum in which the plaintiff commences proceedings, and also which rules of law will be treated as substantive and which will be treated as procedural. In *John Pfeiffer Pty Ltd v Rogerson*⁶⁸ the Court held that the law governing all questions of substance in Australian torts involving an interstate element was the *lex loci delicti*, and that a limitation on damages was a matter of substance rather than procedure, and therefore was governed by the *lex loci delicti*. In *Regie Nationale des Usines Renault SA v Zhang*⁶⁹, the Court held that the substantive law for the determination of rights and liabilities in respect of foreign torts was the *lex loci delicti*, and the double actionability rule had no application in Australia to international torts.

Administrative law

The last area of jurisprudence to which I shall refer is governed by constitutional and statute law, as well as common law, and for that reason the Australian solutions to some problems differ from those of comparable jurisdictions. It is, however, too important a subject to overlook and, in addition, it may be of some use if I explain the context in which Australian decisions are made.

Judicial review of administrative action takes place in Australia at two levels: Federal and State or Territory. What follows concerns the Federal level, although the High Court, in its appellate role, also deals with State or Territory regimes.

The starting point is s 75(v) of the Constitution, which confers on the High Court jurisdiction in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. This jurisdiction, which cannot be taken away or altered by Parliament, empowers the High Court to compel officers of the Commonwealth (an expression which includes all Ministers and public officials) to act according to law. Section 75(v) gives the Court power to grant relief against an unlawful exercise of, or a refusal to exercise, Commonwealth executive authority. The High Court also has the power to make orders of certiorari, for the effective exercise of its powers under s 75(v)⁷⁰, and in the exercise of other aspects of its original jurisdiction⁷¹. The power to grant injunctive relief is of particular significance in cases of threatened or continuing illegality. The jurisdiction conferred on the High Court by the Constitution has also been conferred by Parliament on the Federal Court of Australia and the Federal magistracy, but, unlike the constitutional jurisdiction of the High Court, those conferrals, having been made by Parliament, can be modified or withdrawn. The centrality of s 75(v) of the Constitution to judicial review of executive action in Australia, coupled with the principle of the separation of powers which has been held to be inherent in the

structure of our federal Constitution, explains the focus upon the legality of the action under review rather than the substantial merits of such action. A search for jurisdictional error, and an insistence upon distinguishing between excess of power and factual or discretionary error, remain characteristic of our approach to judicial review. Not all errors of law go to jurisdiction and therefore form a basis for the issue of one of the constitutional writs. Certiorari, which is not a constitutional writ, lies for error of law on the face of the record⁷².

Another important feature of the Australian context, and one that is sometimes overlooked by commentators unfamiliar with that context, is the Federal legislation which deals with review of administrative decision-making. That legislation includes an extensive system of merits review. The provision by legislation for a system of independent merits review within the executive branch of government, and the separate legislative scheme for judicial review of administrative action on legally defined grounds, which exists alongside the jurisdiction conferred by s 75(v) of the Constitution, conforms to our constitutional separation of powers. What is sometimes seen as legalism in our approach to judicial review reflects our constitutional arrangements and also the existence of a separate system of merits review.

The *Administrative Appeals Tribunal Act 1975* (Cth) (the AAT Act), and the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) were both part of a Federal legislative scheme recommended by a Commonwealth Administrative Review Committee. Judicial review,

carried out by Federal courts under the ADJR Act, is available on specified grounds, including error of law, whether or not the error appears on the record of the decision, so long as it is material⁷³. Other grounds of review reflect to a large degree the grounds for the prerogative writs. The AAT Act established a tribunal which is part of the executive branch of government, but which has always been headed by a federal judge, includes judges as its members, and follows the judicial model of procedure. Its review function involves deciding whether reviewable decisions were the correct or (in the case of discretionary decisions) the preferable decision. Members of the Tribunal also include people with special experience or expertise in the areas of reviewable decision-making.

Australian administrative law has not taken up the North American jurisprudence of judicial deference⁷⁴, nor has it embraced the wide English concept of abuse of power as a basis for judicial intervention in administrative decisions⁷⁵. The focus of judicial review is on jurisdiction and legality, including in those concepts the grounds for review provided in the ADJR Act. (Subject to any statutory qualification, breach of the rules of procedural fairness is an excess of jurisdiction⁷⁶). The existence of a strong system of merits review within the executive branch of government relieves the judicial branch of pressure to extend judicial review beyond its constitutional and legal limits. Our approach to administrative law is influenced by the constitutional and legislative context in which we operate.

