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the Hon. J J Spigelman, AC, Chief Justice of NSW in 2010**

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MOU BETWEEN NEW YORK AND NEW SOUTH WALES
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
NEW YORK STATE BAR ASSOCIATION
INTERNATIONAL SECTION MEETING
SYDNEY, 28 OCTOBER 2010

The Chief Judge of New York, Jonathan Lippman, who appears at this Conference by web cast, and I have agreed on the terms of a Memorandum of Understanding to consult and co-operate on questions of law. We will sign this MOU at the end of our presentations to this Plenary Session.

The purpose of the MOU is to create an innovative mechanism for determining a question of law of one jurisdiction, which arises in legal proceedings in the other jurisdiction. The traditional mechanism for determining such issues is to treat the question of law as if it were a question of fact and to determine it on the basis of expert evidence. This method has numerous inadequacies, including cost and delay but, perhaps most significantly, will often lead to conclusions that are just plain wrong.

The mutual co-operation mechanism which we are announcing today, and which follows a similar MOU between the Supreme Court of New South Wales and the Supreme Court of Singapore announced in June, we are both convinced will serve as a model for adoption between additional jurisdictions. If that happens then the inadequacies of the present system can be ameliorated to a substantial degree.

The multifaceted process called globalisation has expanded the scope and range of cross-border legal issues which arise in the course of dispute resolution. There will be an increase in the number of cases in which a court will not decline jurisdiction on *forum non conveniens* grounds, even though a question of foreign law must be determined.

Let me illustrate the difficulties that arise in this respect by referring to the resolution of an Australian commercial dispute under a contract governed by New York law. Dr Louis Weeks, a United States geologist, advised BHP to search for oil off the southern coast of Australia. His advice was taken and the success of the exploration was the start of the process that has transformed a domestic steelmaker into the world's largest mining

conglomerate. It led to the discovery of Australia's largest oil field and its major gas field for domestic use.

Dr Weeks was granted what was described as a "overriding royalty" of two and a half percent of the gross value of all hydrocarbons produced and recovered by BHP and its successors in the relevant area. Originally, BHP acquired exploration permits which, over the course of the next forty years, were converted into different forms of title, some of which were surrendered and re-acquired. Dr Weeks' successors in title, a company called Oil Basins Ltd, contended that the words "overriding royalty" were area based, and its rights depended only on the production and recovery of hydrocarbons in a relevant area. BHP contended that the words "overriding royalty" had acquired a technical meaning in New York oil and gas law so that the overriding royalty did not extend to extraction from some of its titles.

Of central significance was a judgment in the Appellate Division of the Supreme Court of New York Court in which the words "overriding royalty" had been interpreted.¹ The parties relied on expert evidence, including two extremely experienced

and accomplished jurists. They gave diametrically opposite evidence about the applicability of the New York judgment.

One expert for BHP was Judge Howard Levine, who had been a judge for some thirty years including a decade as an Associate Judge of the Court of Appeal. The expert called on behalf of Oil Basins was Judge Richard Simons, who also had some three decades experience as a judge, including fourteen years as an Associate Judge of the New York Court of Appeal. The tribunal preferred Judge Simons.

This was a commercial arbitration. The arbitral tribunal consisted of two retired Australian judges, who agreed in the result, and an American oil and gas lawyer who dissented. Accordingly, the conflicting opinions of two senior retired American judges had been adjudicated upon, as a finding of fact, by two senior retired Australian judges. The reason that this dispute is known to us, unlike the usual position with commercial arbitrations, is because there was a challenge to the arbitral award on the basis that the tribunal did not give adequate reasons.²

The difficulty in expressing the reasons for choosing between the opinions of two equally qualified experts³ arose because, as a matter of substance, the retired judges on the arbitral tribunal decided the matter as lawyers rather, than as deciders of fact. That is to say, the two retired Australian judges decided the issue in the same way as they would decide a question of domestic law. To regard this process as some sort of factual determination is a fiction.

The example I have chosen involved commercial arbitration. I appreciate that the arrangement that we are announcing today does not extend to that form of dispute resolution. Indeed, in international commercial arbitration there is no such thing as “foreign law”. International commercial arbitrations are required to decide the matter before them in accordance with the law applicable to the relevant dispute which will often not be the law with which the arbitrators are most familiar.

I am convinced that the kind of reference mechanism that we are initiating today can play a useful role even in the context of arbitration. One of the principal disadvantages that has emerged as a result of the dominance of international commercial arbitration

is that the development of legal principles in the law chosen to govern the particular relationship is significantly impeded. Whether it is the law of England or the law of New York, both of which are frequently chosen as the law of international commercial contracts, the fact that so much of the law that is thrown up by contemporary commercial relationships is being determined in arbitral awards that remain confidential, is of concern because it prevents the development of commercial law.

The basis of international commercial arbitration is respect for the autonomy of the commercial parties who have chosen to submit their disputes to arbitration. In contexts where commercial law is still developing, it is quite likely that both parties to a particular arrangement will have a mutual interest in the further development of that law. Where that occurs, both parties may consensually wish to have the matter determined on an authoritative and public basis by the courts. It is perfectly consistent with the fundamental principles of international commercial arbitration that an arbitral tribunal can be empowered, at the request of both parties to a dispute, to refer a specific question of law for determination by the relevant court.

Even in the context of court proceedings, where public interest considerations are entitled to override the consensus of the parties, in New South Wales we have decided, at this stage, to proceed only on the basis of the agreement of the parties. This is reflected in the Rules of the Supreme Court of New South Wales which establish a procedure for ordering, with the consent of the parties, that proceedings be commenced in a foreign court in order to answer a question of foreign law that has been identified as being in dispute in proceedings in the NSW Supreme Court.

Often these issues arise when a party to proceedings in the NSW Supreme Court seeks a stay of proceedings on *forum non conveniens* grounds. In deciding such an application the fact that the whole or part of the proceedings is governed by foreign law is always a significant matter. However, it is not the only factor entitled to weight. It would be open to the Court to reject the application for a stay on the condition that a discrete issue of foreign law is determined in the overseas jurisdiction pursuant to our rules.

There is a longstanding alternative mechanism employed in this State for referring the whole, or any part, of proceedings to a

referee appointed by the Court. The reports of such referees are brought back to the Court to determine whether or not the Court will adopt the reasons and orders proposed by the referee. Our Rules now expressly contemplate the reference of a specific question of foreign law to such a referee.

I envisage that, in jurisdictions other than New York, a referee on a question of foreign law will probably be a senior retired judge from the relevant jurisdiction and will conduct proceedings in that jurisdiction, with the assistance of foreign lawyers appearing for the parties. Pursuant to the MOU and the Administrative Order proposed by Chief Judge Lippman, a member of the New York Panel of Referees could be appointed to act as a referee under our Rules.

The Rules of the Supreme Court of New South Wales expressly authorise the Court to exercise its jurisdiction on an issue of Australian law in order to answer a question formulated by a foreign court, which arises in proceedings in that Court. We believe that this is permissible under our existing legislation but, to put the matter beyond doubt, I have requested that express provision be made in either the *Supreme Court Act* or in the *Civil*

Procedure Act to this effect. I understand that there are constitutional limitations upon courts in the United States in this regard and they will be addressed by Chief Judge Lippman.

Over recent decades an enhanced sense of international collegiality has developed amongst judges. There are many more opportunities for interaction at conferences and on visits by judicial delegations. This has considerably expanded the mutual understanding amongst judges of other legal systems. It has transformed the concept of judicial comity.

Where two legal systems trust each other, the way Australian jurisdictions trust United States jurisdictions, the kind of interaction for which this MOU provides will be readily accepted. I hope, and I believe Chief Judge Lippman agrees, that our initiative will be taken up between each of our courts and other jurisdictions and beyond.

Perhaps somewhat perversely, the expansion of dialogue, interaction and understanding amongst the judges of different nations has reduced the willingness of judges to defer to colleagues overseas simply because of their status. That has

occurred as part of the same process as there has been an increase in the willingness to defer if the other jurisdiction is recognised for its ability and efficiency.

Judges have become more willing, generally at the request of parties in cross-border litigation, to assess the capacity of another legal system which could resolve the dispute. Judges are better placed to assess delays that arise in another jurisdiction and, with a higher degree of sensitivity, to assess the competence and the integrity of its judges. There are jurisdictions in which the level of corruption amongst the judiciary is known to be high and that is often accepted to be the case even by lawyers from such a jurisdiction.

Particularly in the context of commercial disputes with cross-border elements, judges in the jurisdictions with which I am most familiar, approach the issue of whether or not to assert or decline jurisdiction on the basis of serving the requirements of practical justice in the determination of a particular dispute. We no longer apply, in a technical manner, the rules of the conflicts of laws, let alone a concept of comity based only on national sovereignty. This trend should be encouraged.

The multiplication of legal disputes which have cross-border elements will require the judiciaries of different jurisdictions to cooperate to a degree that has never hitherto been the case, which I have addressed on earlier occasions.⁴ This will encompass a range of forms of interaction between courts including:

- Assistance with service of process and evidence, particularly pursuant to the provisions of the *Hague Service Convention* 1965 and the *Hague Evidence Convention* 1970.
- Enforcement of judgments, particularly money judgments, pursuant to the existing patchwork quilt of national provisions of variable efficacy.
- Assistance to foreign litigation by the grant of freezing and search orders, to prevent assets from being dissipated and electronic records from being hidden.
- Assistance in the form of interim measures in support of international commercial arbitration, particularly pursuant to the 2006 Revision of the UNCITRAL *Model Law on International Commercial Arbitration*.
- Consideration of harmonious resolution of cross-border insolvency issues, particularly under the system of protocols for court to court communications developed pursuant to the

guidelines issued by the American Law Institute and the International Insolvency Institute.

- The harmonisation of procedure for commercial litigation amongst the major commercial jurisdictions, particularly by following the guidance provided by the Model Principles of Transnational Civil Procedure promulgated jointly by the American Law Institute and UNIDROIT, of which Principle 31 expressly calls for the provision of assistance between courts and which constitutes a workable compromise between the practices of common law and civil law jurisdictions.

There is nothing systematic about these various provisions for judicial co-operation. There is a real need for the development of bilateral and multilateral arrangements which will render it more effective.

The initiative we are announcing today may find wider favour with many jurisdictions that share our view as to the limitations of existing practice with respect to proof of foreign law. This is matter that could well be the subject of international treaties or conventions, whether bilateral or multilateral. In the case of Australia the most likely development of that character will be in

the continuing evolution of the treaty arrangements for judicial co-operation between Australia and New Zealand. By reason of our close relationship across the full range of legal interaction, that is the most likely first step to be taken by Australia in this regard. An important precedent exists in the *European Convention on Information on Foreign Law*, which makes express provision for requests for answers to legal questions from one judiciary to another within the European Union.

Pending the emergence of new international arrangements, across the full spectrum of matters to which I have referred, we are left with a complete disconnect between the willingness and ability of persons, particularly commercial corporations, to operate and interact across borders in a seamless manner, on the one hand, and the restrictions that are imposed upon public authorities, both regulatory and judicial, from acting in a similar manner. The freedom of commercial communication and transaction stands in marked contrast to the inhibitions upon communication and transaction between public authorities. Anything that can be interpreted as impacting upon the sovereignty of the nation, by reason of the intrusion of *any* manifestation of the sovereign power of another nation, is subject to restrictions that have been

abolished with respect to private actors, even extending to state-owned commercial actors.

One of the barriers to trade and investment, as significant as many of the tariff and non-tariff barriers that have been modified over recent decades, arises from the way the legal system impedes transnational trade and investment by imposing additional and distinctive burdens including:

- uncertainty about the ability to enforce legal rights;
- additional layers of complexity;
- additional costs of enforcement;
- risks arising from unfamiliarity with foreign legal process;
- risks arising from unknown and unpredictable legal exposure;
- risks arising from lower levels of professional competence, including judicial competence;
- risks arising from inefficiencies in the administration of justice and, in some cases, of corruption.

These additional transactions costs of international trade and investment are of a character which do not operate, or operate to a lesser degree, with respect to intra-national trade and investment. These increased transaction costs impede mutually beneficial exchange by means of trade and investment.

These problems may be ameliorated to a certain extent by the increased sense of collegiality amongst judges from different nations. Understandably, there remains some turf battle considerations between the judges, and their supporting legal professions, who wish to exercise their jurisdiction and keep the legal fees at home, at least in interesting cases. Like most international arrangements, this system will only be effective on the basis of true reciprocity.

The MOU we are entering today, even if it comes to be widely adopted, is a small step in ameliorating the disadvantages which the multiplicity of legal systems imposes on international intercourse. It is, I am convinced, a step in the right direction.

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- ¹ See *Estate of Hatch v NYCO Minerals Inc* 245 AD 2d 746, 666 NYS 2d 296 (NW) App Div 1997.
- ² *BHP Limited v Oil Basins Limited* [2006] VSC 402; *Oil Basis Limited v BHP Billiton Limited* [2007] VSCA 255; (2007) 18 VR 346.
- ³ This is not a novel difficulty. See, eg, *In re Duke of Wellington: Glentana v Wellington* [1947] 1 Ch 506 and on appeal [1947] 1 Ch 118.
- ⁴ See J J Spigelman “Transaction Costs and International Litigation” (2006) 80 *ALJ* 435; J J Spigelman “International Commercial Litigation: An Asian Perspective” (2007) 37 *Hong Kong Law Journal* 859 at 866-867; (2007) *Australian Business Law Review* 318, reprinted in Tim Castle (ed) (2008) *Speeches of a Chief Justice: James Spigelman 1998-2008*; J J Spigelman “Cross Border Insolvency: Cooperation or Conflict” (2009) 83 *ALJ* 44; J J Spigelman “The Hague Choice of Court Convention and International Commercial Litigation” (2009) 83 *ALJ* 386; J J Spigelman “Cross Border Issues for Commercial Courts: An Overview”, Address to the Second Judicial Seminar on Commercial Litigation, Hong Kong, 13 January 2010; J J Spigelman “Freezing Orders in International Commercial Litigation” (2010) 22 *Singapore Academy of Law Journal* 490; J J Spigelman “The global financial crisis and Australian courts” (2010) 84 *Australian Law Journal* 615; J J Spigelman “Law and International Commerce: Between the Parochial and the Cosmopolitan” NSW Bar Association, Sydney, 22 June 2010. All of these addresses are accessible at [Hwww.lawlink.nsw.gov.au/scH](http://www.lawlink.nsw.gov.au/scH) under “speeches”.

**THE GARRAN ORATION:
PUBLIC LAW AND THE EXECUTIVE
BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
INSTITUTE OF PUBLIC ADMINISTRATION AUSTRALIA
NATIONAL CONFERENCE ADELAIDE, 22 OCTOBER 2010**

The Allegory of the Cave was devised by Plato in his great work *The Republic*. It takes the form of dialogue between Socrates and Plato's brother. The Allegory is a serviceable metaphor for the significant transformation of the public service over the last three or four decades.

Socrates imagines a cave in which prisoners have been chained and held immobile since childhood. Behind them is a fire, between the fire and the prisoners is a walkway. The prisoners watch the shadows cast by persons on the walkway, but do not know that they are shadows. As far as they know the shadows are the real thing.

As Socrates hypothesises, even if a prisoner were freed and saw the persons themselves, he would continue to believe that the

shadows were real. If that free prisoner were let out of the cave and exposed to the sunlight, it would take some time before s/he adjusted both to the sun and to the reality which s/he was observing for the first time. There are, as Socrates observed, two kinds of bewilderment of the eyes: first, when going into the light from the cave and, secondly, when coming back into the cave from the light.

In the process of fundamental reform of the public service that has occurred over recent decades, the general movement has been in the direction of freeing public servants from their caves and exposing them to the sunlight. From time to time, however, those set free have had to engage in speleological excursions to departmental caves that had been overlooked or have re-emerged.

Socrates identified the dilemmas facing a person who has been enlightened and who is forced to descend again into the cave. He happened to choose, as his example, descent into the world of the law, by a person who has seen the light of true justice. Such a person's behaviour could well appear ridiculous to those who never left the cave, in circumstances which Socrates identified as follows:

“If, while his eyes are blinking and before he has become accustomed to the surrounding darkness, he is compelled to fight in courts of law, or in other places, about the images or the shadows of images of justice, and is endeavouring to meet the conceptions of those who have never yet seen actual justice.”

Socrates warned that even an enlightened person in this situation may be tempted to misbehave when faced with the obduracy of those who continue to mistake shadows for reality. Although Plato would be the last to say so, a sense of omniscience usually leads to misbehaviour. In the judiciary this form of misbehaviour is called activism. In the public service it is called strategic planning with performance indicators.

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My personal journey has taken me from involvement with early attempts to expose the public service to the light, via the privileges associated with appointment to head a government department – in the days when the head of the department was, accurately, characterised as a “permanent” head, to determining the legality of executive conduct in the exercise of judicial power.

It was in January 1972 at the annual Summer School of the Australian Institute of Political Science held in Canberra, that I first presented a paper on secrecy in government. The commentator on that occasion was then the Minister for Education and Science, Malcolm Fraser. Later that year I published my first book, entitled *Secrecy: Political Censorship in Australia*. The style was considerably more polemical than I adopt today. This was the earliest advocacy of Freedom of Information legislation in Australia.

The process of freeing public servants from the caves in which they once dwelt has been a long one. In order to see just how far we have come, I found it instructive to look back at the opening chapter of my book. It covered the case of Detective Sergeant Phillip Arantz who, in November 1971, leaked to the *Sydney Morning Herald* a secret report on the incidence of crime in New South Wales.

Arantz was a key member of the research branch of the Police Department, responsible for the collection of crime statistics. He noticed that the Police Commissioner's Annual Report to Parliament contained false statistics on crimes

committed and on solution rates. All his attempts to correct the information internally were rebuffed. He first leaked information to parliamentarians, but their questions in Parliament were ignored or evaded and the true statistics remained secret.

Frustrated, Arantz gave the full report to the *Herald*. He was disciplined for a breach of public service rules and dismissed from the force. Even more disturbingly, his conduct was regarded, in the then police culture, as so bizarre that the Police Commissioner ordered that he undergo a psychiatric examination. It was later disclosed that the Commissioner had personally rung the psychiatrist at Prince Henry Hospital, who noted on his report: "Possible political expediency in bringing pressure to bear on patient's admission".

Over a decade later Arantz was exonerated, notionally reinstated in the force and given an ex gratia payment. Later, after the change in the culture of the force brought about in large measure as a result of Jim Wood's Royal Commission, he was posthumously awarded the Police Commissioner's Commendation for Outstanding Service.

The most direct result of Arantz's public spirited sacrifice – which was considerable – was the establishment of the Bureau of Crime Statistics and Research. This Bureau is a regular source of independent, objective information on crime and criminal justice policy in my State. Public debate on the administration of criminal justice is enriched to a degree that other spheres of discourse should envy.

The treatment that Phillip Arantz received is inconceivable today. The institutional structure has been transformed. I refer, for example, to Freedom of Information legislation, Whistleblower legislation, the Ombudsman, ICAC, Corruption Commissions, Integrity Commissions, Statutory Inspectorates and the enhancement, especially through Committee processes, of the efficacy of the ultimate accountability institution, the Parliament.

These new mechanisms for ensuring the integrity of executive decision-making, have been reinforced by statute and by development of the common law, in the form of the invigoration of administrative law. This has been, in my opinion, the most significant judicial development of the law in my legal lifetime. We now have a vigorous set of institutions, principles and practices,

much of which have been conferred or extended by legislation, to reinforce the integrity of governmental activity.

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In this address I wish to focus on recent developments in the jurisprudential foundation of Australian law with respect to the executive arm of government. Australian jurisprudence has long oscillated between emphasis upon a common law, evolutionary basis for legal development, on the one hand, and a positivist focus on textual analysis, both constitutional and statutory, albeit analysis informed by the common law, on the other hand. The drift of recent High Court authority is to privilege the latter.

In the past lawyers debated whether the source of legitimacy of Australian governance resided in an Act of the Imperial Parliament or in the adoption of the *Commonwealth Constitution* by the Australian people, reinforced by the ability of the people to amend that constitution. After the Australian Acts, the former is no longer an option. The alternative to the latter is an evolutionary basis, so that legitimacy is seen to inhere in the interaction of continuity and change within our institutional arrangements over time. The latter is attractive to the common law mindset but is not, at present, the dominant approach.

The contemporary public law jurisprudence of the High Court has turned away from historical continuity as the source of legal legitimacy to focus on the constitutional text. This is a matter on which the High Court has changed its approach from time to time. The present position may not be permanent, but it is the present position.¹

Separate treatment of constitutional law, administrative law and statutory interpretation law remains useful in many respects. However, the integrative terminology of “public law” merges constitutional law, administrative law and the law of statutory interpretation, thereby treating the activity of governing as a distinct subject matter. In Australian jurisprudence, these three subject areas are closely interrelated.

Public law has been defined as:

“The assemblage of rules, principles, canons, maxims, customs, usages, and manners that condition, sustain and regulate the activity of governing.”²

Public law is, or should be, primarily concerned with the way the institutionalised governance system *generates* power, rather than focussing, as is often done, on the way in which power is constrained. Constraints are an inextricable component of the conferral of governmental power.

As one author has put it:

“To put the point paradoxically: in this sphere, constraints on power generate power. Thus understood, modern constitutional structures should not be seen to impose limitations on the exercise of some pre-existing powers; these constitutional structures are the means by which political power is itself generated.”³

In a system of responsible government, of the character which Australia has enjoyed for over a century and a half, public power is based on the consent and trust of the people as a whole. This consent and trust confers power and, in doing so, establishes both substantive and procedural restraints by creating the institutions for its exercise. All three forms of governmental power – legislative, executive and judicial – find their origin, and their legitimacy, in the same source.

Perhaps the most important words of our *Commonwealth Constitution* are the words with which it commences:

“Whereas the people ... have agreed to unite in one indissoluble Federal Commonwealth ...”

Covering Clause 3 goes on to state that upon proclamation “the people shall be united in a Federal Commonwealth”. It was not the States who united, but the people of the States. Furthermore, the Members of Parliament were, by express provision, required to be “directly chosen by the people”.⁴

* * * * *

As with legislative power and executive power, the *Constitution* generates judicial power and, as part of the very same process, establishes boundaries to the exercise of the power. Those of us who exercise judicial power must do so with a recognition that the principal constraint inherent in the conferral of judicial power by the *Commonwealth Constitution* arises from the primacy which that very *Constitution* gives to the political processes of responsible government.

This is a theme that has been developed over the years by Stephen Gageler SC, now the Solicitor General of the Commonwealth.⁵ His conclusion is that there should be “judicial deference where, by virtue of [the] institutional structures, political accountability is inherently strong” and “judicial vigilance where, by virtue of those institutional structures, political accountability is inherently weak or endangered”.⁶ The language of “deference” is inconsistent with contemporary High Court doctrine,⁷ but this distinction is a reasonable guide for determining many cases of judicial review, both constitutional and statutory.

Australian constitutional law has developed a strict separation of judicial power, even more strict than the US jurisprudence on Article III of the US *Constitution* on which Chapter III of our *Constitution* was based. The strictness of our jurisprudence has often been criticised, but it is not likely to change in the near future. This institutional arrangement is often referred to in terms of the separation of powers although in many respects, as one observer of the American system has identified, it is more accurate to speak of separate institutions sharing powers.⁸

The exercise of judicial power to invalidate legislative and executive acts has often caused disappointment. The existence of Constitutional judicial review has not been controversial. However, it can become controversial when legislation has been struck down on a basis not clearly anchored in the text of the *Constitution*.