Conclusion

The examples of the work of the High Court that I have presented will not, I hope, suggest that I think that the Court is seen to its best advantage only when it is being innovative or only when it is resistant to change; only when it is "progressive" or only when it is "conservative". The Court does not pursue self-consciously any intellectual or political fashion. A recently retired member of the Court, Justice McHugh, in 2004 delivered a lecture which contained a detailed and compelling refutation of the suggestion that there had been significant changes in the constitutional jurisprudence of the Court over the previous 15 years, and of popular labels applied to the Court at different stages of that period⁷⁷. It seems to have made little impact on some who cling to convenient, labels. The common law work of the Court, when considered as a whole, also defies simplistic characterisation. A problem of legal specialisation is that the work of the Court is sometimes characterised by people who have not considered that work in its entirety, but have concentrated on their areas of particular interest.

Although on evaluation of the Court's contribution directs particular attention to cases where the Court's jurisprudence may have been different from that of courts of other common law jurisdictions, the Court has always been in the mainstream of the common law tradition, and its decisions generally have been in line with decision of its counterparts elsewhere. Consistency and reasonable certainty are themselves values inherent in the common law. Adherence to established principle

and to precedent, and respect for the wisdom and experience of others, are part of the foundation of the authority of any ultimate appellate court. If such a court were to carry on its business guided by nothing except what was regarded as the wisdom of its current members, then the opinions of its current members would be written in water, for they could claim no authority binding on their successors. "[T]he effort to be wiser than the laws" would be self-destructive⁷⁸. Perhaps the High Court is making its most significant contribution to the common law when, in its day-to-day business, it participates, together with its counterparts in other jurisdictions, in the principled application and, where necessary, orderly and predictable development, of that body of wisdom and experience which is our common inheritance.

The common law judicial method exerts a certain pressure for conformity. Innovation is not valued for its own sake. A mid-twentieth century Australian Chief Justice's criticism of "the conscious judicial innovator" who is bound "by no authority except the error he committed yesterday"⁷⁹ may seem discordant in an age that tends to equate change with progress. Yet, by comparison with most other intellectual disciplines, the judicial technique does not lend itself to abrupt and radical changes of direction. In Australia, there are about 1000 judges and magistrates, and the decisions of all but seven of them are routinely subject to appellate review. Intermediate appellate courts, and the High Court, act in a collegiate fashion, deciding cases either unanimously or by majority. The principle of *stare decisis* is respected. No individual judge has the capacity to bring about legal change, which can only come

from binding decisions. Furthermore, the reasoning employed by judges emphasises continuity and respect for precedent. Because no individual appellate judge can change the law without gaining the support of a majority of the others on that judge's court, a process of reasoning based on personal inclination or preference leads nowhere. If one member of a court of final appeal favours change, he or she needs to persuade a sufficient number of the other members of the court to agree in order for the change to come about, and that can only be done by a process of justification which appeals to principles that are external to the individual judge and that are accepted by a sufficient number of his or her judicial colleagues to be reflected in the decision of the court.

I should mention a technical matter that is often overlooked when comparisons are made between the work of the modern High Court and that of its predecessors. For most of the last century, in civil cases litigants could appeal as of right to the High Court provided the matter in dispute in the case was of a certain value, which was rather modest. In consequence, much of the work of the Court consisted of dealing with disputes that could be resolved by the application to the facts of settled legal principle. In addition, as I mentioned earlier, there were appeals to the Privy Council. By a gradual process, culminating in the 1980s, appeals to the Privy Council were ended. Since 1984, appeals to the High Court have required special leave. Although there is a broad provision to cover cases where the interests of justice require special leave, the statutory grounds for special leave are such that it will not ordinarily be attracted in cases where the law is clear and settled.