Perhaps the most dramatic example was the *Communist Party Case*. During the Mason and Brennan Courts, similar controversy arose from case law expressed in terms of constitutional implications, such as the guarantee of freedom of political speech. In recent years the High Court has abjured that approach. Contemporary constitutional jurisprudence focuses on the text, at least in the first instance.

Over the last decade or two the High Court has emphasised the constitutional dimension of a number of terms found in the *Commonwealth Constitution* by characterising them as “constitutional expressions”. It is the next step that matters. These expressions have been imbued with substantive force by identifying a bundle of essential characteristics of each such expression, being characteristics which Parliament cannot alter.

This required substantive content does not necessarily reflect the incidents of the same terminology when deployed at common law.⁹ Identifying the essential characteristics of many constitutional expressions is a task which has only just begun.

The end result is the same as if the essential characteristics of these “constitutional expressions” had been treated as constitutional implications, although the focus on the text appears to be orthodox. This jurisprudence is in the process of transforming public law.

The impact of this new approach on executive power has been the emergence of a constitutional foundation for Commonwealth and State administrative law and a renewed focus on the constitutional foundation of executive authority, possibly extending beyond the Commonwealth executive to encompass that of the States. This development is of profound significance for the entire range of interaction between the judiciary and executive government.

* * * * *

The process of constitutionalisation of administrative law commenced with a change of terminology. What had long been

called the “prerogative writs”, being remedies by which the courts supervised legality on the part of the executive, were retitled the “constitutional writs”. This was done for the purpose of establishing that the basis of the exercise of judicial power, with respect to the Commonwealth Executive and, indeed, the legislature, was to be found in s 75(v) of the *Commonwealth Constitution*, which established the power to give such relief. The act of changing the terminology has meant that the scope and incidents of this aspect of judicial power now has to be analysed in constitutional terms, rather than in terms of the inheritance of the common law powers, traditionally called prerogative writs.¹⁰

The cases in which the new principles were established arose primarily because of attempts to restrict the capacity of the Federal Court to overturn administrative decisions in immigration cases. The constitutional jurisdiction of the High Court could not be restricted.¹¹

The High Court has affirmed that there is a minimum provision of judicial review which is entrenched in the *Constitution*. Accordingly, any attempt by Parliament to restrict this minimum provision of judicial review would be invalid as infringing upon the

separation of powers under the *Constitution*, specifically as infringing upon the constitutionally entrenched availability of the newly styled “constitutional writs”.¹² The permissible scope of privative clauses seeking to protect administrative conduct from invalidity was significantly restricted.

The next step in this process was taken earlier this year, in a judgment of the High Court which determined that the words “Supreme Court of a State” were also a constitutional expression with a defined, requisite content. A State Parliament does not have the power to alter the character of a Supreme Court in such a way that it ceases to meet the constitutional description.

The High Court held that, by force of the *Commonwealth Constitution*, there is an entrenched minimum provision of judicial review applicable to State decision-makers, of the same character as the High Court found to exist with respect to Commonwealth decision-makers.¹³ Contrary to earlier authority which, in accordance with recent High Court practice, was superseded rather than overruled, State Parliaments could not enact privative clauses which took away the core supervisory jurisdiction of State Supreme Courts.

There may emerge differences between the scope and incidents of constitutionally required judicial review at Commonwealth and State level, but the fundamental underlying principles are the same. The express references in the *Commonwealth Constitution* to the constitutional writs and to “the Supreme Court of the States” provides “textual reinforcement”,¹⁴ the High Court has said, for the rule of law as an assumption underlying the text of the *Constitution*.¹⁵

* * * * *

In the mid 1970’s after detailed inquiry about the inadequacies of administrative law as then perceived, the Commonwealth adopted an administrative law package including the creation of the Administrative Appeals Tribunal, the Ombudsman and the enactment of the *Administrative Decisions (Judicial Review) Act 1977*. This was regarded as significant progress at the time, because it bypassed the perceived inadequacies and technicalities of the common law. However, subsequent development in the common law of other jurisdictions, and to a lesser degree here, suggested that in this respect, as is so often the case, freezing legal development in the form of statutory formulation prevents the law developing.¹⁶ The

emergence of a constitutional basis for judicial review of administrative action has led to renewed attention to fundamental principles.

The central unifying principle of administrative law, both State and Federal, is now “jurisdictional error”. This is a much contested concept.¹⁷ It may be appropriate to regard the appellation of “jurisdictional error” as a mode of stating a conclusion, rather than as an ex ante independent test. However, it is a concept that is now at the heart of Australian administrative law jurisprudence.

In my view, jurisdictional error provides an appropriate focus on the integrity and legality of executive conduct. Furthermore, it ought to operate as a restriction on judicial intervention in executive decision-making but for it to do so will require frequent re-affirmation of the constitutional constraints upon the exercise of judicial power.

The most oft cited, indeed now almost iconic, statement of the scope of Australian administrative law is the formulation of Sir Gerard Brennan, when his Honour said:

“The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power. If, in so doing, the court avoids administrative injustice or error, so be it, but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent to which they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.”¹⁸

So stated, the Court concentrates on the legality of administrative action which, in our traditional terminology, is distinguished from the merits of administrative action. There remains, I am aware, much scope for differences of opinion as to which side of the legality/merits distinction particular conduct falls. Nevertheless, to a degree which is not apparent in the development of the administrative law of other common law nations, notably England and Canada, Australian law has to a substantial extent maintained this differentiation.

Academic criticism has been directed to what has been called Australian “exceptionalism” in the field of judicial review.¹⁹ (It was not meant as a compliment.) The different development of Australian law reflects a significant divergence in judicial attitude. By comparison with judges in other common law jurisdictions, the majority of Australian judges have manifested a higher degree of reluctance to intervene because they did not like the result. The exceptions generally occurred in the immigration context. This is what prompted the legislative intervention that has now been, in substance, bypassed by the affirmation of a constitutional foundation for judicial review. The task of appropriate restraint now falls to the judiciary.

Until comparatively recently, the kinds of errors which would give rise to judicial review appeared to have been identified, perhaps comprehensively. There was a list of categories such as relevant considerations, improper purpose, procedural fairness, etc.²⁰ The fact that this list was regarded as inadequate was part of the reason for a differently expressed and more expansive list being enacted in the *Administrative Decisions (Judicial Review) Act*.

Our constitutional jurisprudence has now installed jurisdictional error as an overriding, unifying concept. One result is that the list of categories hitherto set forth cannot be regarded as exhaustive.²¹ We now find ourselves in a position where we have a general concept of undefined, probably undefinable, content. New categories of error can be added to the list. This will occur on a case by case basis which, despite its constitutional foundations, can only be described as a common law process.

This has now been manifest in the development of a new ground for judicial intervention characterised as illogicality or irrationality on the part of the decision-maker.²² The most recent judgment of the High Court in this respect indicates that two quite distinct approaches have been adopted in this regard.²³ This difference may be resolved by the High Court in a case on which it is presently reserved.²⁴

This new category of jurisdictional error carries a real possibility of the judiciary straying, as a matter of substance, into the merits of decisions, when the result is significantly different to what the judge would have done. It may take, on occasions, considerable self-restraint, and will always require self-awareness,

for a judge to refrain from concluding that such a difference manifests illogicality or irrationality on the part of the executive decision-maker.

As Chief Justice Gleeson and Justice McHugh once warned:
“Someone who disagrees strongly with someone else’s process of reasoning on an issue of fact may express such disagreement by describing the reasoning as ‘illogical’ or ‘unreasonable’, or even ‘so unreasonable that no reasonable person should adopt it’. If these are merely emphatic ways of saying that the reasoning is wrong, then they may have no particular legal consequence.”²⁵

I am not alone in the judiciary when I acknowledge that judges must resist the temptation to stray beyond the proper bounds of judicial power. The constitutional doctrine of the separation of powers is a two-way street. Indeed, one of its most important constraints is on the judiciary. There is scope for debate about the strictness of our present separation of powers doctrine which prevents consideration of legal issues outside the context of a specific dispute. However there is a fundamental differentiation

between matters which are properly subject to the exercise of judicial power and the matters which must be subject to the institutions of political accountability.²⁶

The very fact that it is the judiciary itself which decides what is an appropriate exercise of judicial power imposes a significant burden of circumspection on judges. I acknowledge that there have been examples where the appropriate circumspection was not displayed. It is an important part of the task of appellate courts to enforce the proper boundaries of judicial intervention. I refer particularly, in the immediate future, to the development of the case law on the new irrationality/illogicality ground.

* * * * *

The task of identifying jurisdictional error in the case of statutory powers involves the deployment of the full range of the principles, practices and presumptions of the law of statutory interpretation. That is how courts identify what a decision-maker has authority to decide and how s/he is required to go about making the decision. Furthermore, the process of statutory interpretation must be deployed to determine whether the conduct complained of is of such significance that Parliament must be taken to have intended that the resulting decision was invalid.²⁷

The law of statutory interpretation is now at the heart of administrative law.

However, not all executive conduct is statute based. The exercise of what we have hitherto called prerogative powers is also, as a result of legal development some three decades ago, open to judicial review, subject to principles of justiciability. That process must now be regarded as involving constitutional interpretation which, to a significant extent, is analogous to the practice of statutory interpretation. It differs, however, in one crucial respect. To a substantial degree, the law of statutory interpretation, but not constitutional interpretation, can be amended by Parliament.

Traditionally the power of the executive has been sourced to either statute or to the prerogative powers of the Crown.²⁸ However, it now appears that the traditional concept of the “prerogative” is not determinative of the executive power of the Commonwealth, which must be traced, and traced exclusively, to s 61 of the *Constitution*. The history of the prerogative will still be relevant, as has been recognised in numerous contexts for the purposes of s 61.

The issue arose in the Federal Court from the incident involving the *MV Tampa*. The majority judgment delivered by Justice French, then of the Federal Court, rejected the proposition that the power conferred by s 61 was the equivalent of the prerogative.²⁹ The majority applied an earlier judgment of Justice Gummow, also from when he was a judge of the Federal Court.³⁰ In the *Tampa* case, the executive was found to have a power to exclude or prevent the entry of non-citizens to Australia, irrespective of whether there was a traditional common law prerogative in this respect.

The issue also arose in the context of the challenge to the tax bonus element of the stimulus package of 2008. The power of the executive to incur expenditure unrelated to any head of legislative power was extended to emergency circumstances or adverse economic conditions, as determined by the executive.³¹

The extent of the executive power of the Commonwealth appears to have been cut free from the traditional conception of prerogative powers in a manner which means that there is now no source of guidance as to the boundaries of executive power. The

delineation of the permissible scope of the executive power of the Commonwealth will develop on a case by case basis, albeit with reference to the traditional categories of the prerogative. This new focus will probably lead to a change of terminology. In the same way as the “prerogative writs” have been replaced with “constitutional writs”, so “prerogative power” will be replaced by the terminology of “executive power”.³²

In terms of our legal history, this is quite a dramatic development. In England a King was executed and a civil war was waged to limit the scope of the prerogative and to assert the supremacy of Parliament. However, the executive power is, apparently, no longer confined to well-established traditional categories.

It is revealing to contrast two judicial statements. Lord Diplock once put it thus: “it is 350 years and a civil war too late for the Queen’s Court to broaden the prerogative”.³³ In the tax bonus case, Chief Justice French said of s 61, “While history and common law inform its content it is not a locked display cabinet in a constitutional museum. It is not limited to statutory powers and

the prerogative”.³⁴ The unfettering of executive power is not welcomed by all.³⁵

Identifying the scope and limits of executive power will now turn on a process of constitutional interpretation, rather than historical inquiry. In this respect the fundamental assumptions underlying the *Constitution* – including the rule of law and responsible government – will be of critical significance. Other presumptions in the law of statutory interpretation may also come to play a part.

An intriguing possibility of an expansion of Commonwealth executive power has been raised in a recent case. For the first time, as far as I am aware, it has been suggested that the traditional Crown prerogative in Royal minerals, such as gold, was inherited by the Commonwealth rather than, as has long been assumed in all Australian mining legislation, by the Crown in the right of the States.³⁶

The majority judgment in that case specifically noted that the allocation between the Commonwealth and the States of the traditional prerogatives is not “fully resolved”.³⁷ An earlier

judgment suggested that the only prerogative powers exercisable by the State executive were those “necessarily exercisable ... under the allocation of responsibilities made by the Constitution”.³⁸

We have not heard the last of this issue.

* * * * *

A third matter, which appears to be on the cusp of being constitutionalised is the structure of State *Constitutions*, including each State Executive. This arises by reason of the provisions of s 106 and s 107 of the *Commonwealth Constitution* which, in terms, preserve the *Constitutions* of each State, until altered in accordance with such *Constitution* and the powers of the Parliament of each State.

As I have pointed out on a previous occasion,³⁹ the only time when the people of New South Wales and, I believe, the people of every other State, voted to adopt their State *Constitution* was when the people of the colonies – other than women, except in South Australia and Western Australia – voted in favour of the adoption of the *Constitution* of the Commonwealth. It was that *Constitution* which, by s 106, gave continued effect to the *Constitution* of that polity and transmogrified the former colonies into States.

As I am delivering the *Garran Oration* it is appropriate to note that these issues were canvassed in that great foundational text of Australian constitutional scholarship, Quick and Garran. The learned authors identified the way in which the sovereignty vested in the “united and indivisible people of the Commonwealth” had been divided between the Federal and the State.⁴⁰

They went on to state that by force of s 106 of the *Constitution*:

“ ... It may be argued that the Constitutions of the States are incorporated into the new Constitution, and should be read as if they form parts or chapters of the new Constitution. The whole of the details of State Government and Federal Government may be considered as constituting one grand scheme provided by and elaborated in the Federal Constitution; a scheme in which the new national elements are blended harmoniously with the old provincial elements, thus producing a national plan of government having a Federal structure.”⁴¹

From time to time judges of the High Court have referred to the way in which the States, as States, owe their existence to the *Commonwealth Constitution*.⁴² Of central significance in this context will be the continued development of the “constitutional expression” jurisprudence of the High Court.

Just as the concept of a “Supreme Court of a State” is found to have certain essential characteristics, which cannot be changed and are, therefore, entrenched by the *Commonwealth Constitution*, so the frequent references in that *Constitution* to the Parliaments of the States will also be found to have entrenched essential characteristics which cannot be altered by the Parliaments of the States or, indeed, by the people of the State in a referendum.⁴³ It may, however, be too late to force Queensland to restore its Upper House.

The terminology “the Constitution of each State” within s 106, is itself a constitutional expression. Indeed, this constitutional expression may not be limited to the Act entitled “The Constitution Act” of each State. In my opinion, it extends to other fundamental laws regulating the activity of governance.⁴⁴ Additional, hitherto unidentified acts and customs may similarly be found to have

binding force by reason of the *Commonwealth Constitution*.⁴⁵ The *Commonwealth Constitution* contemplates that State Constitutions can be altered. However, there may be limits to such changes.

Similarly, the executive power of the State is a constitutional expression by reason of references to the Governor,⁴⁶ and to the State Executive Councils.⁴⁷ It is by no means clear what are the essential characteristics of executive power so preserved, but it is likely that the incidents of responsible government are amongst them perhaps including, if I can be a little provocative, even the undefined reserve powers.

Fundamental principles of the rule of law and of responsible government may now be entrenched in State practice by force of the *Commonwealth Constitution*. To give one further example, it may not be permissible for one State to unilaterally adopt a republican form of government. Of course, none of these intriguing possibilities will necessarily arise for determination. Constitutional lawyers, however, can indulge themselves for years to come.

* * * * *

For the reasons I have outlined, the three spheres of application of public law to the exercise of executive power which I have discussed will involve the application of the principles of statutory and constitutional interpretation by the judiciary. This will include:

- identifying the decision-maker's authority for the purposes of determining jurisdictional error;
- identifying the essential characteristics of the respective constitutional expressions, and
- determining the scope of executive power, both Federal and State.

The centrality of statutory and constitutional interpretation to the task of courts exercising federal jurisdiction under Chapter III, including for the maintenance of State courts as fit repositories of such jurisdiction, in my opinion implies some limits on the capacity of Parliaments to modify the law of statutory interpretation. This is reinforced by the constitutional requirement that State Supreme Courts must retain the essential characteristics of their status as a constitutional expression. I am not suggesting that any of the existing *Acts Interpretation Acts* trespass on constitutionally

protected principles in this respect. There must be, however, some limits to the power of amendment.

I return to a theme that I have already mentioned: the restraints on the exercise of judicial power. As a constitutional requirement, judges must respect the limits of judicial power in the course of the interpretive tasks in which they will be engaged. It is all too easy to dress up a conclusion, reached on other grounds, by selecting from the smorgasbord of maxims and principles of interpretation those which assist the achievement of the pre-determined result. However, intellectual honesty is a core obligation of the judicial oath.

As propounded many years ago by the founder of positivist jurisprudence, John Austin, there is a clear distinction between legitimate and spurious interpretation.⁴⁸ A century ago, the foremost American legal scholar of the era, Roscoe Pound, developed the concept of spurious interpretation. The contemporary relevance of his observations make them worthy of extensive quotation.

He said:

“The object of genuine interpretation is to discover the rule which the lawmaker intended to establish; to discover the intention with which the lawmaker made the rule, or the sense which he attached to the words wherein the rule is expressed ... Employed for these purposes, interpretation is purely judicial in character; and so long as the ordinary means of interpretation, namely the literal meaning of the language used in the context, are resorted to, there can be no question. But when, as often happens, these primary indices to the meaning and intention of the lawmaker fail to lead to a satisfactory result, and recourse must be had to the reason and spirit of the rule, or to the intrinsic merit of the several possible interpretations, the line between a genuine ascertaining of the meaning of the law, and the making over of the law under the guise of interpretation, becomes more difficult. Strictly, both are means of genuine interpretation. They are not covers for the making of new law. They are modes of arriving at the real intent of the maker of existing law. The former means of interpretation tries to find out directly what the lawmaker meant by assuming his

position, in the surroundings in which he acted, and endeavouring to gain from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy. The latter, if the former fails to yield sufficient light, seeks to reach the intent of the lawmaker indirectly. ...

On the other hand, the object of spurious interpretation is to make, unmake, or remake, and not merely to discover. It puts a meaning into the text as a juggler puts coins, or what not, into a dummy's hair, to be pulled forth presently with an air of discovery. It is essentially a legislative, not a judicial process ..."⁴⁹

Pound went on to say:

" ... The bad features of spurious interpretation, as applied in a modern state, may be said to be three: (1) That it tends to bring law into disrepute, (2) that it subjects the courts to political pressure, (3) that it reintroduces the personal element into judicial administration. ... In the first place, in a modern

state, spurious interpretation of statutes, and especially of constitutions, tends to bring law into disrepute. Law is no longer the mysterious thing it was once. This is an age and a country of publicity. It is no longer possible to impose upon the public by covering legislation with the cloak of interpretation. ... The disguise is transparent and futile, and can only result in creating or confirming a popular belief that courts make and unmake the law at will. Second, in a common-law country where questions of politics and economics are so frequently referred to the courts, the knowledge that courts exercise, or may exercise, a power of spurious interpretation subjects the courts to political pressure which can not but impair the general administration of justice. ... Finally, spurious interpretation reintroduces the personal element into the administration of justice. The whole aim of law is to get rid of this element. And, however popular arbitrary judicial action and raw equity may be for a time, nothing is more foreign to the public interest, and more certain in the end to engender disrespect if not hatred for the law. The

fiction of spurious interpretation can no longer deceive anyone today. The application of the individual standard of the judge instead of the appointed legal standard is quickly perceived, and is, indeed, suspected too often where it has not occurred.”⁵⁰

I cannot put these propositions better. That is why I have extracted them at such length. Judicial review does raise issues about excessive judicial intervention in executive decision-making and Pound’s analysis retains its relevance in this regard.

The principle is one of what Chief Justice Gleeson felicitously called judicial legitimacy. As his Honour said:

“Judicial power ... is held on trust. It is an express trust, the conditions of which are stated in the commission of a judge or magistrate, and the terms of the judicial oath.

...

The quality which sustains judicial legitimacy is not bravery, or creativity, it is fidelity. That is the essence of what the law requires of any person in a fiduciary

capacity, and it is the essence of what the community is entitled to expect of judges.”⁵¹

I have no doubt that the Australian judiciary understands the proper boundary of the exercise of judicial power. In this, as in all aspects of institutional governance, there is scope for differences of approach. Nevertheless, appellate judges, I assure you, understand that there are real restraints which they are obliged to enforce.

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- ¹ The contrast of jurisprudential approaches is highlighted by a comparison of two extra-judicial writings: Sir Owen Dixon, “The common law as an ultimate constitutional foundation” (1957) 31 *Australian Law Journal* 240, reprinted in Sir Owen Dixon *Jesting Pilate* (1965) Law Book Company, and W M C Gummow, “The Constitution: ultimate foundation of Australian law?” (2005) 79 *Australian Law Journal* 167.
- ² Martin Loughlin, *The Idea of Public Law* (2003) Oxford University Press at 115; Martin Loughlin, *Foundations of Public Law* (2010) Oxford University Press at 11.
- ³ Loughlin, *Foundations of Public Law* supra at 12.
- ⁴ Sections 7, 24.
- ⁵ See, Stephen Gageler “Foundations of Australian federalism and the role of judicial review” (1987) 17 *Federal Law Review* 162 esp at 173, 181-190; Stephen Gageler “Beyond the text: a vision of the structure and function of the Constitution” (2009) 32 *Australian Bar Review* 138 at 144-148.
- ⁶ Gageler (2009) supra at 37.
- ⁷ C/f Aileen Kavanagh “Defending deference in public law and constitutional theory” (2010) 126 *Law Quarterly Journal* 222.
- ⁸ Richard E Neustadt, *Presidential Power* (1964) Signet at 42. See also my earlier adoption of this approach in J J Spigelman, “The Integrity Branch of Government” in Dennis Pearce (ed), *AIAL National Lecture Series on Administrative Law No 2* (2004), Australian Institute of Administrative Law; also published as (2004) 78 *Australian Law Journal* 724.
- ⁹ For a summary of this development see J J Spigelman, “The Centrality of Jurisdictional Error” (2010) 21 *Public Law Review* 77 esp at 78-79.
- ¹⁰ The process commenced in *Re Refugee Tribunal; Ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82 at [20]. For an overview see Walter Sofronoff “Constitutional writs” (2007) 14 *Australian Journal of Administrative Law* 145.
- ¹¹ For an overview see Stephen Gageler “Impact of migration law on the development of Australian administrative law” (2010) 17 *Australian Journal of Administrative Law* 92.
- ¹² *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476 at [83], [104].
- ¹³ See *Kirk v Industrial Relations Commission (NSW)* [2010] HCA 1; (2010) 239 CLR 531; see generally Spigelman, “The Centrality of Jurisdictional Error” supra.
- ¹⁴ *Plaintiff S157/2002* supra at [103].
- ¹⁵ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193; *Kartinyeri v The Commonwealth (Hindmarsh Island Bridge case)* (1998) 195 CLR 337 at [89].
- ¹⁶ See, eg, Mark Aronson “Is the ADJR Act hampering the development of Australian administrative law?” (2005) *Australian Journal of Administrative Law* 79.
- ¹⁷ See, eg, J J Spigelman “Jurisdiction and Integrity” in Pearce (ed) supra at 28-29.
- ¹⁸ *Attorney General (NSW) v Quin* (1990) 170 CLR 1 at 35-36.