Special leave is much more likely to be given in cases where one party is proposing a development in the law, or there is a conflict of authority on a point, or a disagreement between members of past courts, or between other courts in the judicial hierarchy. Attribution to the Court of a surge of radicalism following the end of appeals to the Privy Council is sometimes based upon a selective reading of the Court's jurisprudence. It also overlooks the change in the nature of the work of the Court following the introduction of the requirement of special leave to appeal. A Court that spends most of its time dealing with cases where one party is pressing for legal change is more likely to appear either radical or conservative, according to the outcomes and the inclinations of the commentator, than a Court that spends most of its time dealing with cases that everyone expects to be resolved by the application of settled legal principle to the particular facts.

In the common law tradition, courts and judges do not have agendas. Litigants decide what matters will be presented to the High Court by way of application for special leave to appeal and, if successful, by way of appeal. Counsel decide what issues will be raised for decision. If the Court were ever so unwise as to develop an agenda for legal change, it would be frustrated by the system within which it operates. To some, the Court will always appear disturbingly aggressive, and to others disappointingly passive.

One hundred years ago, GK Chesterton told a story about adventure⁸⁰. It concerned an English yachtsman who, miscalculating his

course, landed in England under the impression that it was an island in the South Seas. Heavily armed and talking in sign language, he advanced to plant the British flag on what turned out to be the Pavilion at Brighton. This, Chesterton said, was a happy man, for within a few minutes he experienced the thrill of discovery and the reassurance of coming home. Chesterton said he had done the same thing: he set out to invent a heresy, and when he had put the last touches to it, he discovered that it was orthodoxy⁸¹. Developments in the common law, like re-affirmations of accepted principle, are generally made in the name of orthodoxy, and justified by techniques of reasoning that appeal to doctrine accepted by those whose concurrence is necessary for such developments to occur, and by those whose conformity is required for such developments to remain stable. Those techniques of reasoning are the surest indication of Australia's commitment to the common law tradition. Specific answers to particular problems often are contestable. A disagreement about the common law would be unlikely to reach the High Court if there were only one outcome reasonably possible. Yet the manner in which the Court sets about reaching, and justifying, a conclusion has always been, and I trust remains, orthodox.

* Chief Justice of Australia. I am grateful for the assistance of my Associates, James Hutton and David Hume.

¹ *Rootes v Shelton* (1967) 116 CLR 383 at 387.

² *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 514 [2].

³ eg *Geelong Harbour Trust Commissioners v Gibbs Bright & Co* [1974] AC 810.

⁴ *Caltex Oil (Aust) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529.

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- 5 *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd* [1986] AC 1.
- 6 *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon Pty Ltd* (1980) 144 CLR 300.
- 7 Stephen, *A Digest of the Criminal Law* (1877) at 161. For a discussion of the Australian history, see *R v Lavender* (2005) 222 CLR 67.
- 8 (1952) 86 CLR 358 at 365.
- 9 [1961] AC 290.
- 10 (1963) 111 CLR 610 at 632-633.
- 11 *Frankland v The Queen* [1987] AC 577.
- 12 [1999] 1 AC 82 at 90.
- 13 [1982] QB 1053.
- 14 [2002] 2 AC 164 at 171-175.
- 15 *Peters v The Queen* (1998) 192 CLR 493.
- 16 *Macleod v The Queen* (2003) 214 CLR 230.
- 17 (2007) 81 ALJR 1107.
- 18 (1874) LRA Ch App 244 at 251-252.
- 19 (2007) 81 ALJR 1107 at 1147 [173] cf *Twinsectra Ltd v Yardley* [2002] 2 AC 164; *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2006] 1 WLR 1476.
- 20 *Thompson v Palmer* (1933) 49 CLR 507; *Grundt v Great Boulder Proprietary Gold Mines Ltd* (1937) 59 CLR 641.
- 21 *Central Newbury Car Auctions Ltd v Unity Finance Ltd* [1957] 1 QB 371.
- 22 See also *Woodhouse Ltd v Nigerian Produce Ltd* [1971] 2 QB 23 at 44; *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225 at 241-242; *Amalgamated Investment & Property Co Ltd (In Liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84; *Gillett v Holt* [2001] Ch 210; *National Westminster Bank plc v Somer International (UK) Ltd* [2002] QB 1286.
- 23 (1948) 76 CLR 646.
- 24 (1956) 99 CLR 362.
- 25 (1983) 151 CLR 447.