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- 19 Michael Taggart, “Australian exceptionalism in judicial review” (2008) 36 *Federal Law Review* 1.
- 20 See, eg, *Craig v South Australia* (1995) 184 CLR 163 esp at 177-178. See also Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th ed, 2009) Law Book Company at 14-15.
- 21 See, eg, *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [82]; *Kirk* supra at [73].
- 22 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; (2003) 77 ALJR 1165; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; (2004) 78 ALJR 992. For earlier references see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 359, 367; *Hill v Green* (1999) 48 NSWLR 161 at [72].
- 23 See, *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611; *MZXSA v Minister for Immigration and Citizenship* [2010] FCAFC 123 at [43]-[45].
- 24 On appeal from *SZJSS v Minister for Immigration and Citizenship* [2009] FCA 1577; (2009) 113 ALD 270; see *Minister for Immigration and Citizenship v SZJSS* [2010] HCA Trans 247.
- 25 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [40].
- 26 For a recent consideration of these issues see James Stellios “The separation of judicial power”, paper presented at the Australian Association of Constitutional Law (AACL) Seminar, Sydney, 20 October 2010.
- 27 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [41], [91], [93].
- 28 See generally Peter Gerangelos “Parliament, the Executive, the Governor General and the Republic: The George Winterton Thesis” in H P Lee and Peter Gerangelos (eds) *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (2009) Federation Press.
- 29 *Ruddock v Vadarlis* [2001] FCA 1329; (2001) 110 FCR 491 at [183].
- 30 *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 369 per Gummow J.
- 31 *Pape v Commissioner of Taxation* [2009] HCA 23; (2009) 238 CLR 1 at [233], [241]-[242] and [10], [127], c/f [345]-[354], [552].
- 32 See generally Robert French “The Executive power” (2010) 12 *Constitutional Law and Policy Review* 5.
- 33 C/f *British Broadcasting Corporation v Jones* (1965) Ch 32 at 79.
- 34 *Pape* supra at [127] and see [214]-[215].
- 35 See, eg, Duncan Kerr “The High Court and the executive: emerging challenges to the underlying doctrines of responsible government and the role of law” (2009) 28 *University of Tasmania Law Review* 145.
- 36 *Cadia Holdings Pty Ltd v State of New South Wales* [2010] HCA 27; (2010) 84 ALJR 588 at [31], [34], [85], [86] and [89].
- 37 *Ibid* at [87].

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- 38 *Davis v The Commonwealth* (1988) 166 CLR 79 at 93.
- 39 See, J J Spigelman “Foreword” in George Winterton (ed) *State Constitutional Landmarks* (2006) Federation Press at vi.
- 40 John Quick and Robert Randolph Garran *The Annotated Constitution of The Australian Commonwealth* (1901) Legal Books at 928.
- 41 *Ibid* at 930. For a full discussion of this issue see Anne Twomey *The Constitution of New South Wales* (2004) Federation Press esp at 797-806.
- 42 See, eg, *New South Wales v Commonwealth* (1975) 135 CLR 337 at 372; *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 182; *R v Phillips* (1970) 125 CLR 93 at 103; *Commonwealth v Queensland* (1975) 134 CLR 298 at 337; *Bistrivic v Rokov* (1976) 135 CLR 552 at 566; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 at 88; *Western Australia v Wilsmore* (1982) 149 CLR 79 at 96; *Muldowney v South Australia* (1996) 186 CLR 352 at 377; *Durham Holdings Pty Ltd v New South Wales* [2001] HCA 7; (2001) 205 CLR 399 at [10]; *Mobil Oil Australia Pty Ltd v Victoria* [2002] HCA 27; (2002) 211 CLR 1 at [102]; c/f *Wilsmore v Western Australia* (1981) WAR 159.
- 43 *Commonwealth Constitution* ss 10, 15, 25, 29, 30, 31, 41, 107, 108, 111, 123, 124, 128.
- 44 *Egan v Chadwick* (1999) 46 NSWLR 563 at 565-568. See also *McGinty v Western Australia* [1996] HCA 48; (1995) 186 CLR 140 at 178; *Yougarla v Western Australia* [2001] HCA 47; (2001) 207 CLR 344 at [64].
- 45 See, eg, *New South Wales v Commonwealth (The Work Choices Case)* [2006] HCA 52; (2006) 229 CLR 1 at [390]; *Cadia Holdings* supra at [54].
- 46 *Ibid* ss 7, 15, 70, 110.
- 47 *Ibid* s 15.
- 48 See John Austin *Lectures on Jurisprudence Vol 2*, (4th ed, 1879) John Murray, London at 1029-1030. See also my extended discussion of this distinction in “Legitimate and Spurious Interpretation”, J J Spigelman *Statutory Interpretation and Human Rights: McPherson Lecture Series Vol 3*, (2008) University of Queensland Press, Ch 3.
- 49 Roscoe Pound “Spurious interpretation” (1907) 7 *Columbia Law Review* 379 at 380-382.
- 50 See *ibid* at 384-385.
- 51 Murray Gleeson, “Judicial legitimacy” (2000) 20 *Australian Bar Review* 4 at 5, 11.

**THE INTOLERABLE WRESTLE:
DEVELOPMENTS IN STATUTORY INTERPRETATION
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
KEYNOTE ADDRESS
TO THE AUSTRALASIAN CONFERENCE OF PLANNING AND
ENVIRONMENT COURTS AND TRIBUNALS
SYDNEY, 1 SEPTEMBER 2010**

In *East Coker* the second of T S Eliot's *The Four Quartets*, he referred to the difficulties of expression as:

“A periphrastic study in a worn-out poetical fashion,
Leaving one still with the intolerable wrestle
With words and meanings. ...”¹

“Periphrastic” is a wonderful word. It means circumlocutory or a round about way of expression. It is an appropriate word to bear in mind when considering the law of statutory interpretation, the dominant task of the judiciary in environmental law, as it is in most spheres of legal discourse.

I have chosen recent High Court authority on statutory interpretation as my theme for this keynote address. The title of the address – “The Intolerable Wrestle” – was identified by Eliot as a perpetual challenge for poets. As Lord Hoffmann correctly observed, this is a challenge equally applicable to lawyers.² All judges from time to time feel that the “wrestle” with words is “intolerable”, but it took a poet, rather than a lawyer, to put it in writing.

Applying the principles of statutory interpretation is always a matter of emphasis and nuance. There have been differences in judicial approaches to the task over time. These transitions are hard to detect. The issue I wish to discuss in this address is whether or not there has been such a shift over recent years in the approach of the High Court.

Justice Kirby thinks there has been. He said, in a judgment, when he agreed with the majority but thought their approach unnecessarily narrow:

“I see ... hints of a return to the literal interpretation of legislation which this court has (in my view rightly)

earlier discarded. ... I would resist any return to that earlier narrowing of the judicial focus.”³

If he is right, all we toilers lower in the judicial hierarchy need to know.

It is useful to think of a spectrum of judicial opinion ranging from strict literalism at one end to broadly based purposive interpretation at the other end. That such a spectrum exists, and that it is a wide spectrum, reflects the fact that there are a number of well established principles – like the literal rule, the golden rule and the mischief rule – which do not necessarily point in the same direction. The process of selecting which principle or rule should be given salience in a particular case is a matter of judgment about which reasonable minds can differ. Indeed, few judges will be found to always give salience to one or another principle or rule.

If one goes back over the centuries and interrogates texts and judgments on statutory interpretation, it becomes apparent that the propositions with which we struggle today are not novel. The first such text was Lord Elsmere’s treatise on statutory

interpretation published in 1565 which, as I have pointed out elsewhere, raises a familiar range of issues.⁴

One of my favourite quotations on the literalism/purposive spectrum is from the Barons of the Court of the Exchequer who said, as long ago as 1560:

“... the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter,

and according to that which is consonant to reason and good discretion.”⁵

The sentiments in this 1560 judgment have a decidedly contemporary ring to them. There is not much that is new in this sphere of legal discourse.

There are, however, I repeat, changes in nuance and emphasis over time. I have characterised the development of approaches to interpretation, both statutory and contractual, over recent decades as a movement from “text to context”.⁶ A judge of the final Court of Appeal of Singapore has paid me the compliment of adopting that formulation in an article subtitled “from text to context to pre-text”.⁷ This was in a context of contractual interpretation and the word “pre-text” was spelled with a hyphen, as meaning ‘before text’. He advocated an expanded use of pre-contractual material for the purposes of contractual interpretation.

In the context of statutory interpretation the word “pretext”, without a hyphen, is often quite appropriate. I wish I had thought of this extension when I gave an address distinguishing between legitimate and spurious interpretation, particularly in the context of

British decisions applying the interpretation clause of the *Human Rights Act* 1998 (UK).⁸

In a number of judgments, often in dissent, Justice Kirby referred to judgments of the Mason and Brennan courts as having established a new approach to statutory interpretation, based on a contextual and purposive approach, as distinct from the literalism of the past. He referred to three authorities most frequently.

The first is the joint judgment in *Bropho*, which affirmed the purposive approach to statutory interpretation as the correct common law approach, even without statutory intervention (for example, by s 15AB of the *Acts Interpretation Act* 1901 (C'th)).

The joint judgment of six judges said:

“... [T]he contemporary approach to statutory construction, with its added emphasis on legislative purpose ... and permitted reference to a range of extrinsic materials for the ascertainment of that purpose ... has added an element of anachronism to a judicial confinement of the permissible basis for discerning a legislative intent that the Crown be bound to what is ‘manifest from the very terms of the statute’. ...”⁹

This passage has been frequently referred to in subsequent majority joint judgments of the Court.¹⁰

The second judgment is the joint judgment in *CIC Insurance Ltd v Bankstown Football Club Ltd* where their Honours said:

“... [T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses ‘context’ in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.”¹¹

This approach has also been reiterated in a number of subsequent joint judgments in the High Court, some using the language of “mischief”, others employing the language of “purpose”.¹²

The third judgment brought “context” and purpose together. This is the frequently cited judgment in *Project Blue Sky* where the Court said:

“[69] The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalinos* (1955) 92 CLR 390 at 397, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.”¹³

There is nothing new about emphasising context and purpose in the interpretation of words. Sir Owen Dixon, who would be placed at the literalist end of the spectrum of judicial approaches to interpretation, said in 1934:

“The rules of interpretation require us to take expressions in their context, and to construe them with proper regard to the subject matter with which the instrument deals and the objects it seeks to achieve, so as to arrive at the meaning attached to them by those who use them.”¹⁴

Justice Learned Hand explained the approach now generally applied in the following terms:

“Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, sources of interpreting the meaning of any writing; be it a statute, a contract or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”¹⁵

If I may be permitted the sin of self-quotation:

“The courts no longer approach a statute with scissors in one hand and a dictionary in the other.”¹⁶

Context is always important. Take the statement: “The chicken is ready to eat”. This can either refer to a cooked chicken or a hungry chicken. The context alone will determine the meaning.

To similar effect is an adaptation of an example originally propounded by Ludwig Wittgenstein.¹⁷ Parents leave their young children in the care of a babysitter with an instruction to teach them a game of cards. The babysitter would not be acting in accordance with these instructions if he or she taught the children to play strip poker.¹⁸

To give one more example: when a nanny is instructed to “drop everything and come running”, she would know that it is not intended to apply literally to the circumstance in which she was holding a baby over a tub full of water. As Professor L L Fuller said of this example: “Surely we have a right to expect the same modicum of intelligence from the judiciary”.¹⁹

Justice Kirby first began to express doubts about the majority's fidelity to the purposive approach to interpretation in a number of dissenting judgments in taxation cases.²⁰ However, it was the interpretation of "pawned goods", within s 6 of the *Pawnbrokers and Secondhand Dealers Act 1996* (NSW), that convinced his Honour that matters were moving in the wrong direction.

The issue was whether or not the words "pawned goods" referred to goods the subject of a chattel mortgage, as distinct from the traditional legal concept of a "pawn" or "pledge". Kirby J referred to the principles of purposive and contextual interpretation and to the availability of extrinsic materials.²¹ Reiterating what he had said in an earlier case about resisting "any temptation to return to the dark days of literalism",²² his Honour said:

"[40] ... Above all, this Court should strive to be consistent. In all cases, but especially in legislation enacted to achieve important social objectives, the purposive approach is the correct one to follow."

He went on to reject the majority's use of the traditional technical meaning of the words "pawn" and "pledge",²³ and concluded:

"[112] ... This Court has not hitherto withdrawn the purposive approach from the interpretation of penal legislation. It is an approach harmonious with general movements in the law, and elsewhere, that seek to give meaning to contested language and to terminate the misfiring of texts that was the main legacy of the era of literalism.

[113] To the extent that the present decision represents a turning back to literalism, I disagree. No clear judicial authority requires it. The 1996 Act obviously did not intend it. The ordinary use of language denies it. The important social purposes of the legislation are frustrated by it. Supposedly clever legal drafting of the appellant's document is rewarded. The interests of borrowers and the victims of household thefts of pawnable goods and police are defeated. The result is undesirable. In my opinion, it is unnecessary and legally wrong."²⁴

His Honour was not prone to understatement. The joint judgment from which Kirby J was dissenting, expressed disagreement with him more subtly, but no less pointedly:

“[28] No doubt the 1996 *Pawnbrokers Act* is to be given a purposive construction. But that purpose is not to be identified by making *an priori* assumption that the 1996 *Pawnbrokers Act* was intended to reach all of the transactions just identified. Nothing in the text of the Act, its history, or what (little) was said about its purpose in the Second Reading Speech warrants the conclusion that the purpose of the Act was so wide. On the contrary, considering the text of the Act, the indications of the purpose provided by such matters as the headings in ss 5 and 30 and the legislative framework into which the 1996 *Pawnbrokers Act* fitted, reveals that the Act’s purposes were more limited. It follows that consideration of legislative purpose reveals no foundation for reading the relevant provisions of the Act otherwise than according to their terms.”²⁵

Amongst the authorities which Kirby J had cited in support of his analysis in the pawned goods case was *CIC Insurance v Bankstown Football Club*. A few months later, a joint judgment of the Court in a criminal case commenced its analysis of the legislative scheme with the following statement: “This case provides an example of the importance of context in resolving questions of statutory construction” and referred to *CIC Insurance v Bankstown Football Club* as authority for this proposition.²⁶

Kirby J, who came to the same result as the majority, said:

“Context, which is invoked in the joint reasons in the present case to explain a reading of s 18(2)(a) of the *Crimes Act* narrower than the words might otherwise suggest, is indeed an important ingredient in the interpretation of statutes. But it is one that must be used consistently, not intermittently, selectively or idiosyncratically. Despite extremely powerful considerations of context militating against a strict textual construction, this court was persuaded in (the “pawned goods” case) to adopt a literal interpretation of the word ‘pawn’ that prevented the attainment of the fairly obvious purpose of the New South Wales

Parliament. If a narrow and literal approach is taken in one case, but rejected in another, in the name of 'context', those affected by the law are entitled to have the reasons for the change in approach. If context is important for statutory construction, why is it not always important?"²⁷

His Honour also referred to:

" ... the importance of consistency of approach to such problems, so that it cannot be said that the courts pluck out considerations of 'context', 'purpose' and 'history' arbitrarily, so as to sustain the outcomes of interpretation at which they arrive in some, but not other, cases."²⁸

No doubt consistency in judicial decision-making is a virtue. However, in a context where conflicting principles must be weighed and balanced, divergence of outcome is not an indication of an impermissible "inconsistency".

Justice Kirby frequently referred to the significance of the text and sometimes found the text too intractable to achieve what

he identified to be the legislative purpose. However, on occasion, he had less hesitation in identifying the purpose of legislation than may have been warranted.²⁹ His tone did not change even when he was not in dissent.³⁰ In my opinion, Kirby J often applied the purposive approach in a way which was not envisaged by the joint judgments which he cites as authority.

Reliance on context and purpose raises matters about which judicial minds can reasonably differ. Consider such matters:

- What is encompassed in the concept of context?
- How far does context extend beyond the text of the instrument as a whole?
- What weight is to be given to aspects of context so identified?
- How is one to determine what the “purpose” of the Parliament was?
- At what level of generality should any such “purpose” be expressed?

Each of these matters raises difficult questions. Real issues of judicial legitimacy can be raised by judges determining the purpose or purposes of Parliamentary legislation. It is all too easy

for the identification of purpose to be driven by what the particular judge regards as the desirable result in a specific case.

It is necessary to bear in mind the warning given by the Supreme Court of the United States, in a passage which has frequently been quoted with approval in Australian authorities:³¹

“... [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.”³²

Furthermore, as Gleeson CJ once said:

“[5] Another general consideration relevant to statutory construction ... concerns the matter of purposive construction. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object ... That general rule of interpretation, however,

may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.

[6] ... In some cases, there may be found in the text, or in relevant extrinsic materials, an indication of a more specific purpose which helps to answer the question. In other cases, there may be no available indication of a more specific purpose. Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.”³³

By contrast, in the same case in which Gleeson CJ expressed these concerns, Kirby J found no difficulty in identifying the purpose of the legislation in his separate judgment.³⁴

When one is dealing with matters of nuance and emphasis in a context like statutory interpretation, any change is likely to be gradual and difficult to detect. However, I do not agree with Justice Kirby that there has been a reversion to a narrow literalism. No judgment of the High Court has qualified in any way the critical concepts in the joint judgments in *Bropho*, *CIC Insurance*, and *Project Blue Sky* that I have quoted above.

However, with respect to the formulation in *CIC Insurance*, no judgment has attempted to identify a list of matters capable of being encompassed within the concept of “context” when understood “in its widest sense”. Nor, with respect to the formulation in *Bropho*, has any judgment explained, in detail, how much emphasis a court ought to give to legislative purpose when giving it the “added emphasis” required. Nor, with respect to the formulation in *Project Blue Sky*, has there been any further guidance on how to weigh the respective elements of “context”,

“general purpose” and “policy”. I am not suggesting that such elaboration is necessary, let alone easy. This is all part of “the intolerable wrestle”. There is much scope for differences of judicial approach in this respect.

However, there are a number of recent High Court judgments which indicate that the degree of flexibility with respect to the text that has, on occasion, been displayed by judges in intermediate courts of appeal, has gone too far. There are indications that the judiciary must, with greater force and clarity, refocus its attention on the text itself.

Such a focus is consonant with my own approach to statutory interpretation, that I have frequently stated. I suspect that Justice Kirby would regard me as being too far towards the literalist end of the spectrum.³⁵ The task of the courts is to interpret the words used by Parliament. It is not to divine the intent of the Parliament.³⁶ The courts must determine what Parliament meant by the words it used. The courts do not determine what Parliament intended to say.³⁷

What is involved is the search for an *objective* intention of Parliament, not the subjective intention of ministers or Parliamentarians. Subjective intention, even that of a minister expressed in a Second Reading Speech, is, as has often been held, not relevant.³⁸

The drift of recent High Court judgments is to return the focus of the process of statutory interpretation to these fundamental principles. It may be that in the earlier joint judgments, for example, in *CIC Insurance v Bankstown Football Club*, these principles did not receive the emphasis they are now receiving. That does not, however, mean that those earlier judgments were intended to affect these long established principles.

It is not of course permissible to pore over the entrails of High Court judgments as if one was interpreting the Delphic Oracle. With respect to “the intolerable wrestle with words and meanings”, it is by no means clear where one starts and stops. In such a context, the changes in nuance and emphasis to which I have referred will be difficult to detect. That does not make them any less real. I will refer to three recent cases which suggest such

a change and another which indicates that the basic principles have not altered.

The first example is a short passage in the joint judgment in *Alcan (NT) Alumina Pty Ltd v Commissioner*. The High Court had to consider whether or not there was a contrary intention with respect to the application of a statutory definition in a taxation statute. The Court had no difficulty in rejecting the submissions made to it that an intention contrary to the statutory definition should be inferred.

In the course of its reasoning the joint judgment said:

“[47] This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.”³⁹

It is asking too much to closely analyse this paragraph as if it was some kind of restatement of the law of statutory interpretation. Their Honours were not purporting to do anything more than was necessary for the particular task at hand, which was in a quite narrow compass. Nevertheless, I repeat, this is an area of nuance and emphasis and it may be of some utility to look at this passage more carefully than its authors intended.

The commencing proposition that the task of interpretation “must begin” with the text itself is not controversial. Indeed, at a certain level it is quite trite because one must start with the words to be interpreted. Justice Kirby has frequently said the same thing.⁴⁰

If it is more than trite, it must be reconciled with a statement such as that from *Project Blue Sky* that “the process of construction must always begin by examining the context of the provision that is being construed”.⁴¹

Perhaps the frequency with which the High Court has found it necessary to emphasise the proposition – interpretation “must

begin with the text”⁴² – suggests that there is something going on that is worth knowing. This is particularly so because on a number of occasions the Court has gone beyond the terminology of ‘beginning with the text’, to affirm what it calls the “primacy” of the statutory text.⁴³

Although, as I have said, Justice Kirby also makes frequent reference to starting with the text, his approach is to treat a number of principles of statutory interpretation as operating simultaneously. These are principles which he has described as the “textual analysis principle”; “the contextual interpretation principle” and the “purposive construction principle”.⁴⁴ As the passage I have quoted from *Alcan* indicates, these are all relevant matters but they are not of equal application. As the quote states, “the language ... is the surest guide”. “Context” and “purpose” are described as matters which “may require consideration”. There is a significant difference in emphasis between the approach of Justice Kirby and that of the joint judgment in *Alcan*.

The second example of re-emphasis on the statutory text is the joint judgment in the recent case of *Saeed*, which considered whether an amendment to the *Migration Act 1958* (C’th) had the

effect of excluding the natural justice hearing rule. The amendment was adopted after the High Court's earlier judgment in *Ex parte Miah*.⁴⁵ The Full Federal Court relied on both the Second Reading Speech and the Explanatory Memoranda.

In allowing the appeal the High Court said:

“[33] ... [I]t is apparent that the Court did not consider the actual terms of s 51A and its application to the provisions of the subdivision. As was pointed out in *Catlow v Accident Compensation Commission* ((1989) 167 CLR 543 at 550 per Brennan and Gaudron JJ) it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction.

[34] It may be accepted that the context for the enactment of s 51A was provided by the decision in *Ex parte Miah* and that s 51A was an attempt to address the shortcomings identified in that decision. Resort to the extrinsic materials may be warranted to ascertain that context and that objective, although it is hardly necessary to do so. But that objective cannot be

equated with the statutory intention as revealed by the terms of the subdivision. The question whether s 51A in its operation has the effect contended for, of excluding the natural justice hearing rule, is to be answered by having regard, in the first place, to the text of s 51A and the provisions with which it interacts. The questions which, in turn, are raised about the operation of s 51A, it will be seen, are not answered by anything said in the extrinsic materials. This is explicable. The decision in *Ex parte Miah*, which s 51A addressed, was not concerned with the application of s 57 of the subdivision to offshore visa applicants.”⁴⁶

The second sentence in par [34], which states that it is permissible to “resort to the extrinsic materials ... to ascertain ... context and ... objective”, does suggest that resort for that purpose is “the application of the ordinary rules of statutory construction” referred to in par [33]. This would, in any event, be required by the statutory requirements of ss 15AA and 15AB of the *Acts Interpretation Act* 1901, to which the High Court was not directing its attention.

It is, as always, difficult to draw implications of a broader nature with respect to observations that were sufficient to dispose of the issues in a particular case. Nevertheless, it is interesting that the Court chose to refer to a 1985 dissenting joint judgment, which had been referred to in only one subsequent High Court case, in another two judge joint judgment.⁴⁷ The passage from the joint judgment of Brennan and Gaudron JJ in *Catlow*, which is referred to in *Saeed*, suggests a restrictive approach to the use of extrinsic materials of a character which is not consistent with much recent judicial practice.⁴⁸

It is instructive to read the entire passage from that joint judgment in *Catlow*. Their Honours said:

“If the meaning which would otherwise be attributed to the statutory text is plain, extrinsic material cannot alter it. It is only when the meaning of the text is doubtful (to use a neutral term rather than those to be found in s 15AB(1) of the *Acts Interpretation Act*), that consideration of extrinsic material might be of assistance. It follows that it would be erroneous to look to the extrinsic material before exhausting the application of the ordinary rules of statutory construction.