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- 26 *Moffatt v Moffatt* [1984] 1 NZLR 600; *Nichols v Jessup* [1986] 1 NZLR 226; *Bowkert v*
Action Finance Ltd [1992] 1 NZLR 449.
- 27 (1983) 151 CLR 447 at 474.
- 28 cf *Ha v State of New South Wales* (1997) 189 CLR 465 and the cases there
discussed.
- 29 American Law Institute, *Restatement of the Law of Restitution*, (1937) at 179.
- 30 Following *Bilbie v Lumley* (1802) 2 East 469; 102 ER 448.
- 31 (1992) 175 CLR 353 at 375.
- 32 (1992) 175 CLR 353 at 378-379 per Mason CJ, Deane, Toohey, Gaudron and
McHugh JJ.
- 33 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 544-545.
- 34 (1933) 48 CLR 457.
- 35 (1933) 48 CLR 457 at 476-477.
- 36 [1980] AC 367.
- 37 [1980] AC 367 at 396.
- 38 (1954) 90 CLR 409.
- 39 [1980] AC 389 at 396-398.
- 40 [1932] AC 161.
- 41 (1951) 84 CLR 377.
- 42 eg Shatwell, "The Supposed Doctrine of Mistake in Contract", (1955) 33 *Canadian Bar*
Review 164; Fleming, Common Mistake (1952) 15 *Modern Law Review* 229; Slade,
The Myth of Mistake in the English Law of Contract (1954) 70 *LQR* 385, *Rose v Pim*
[1953] 2 QB 450 at 460 per Denning LJ.
- 43 eg *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1988] 3 All ER
902 at 912, [1989] 1 WLR 255 at 268; *Great Peace Shipping Ltd v Tsavliris Salvage*
(International) Ltd [2003] QB 679 at 703-704.
- 44 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679.
- 45 (1967) 119 CLR 460.
- 46 (1988) 165 CLR 107.
- 47 *Beswick v Beswick* [1968] AC 58.

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- 48 *London Drugs Ltd v Kuehne & Nagel International Ltd* [1992] 3 SCR 299.
- 49 *The Mahkutai* [1996] AC 650.
- 50 [1996] AC 650 at 665.
- 51 [1932] AC 562.
- 52 See [1932] AC 562 at 577-8; cf *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177; *Murphy v Brentwood District Council* [1991] 1 AC 398, *Bryan v Maloney* (1995) 182 CLR 609.
- 53 [1964] AC 465.
- 54 As to Australia, see *Perre v Apand Pty Ltd* (1999) 198 CLR 180.
- 55 [1990] 2 AC 605 at 617-618
- 56 eg *Perre v Apand Pty Ltd* (1999) 198 CLR 180; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; *Sullivan v Moody* (2001) 207 CLR 562.
- 57 (2001) 207 CLR 562 at 579 [49].
- 58 (2002) 211 CLR 317.
- 59 (1987) 162 CLR 479.
- 60 [1951] AC 737.
- 61 (2005) 221 CLR 234.
- 62 eg *Jones v Bartlett* (2000) 205 CLR 166.
- 63 *Robert Addie & Sons (Collieries) Ltd v Dumbreck* [1929] AC 358 at 365.
- 64 (1960) 104 CLR 274.
- 65 *Commissioner for Railways v Quinlan* [1964] AC 1054.
- 66 *British Railways Board v Herrington* [1972] AC 877 at 913.
- 67 *Veinot v Kerr-Addison Mintes Ltd* [1975] 2 SCR 311.
- 68 (2000) 203 CLR 503.
- 69 (2002) 210 CLR 491.
- 70 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 234 ALR 114.
- 71 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

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- ⁷² See *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 467-472 [267]-[280] per Hayne J.
- ⁷³ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 353-354.
- ⁷⁴ *Canada (Director of Investigation & Research) v Southam Inc* [1997] 1 SCR 748; cf *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.
- ⁷⁵ *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213; cf *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1.
- ⁷⁶ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.
- ⁷⁷ McHugh, "The Constitutional Jurisprudence of the High Court: 1989-2004", Inaugural Sir Anthon Mason Lecture, 26 November 2004, Sydney.
- ⁷⁸ Dixon, "Concerning Judicial Method", *Jesting Pilate*, (1965) at 158.
- ⁷⁹ *Ibid* at 158-159.
- ⁸⁰ Chesterton, *Orthodoxy*, (1908) at 4.
- ⁸¹ *Ibid* at 6.