If, when that is done, the meaning of the statutory text is not doubtful, there is no occasion to look to the extrinsic material.”⁴⁹

It is pertinent to note that the language used in this passage – when the meaning of the text is “doubtful” – is not confined to the terminology of “ambiguity” which has hitherto traditionally been used. To similar effect is the formulation “ambiguous or uncertain” which was used in the other judgment in the High Court that had referred to *Catlow*.⁵⁰ These are clear references to a broader concept of ambiguity than either lexical or verbal ambiguity and grammatical or syntactical ambiguity. Indeed, the word “doubtful” picks up terminology from a 1906 judgment which put forward an expanded concept of “ambiguity”.⁵¹

Neither *Catlow* nor *Saeed* address the possibility, set out in s 15AB(1)(a) of the *Acts Interpretation Act*, that a court may have regard to extrinsic material “to confirm that the meaning of the provision is the ordinary meaning”. Whilst trying to again restrain myself from delving into the entrails, it is permissible to ask what significance is to be attached to the quotation of a sentence which restricts the circumstances in which extrinsic materials may be

used. There are a significant range of circumstances in which courts have done that, following the express reliance upon the Law Reform Commission report in *CIC Insurance v Bankstown Football Club*.⁵² Perhaps the answer is to be found in the chapeau to s 15AB(1) confining the section to “material ... capable of assisting in the ascertainment of the meaning of the provision”.⁵³

The third case in this survey of recent authority suggests, *sub silentio*, that the recent proclivity of judges to incorporate reference to extrinsic materials in judgments may not be regarded as benignly as it may have been in the past. In a judgment of the Court of Appeal of New South Wales, concerned with restrictions under the *Civil Liability Act* with respect to the recovery of damages for mental harm, two judgments made extensive, although divergent, reference to extrinsic materials. The majority judgment placed particular reliance on the Ipp Report. The other judgment, which differed on the interpretation, but not in the result, relied extensively on legislative history.⁵⁴

The High Court unanimously allowed the appeal. In the Court’s reasons there is a brief reference to legislative history, but no reference to any of the other extrinsic materials. The judgment

focused on the common law of negligence as determined by the High Court in a case which was considered in the Ipp Report. The Court construed the legislative provision solely in the light of the common law as so stated. There was no discussion, of the character which had occurred in the Court of Appeal, of the extrinsic materials or of the legislative history.⁵⁵

At the very least there is a different approach in this regard. The High Court judgment suggests that judges lower in the hierarchy should focus on the text and give greater attention to the permissibility of reference to extrinsic materials, prior to setting them out and relying upon them.

Notwithstanding these decisions, it cannot be concluded that the approach in *Bropho*, *CIC Insurance v Bankstown Football Club* and *Project Blue Sky* has in any way been superseded. Australian courts must continue to apply this approach until it is overruled by the High Court.

Late last year in an immigration case with the alphabet soup title *SZJGV*,⁵⁶ there were two joint judgments, basically to similar effect, and a third dissenting judgment by a single judge.

These judgments contained the following propositions:

- One joint judgment referred to the need to begin the task of interpretation with the ordinary meaning of the words “having regard to their context and legislative purpose”. [5]
- The other joint judgment referred to “the context, general purpose and policy” of the statutory provision being “the surest guide to construction”. [47]
- One joint judgment referred to *CIC Insurance v Bankstown Football Club* for the proposition that departure from the literal or natural and ordinary meaning is permitted if the result would be “irrational”. [9]
- The other joint judgment referred to *CIC Insurance v Bankstown Football Club* for the proposition that “the modern approach to statutory construction uses context” in its widest sense. [47]
- Both joint judgments effortlessly referred to the Second Reading Speech and the Explanatory Memoranda for the purpose of identifying the relevant legislative purpose. [9], [44]-[45]

- One joint judgment went on to analyse why it was that the Full Court of the Federal Court “concentrated upon the language of the section” and observed “the recognition that the answer to the question is not readily provided by the language and structure of the subsection should suggest that the answer may lie in considerations of the subsection’s object”. [51]-[52]
- The dissenting judgment stated that the task of construction must begin with the text [19] but added, with reference to 1905 English authority quoted with approval by Dixon J in 1950: “It is well established that ‘the manifest intention of a statute must not be defeated by too literal an adherence to its precise language”. [19]⁵⁷

We can conclude that the basic principles do not appear to be in dispute. It is in the application of these principles that differences emerge. This is, indeed, an “intolerable wrestle”.

I return to T S Eliot:

“Leaving one still with the intolerable wrestle

With words and meanings. The poetry does not matter.

It was not (to start again) what one had expected.

What was to be the value of the long looked forward to,
Long hoped for calm, the autumnal serenity
And the wisdom of age? Had they deceived us,
Or deceived themselves, the quiet-voiced elders,
Bequeathing us merely a receipt for deceit?
The serenity only a deliberate hebetude,
The wisdom only the knowledge of dead secrets
Useless in the darkness into which they peered
Or from which they turned their eyes ...”⁵⁸

Amidst Eliot’s dismal description of the daily task of those who craft and interpret words, this passage concludes with a thought from which we should take comfort:

“The only wisdom we can hope to acquire
Is the wisdom of humility: humility is endless.”⁵⁹

¹ T.S. Eliot *The Four Quartets: East Coker* II 20-21.

² Lord Hoffmann “The Intolerable Wrestle with Words and Meanings” (1997) 114 *South African Law Journal* 656.

³ *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* [2008] HCA 48; (2009) 237 CLR 285 at [7].

⁴ J J Spigelman “Lions in Conflict: Ellesmere, Bacon and Coke – The Years of Elizabeth (2007) 28 *Australian Bar Review* 254 at 277. His text covered perennial issues such as the

focus on the mischief to be remedied (20 years before Heydon’s case), the use of preambles, parliamentary debates and subsequent application by the courts.

5 *Stradling v Morgan* (1560) 75 ER 305 at 315.

6 See J J Spigelman “From Text to Context: Contemporary Contractual Interpretation” (2007) 81 *Australian Law Journal* 322; reprinted in T D Castle *Speeches of a Chief Justice: James Spigelman 1998-2008* (2008) CS2N Publishing, Sydney.

7 V K Rajah “Redrawing the Boundaries of Contractual Interpretation: From Text to Context to Pre-Text and Beyond” *Singapore Academy of Law Journal*, forthcoming.

8 See J J Spigelman *Statutory Interpretation and Human Rights: The McPherson Lecture Series* (2008) University of Queensland Press, vol 3, especially Ch 3 and cf in Ch 2 at pp 70-80. Australian courts have not followed the English case law in this respect; *R v Momcilovic* [2010] VSCA 50; (2010) 265 ALR 751.

9 *Bropho v Western Australia* (1990) 171 CLR 1 at 20.

10 See, eg, *Eastman v Director of Public Prosecutions (ACT)* [2003] HCA 28; (2003) 214 CLR 318 at [140] fn 99.

11 *CIC Insurance Limited v Bankstown Football Club Limited* [1997] HCA 2; (1997) 187 CLR 384 at 408.

12 See *Newcastle City Council v GIO General Limited* [1997] HCA 53; (1997) 191 CLR 85 at 99 and 112-113; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [69] and [78]; *Astley v Austrust Limited* [1999] HCA 6; (1999) 197 CLR 1 at [49] and [71]; *Network Ten Pty Limited v TCN Channel Nine* [2004] HCA 14; (2004) 218 CLR 273 at [11]-[12].

13 *Project Blue Sky* supra at [69].

14 *R v Wilson; Ex parte Kisch* (1934) 52 CLR 234 at 244.

15 *Cabell v Markham* 148 F.2d 737 at 739 (2d Cir 1945).

16 *R v Campbell* [2008] NSWCCA 214; (2008) 73 NSWLR 272 at [49]; *Newcastle City Council v Caverstock Group Pty Ltd* [2008] NSWCA 249; (2008) 163 LGERA 83 at [25]; *Caterpillar of Australia Pty Ltd v Industrial Court of New South Wales* [2009] NSWCA 83; (2009) 255 ALR 131 at [88]

17 L Wittgenstein *Philosophical Investigations* (1958) Basil Blackwell, Oxford at p 33, fn 2 pars 68-69.

18 This adaptation is found in M Zander *The Lawmaking Process* (1980) Wiedenfelt & Nicholson, London at p 57.

19 Lon L Fuller “The Case of the Speluncean Explorers” (1949) 62 *Harvard Law Review* 616 at 625-626.

20 See *Commissioner of Taxation (Cth) v Ryan* [2000] HCA 4; (2000) 201 CLR 109 at [79]-[83]; *Commissioner of Taxation v Scully* [2000] HCA 6; (2000) 201 CLR 148 at [43].

21 *Palgo Holdings Pty Ltd v Gowans* [2005] HCA 28; (2005) 221 CLR 249 at [35]-[39].

22 See *FCT v Ryan* supra at [82]; *Palgo* supra at [40].

23 *Palgo* supra at [28].

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- 24 Ibid at [112]-[113].
- 25 Ibid at [28].
- 26 *The Queen v Lavender* [2005] HCA 37; (2005) 222 CLR 67 at [33].
- 27 Ibid at [109].
- 28 Ibid at [69].
- 29 *The State of New South Wales v Amary* [2006] HCA 14; (2006) 230 CLR 174 esp at [86]-[88], [137]-[141]; *Forsyth v Deputy Commissioner of Taxation* [2007] HCA 8; (2007) 231 CLR 531 at [99]-[102].)
- 30 *Australian Finance Direct Ltd v Director of Consumer Affairs, Victoria* [2007] HCA 57; (2002) 234 CLR 96 at [59]-[66]; *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* [2008] HCA 48; (2008) 237 CLR 285 at [6]-[21], [44]-[48].
- 31 *Brennan v Comcare* (1994) 50 FCR 555 at 574 (per Gummow J); *Morrison v Peacock & Roslyndale Shipping Co Pty Ltd* [2000] NSWCCA 452; (2000) 50 NSWLR 178 at [33] (per Spigelman CJ); *Victims Compensation Fund v Brown* [2002] NSWCA 155; (2002) 54 NSWLR 668 at [9] (per Spigelman CJ); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 248 (per Dawson J); *Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1 at [658] (per Callinan J); *Attorney-General (WA) v Marquet* [2003] HCA 67; (2003) 217 CLR 545 at [145] (per Kirby J); *Director General, Dept of Education and Training v MT* [2006] NSWCA 270; (2006) 67 NSWLR 237 at [50] (per Spigelman CJ); *NSW Food Authority v Nutricia Australia Pty Ltd* [2008] NSWCCA 252; (2008) 72 NSWLR 456 at [125] (per Spigelman CJ).
- 32 *Rodriguez v United States* 480 US 522 at 525–526 (1987).
- 33 *Carr v Western Australia* [2007] HCA 47; (2007) 232 CLR 138 at [5]-[6].
- 34 Ibid at [130]-[134].
- 35 See J J Spigelman “Statutory Interpretation: Identifying the Linguistic Register” (1999) 4 *The Newcastle Law Review* 1 at 4; J J Spigelman “The Poet’s Rich Resource: Issues in Statutory Interpretation” (2001) 21 *Australian Bar Review* 224 at 225; J J Spigelman “The Principle of Legality and the Clear Statement Principle” (2005) 79 *Australian Law Journal* 769 at 770-771; J J Spigelman *Statutory Interpretation and Human Rights* supra at 120; (These addresses are accessible online at www.lawlink.nsw.gov.au/sc under “Speeches”); *R v Young* [1999] NSWCCA 166; (1999) 46 NSWLR 681 at 686; *Harrison v Melhem* [2008] NSWCA 67; (2008) 72 NSWLR 380 at [16].
- 36 See *State v Zuma* (1995) 2 SA 642; (1995) (4) BCLR 401 at 402; *Matadeen v Pointu* [1999] 1 AC 98 at 108; *R v PLV* [2001] NSWCCA 282; (2001) 51 NSWLR 736 at [82]; *Pinda v The Queen* [2002] UKPC 46; [2003] 1 AC 620 at [24].
- 37 See *R v Bolten; Ex parte Beane* (1987) 162 CLR 514 at 518; *Byrne & Frew v Australian Airlines Limited* (1995) 185 CLR 410 at 459; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168-169; *Stock v Frank Jones (Tipton) Limited* [1978] 1 All ER 948 at 953; [1978] 1 WLR 231 at 236; *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 613G, 645C-V; *Dossett v TKJ Nominees Pty Limited* [2003] HCA 69; (2003) 218 CLR 1 at [10]; *R v Young* supra at [5]; *Harrison v Melhem* supra at [16].
- 38 See, eg, *R v Bolten* supra at 524-518; *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 84 ALJR 507 esp at [31]-[33]; *R v Young* supra esp at [33]-[37]; *Harrison v Melhem* supra at [14] and [159]-[173].

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- 39 *Alcan (NT) Aluminium Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at [47], (references omitted).
- 40 *Australian Finance Direct* supra at [34]; see also *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56; (2007) 234 CLR 52 at [96].
- 41 *Project Blue Sky* supra at [69].
- 42 On the day this address was delivered, the High Court delivered its judgment in *Spencer v Commonwealth of Australia* [2010] HCA 28. At [50], the joint judgment said interpretation “must begin from consideration of ... text” and footnoted the word “must” with the following references: *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* [2001] HCA 49; (2001) 207 CLR 72 at [9] and [46]; *Commonwealth v Yarmirr* [2001] HCA 56; (2001) 208 CLR 1 at [11]-[15] and [249]; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58; (2005) 224 CLR 193 at [30] and [167]-[168]; *Weiss v R* [2005] HCA 81; (2005) 224 CLR 300 at [31]; *Stingel v Clark* [2006] HCA 37; (2006) 226 CLR 442 at [26]; *AK v Western Australia* [2008] HCA 8; (2008) 232 CLR 438 at [52]-[53]; *Gassy v R* [2008] HCA 18; (2008) 236 CLR 293 at [16]; *Cesan v R* [2008] HCA 52; (2008) 236 CLR 358 at [126]; *CTM v R* [2008] HCA 25; (2008) 236 CLR 440 at [5].
- 43 See, eg, *Foots v Southern Cross Mines* supra at [62]; *International Air Transport Association v Ansett Australia Holdings Ltd* [2008] HCA 3; (2008) 234 CLR 151 at [78].
- 44 See *Foots v Southern Cross Mines* supra at [96].
- 45 *Re Minister for Immigration and Multicultural Affairs: Ex parte Miah* [2001] HCA 22; (2001) 206 CLR 57.
- 46 See *Saeed v Minister* supra at [33]-[34].
- 47 See *Mills v Meeking* (1990) 169 CLR 214 at 223.
- 48 C/f the discussion in the five judge judgment of the Court of Criminal Appeal of the Supreme Court of Victoria in *R v Boucher* [1995] 1 VR 110 at pp 123-126.
- 49 *Catlow v Accident Compensation Commission* (1989) 167 CLR 543 at 550.
- 50 *Mills v Meeking* supra at 233.
- 51 See *Bowtell v Goldsborough Mort & Co Limited* (1905) 3 CLR 444 at 456-457. See also the authorities referred to in *Repatriation Commission v Vietnam Veterans Association of Australia NSW Branch Inc* [2000] NSWCA 65; (2000) 48 NSWLR 548 at [116] and *R v Sharma* [2002] NSWCCA 142; (2002) 54 NSWLR 300 at [54]-[57].
- 52 See, eg, D C Pearce and R S Geddes *Statutory Interpretation in Australia* (6th ed, 2006) LexisNexis Butterworths at [3.3]-[3.8].
- 53 C/f *Harrison v Melhem* supra at [12].
- 54 See *Sheehan v State Rail Authority; Wicks v State Rail Authority* [2009] NSWCA 261.
- 55 See *Wicks v State Rail Authority of New South Wales; Sheehan v State Rail Authority of New South Wales* [2010] HCA 22; (2010) 84 ALJR 497.
- 56 *Minister for Immigration and Citizenship v SZJGV* [2009] HCA 40; (2009) 83 ALJR 1135.
- 57 Referring to *R v Vasey* [1905] 2 KB 748 at 751 quoted by Dixon J in *H Jones & Co Pty Ltd v Kingborough Corporation* (1950) 82 CLR 282 at 318.

⁵⁸ T.S. Eliot *The Four Quartets: East Coker* II 21-33.

⁵⁹ T.S. Eliot *The Four Quartets: East Coker* II 48-49

**LAW AND INTERNATIONAL COMMERCE: BETWEEN THE
PAROCHIAL AND THE COSMOPOLITAN
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
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NEW SOUTH WALES BAR ASSOCIATION
SYDNEY, 22 JUNE 2010**

The focus of this lecture series is upon the significance of values in the law. In the context of international commerce, relevant legal decision-makers in the legislative, executive and judicial branches of government are influenced by their philosophical predisposition with regard to the respect to be given to the foreign elements that arise in this context. This predisposition ranges over a broad spectrum: from parochialism at one end to cosmopolitanism at the other.

This range of values affects every stage of the process: what treaties are ratified and given statutory force; what regional or bilateral arrangements are made; what model laws are adopted and implemented; how other national legislation recognises foreign law and jurisdiction; how judges choose from the broad range of options which are often available in litigation.

The multifaceted process known as globalisation has significantly extended the circumstances in which such decisions have to be made. My focus will be on the judiciary.

Cross Border Issues

The issues that arise in cross border litigation have engaged my interest for some time, both in speeches¹ and in judgments.² I suspect that an objective appraisal of my philosophical predisposition would probably locate me towards the cosmopolitan end of the spectrum. However, I accept that there is no single correct approach to such matters. These are matters on which reasonable minds can and do differ.

In most jurisdictions particular judges will be located at different parts of this spectrum. Indeed, an individual judge may approach different kinds of cross border issues with a different predisposition. In some jurisdictions virtually all judges will be located at the parochial end of the spectrum. I doubt if there is any jurisdiction in which all judges are to be found at the cosmopolitan end.

Within the bounds of judicial legitimacy, the values of judges find expression in the gaps, silences and verbal flexibility of positive law. With respect to international commerce, there remains much nuance available in the process of applying treaties, interpreting statutes and contracts, identifying the scope of binding precedent and exercising, judicially of course, discretions. All these steps in the judicial reasoning process require the formulation of judgments for which there is often no single correct answer, at least until authoritative determination by a final court of appeal.

The unpredictability of the judicial process in many nations constitutes one of the incentives for persons in cross border legal relationships to avoid formal court processes and replace them with decision-makers whose loyalties are not territorial. This is part of the explanation for the success of the international commercial arbitration regime based on the interlocked provisions of the UNCITRAL Model Law,³ the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁴ and the Washington Convention on the Settlement of Investment Disputes.⁵

Arbitration has other advantages. However, for present purposes it is pertinent to note that parties to a commercial arrangement with cross border elements can adopt arbitration to reduce the uncertainty that arises from the existence of competing jurisdictions with claims to adjudicate disputes. The quality, integrity and philosophical approach of judges varies significantly from one nation to another. Furthermore, there is, understandably, a fear that one party could obtain a “home town advantage”. The very point of choosing either a neutral venue or a neutral decision-maker, either alone or as the circuit breaker, is to minimise the commercial risks that are involved in dispute resolution.

One of the reasons why I have chosen the terminology of “cosmopolitanism” rather than more traditional terminology of “comity” is in recognition of the significant debate as to whether a new *lex mercatoria* has emerged. Similar issues may arise in a non-commercial sphere, eg, whether or not to recognise a choice of law clause which is expressed to be not that of a specific nation but which chooses the law of a religion as the proper law.⁶ Historically English courts have recognised the existence of international systems of law, particularly canon law, the law merchant and admiralty law.⁷

The widespread adoption of commercial arbitration over recent decades and the creation of a multiplicity of parallel, and sometimes interlocked, institutions administering what has emerged as a global system of internationally mobile arbitrators has led many to identify a new international *lex mercatoria* capable of applying even in the absence of an express choice of law clause.⁸

This is in direct contrast with the tradition of Anglo Australian law which operates on the basis that the governing law of a contract must be the law of a single, specific nation.⁹ This assumption may now be subject to doubt with respect to multinational contracts that contain an arbitration clause. However, it remains necessary to identify a jurisdiction or jurisdictions which can authoritatively adjudicate upon challenges to the process and/or the result of the arbitration and enforce the outcome.

In this, as in many other contexts, in my opinion, it may be best to start at the end of the judicial process – enforcement – rather than the beginning – eg, service or domicile. Determinative

weight could well be given in many cases to the place where relief of the character sought can be most efficacious. This pragmatic focus is not, however, how cross border disputes are now addressed.

Issues which may engage the philosophical disposition of a particular judge with respect to foreign elements can arise in virtually any case involving a question of private international law. However, there are some spheres in which the question appears to arise more often than in others.

Venue Disputation

Decisions as to whether or not to accept or decline jurisdiction arise more often as globalisation expands the range of transactions that involve cross border elements. All nations make claims for exorbitant long arm jurisdiction – in civil law countries generally turning on citizenship or residence and, in common law countries, generally turning on service of process. The net is cast deliberately wide, but a discretion is created to restrict those claims to some kind of rational extent, by doctrines such as *forum non conveniens*. When rules of an unnecessary wide character are qualified by broadly expressed discretions, the scope for

deployment of values is clearly greater than in situations where rules are closely defined.

Most common law nations have adopted a “more appropriate forum” test¹⁰ which, at least in principle, is considerably less parochial than the Australian “clearly inappropriate forum” test.¹¹ I note that by the recently amended treaty arrangements between Australia and New Zealand, the “more appropriate forum” test has been adopted and will be applied by Australian courts to disputes for which New Zealand is the alternative forum.

The Australian test is derived from the express application of an assumption that a person who has invoked the jurisdiction of a court has a prima facie entitlement to the exercise of that jurisdiction. United States courts take a similar approach. This is not dissimilar, albeit not as rigid, as the civil law principle that the court first seised is entitled to determine whether it will exercise its jurisdiction. Such approaches are at the parochial end of the spectrum of values.

Venue disputation has always existed in litigation, but it is clearly more common than in the past. Lawyers throughout the

world have decided that where an issue is litigated matters. One learned commentator on conflicts law has observed that, in private international law, disputes about choice of law seem to have been superseded by disputes about jurisdiction.¹²

Courts are called upon more frequently to determine, not only whether they will assume jurisdiction, but whether they will do so notwithstanding the fact that parallel litigation has been instituted in another jurisdiction. Furthermore, courts have to determine whether to issue anti-suit injunctions or anti-anti-suit injunctions, etc.

Inevitably, venue disputation raises issues about the degree of respect to be afforded to the exercise of jurisdiction by a foreign court. This occurs in circumstances where, almost universally accepted, policy considerations indicate that only one court should determine the whole of the commercial dispute, in order to avoid the irrationality of multiple litigation. It is the scope and diversity of the considerations that are relevant to determine disputes about venue that ensures that there is plenty of scope for the application of the values of a particular judge.

Venue disputation is a zero sum game. A court determines whether it will hear the whole of the dispute, including any issue of foreign law or whether, in the circumstances, a foreign court should determine the whole dispute, including any issue involving the law of the forum. I will return to the creation of a system where both courts could play an appropriate role in a collaborative manner.

Wherever a dispute about venue falls to be determined, there are usually a wide range of relevant factors. They must be assessed, weighed and balanced before applying the relevant test. These factors are incommensurable and cannot be reduced to a common metric. There is much scope for the expression of institutional self-interest and philosophical predispositions.

A good example, in the context of venue disputation, is the weight to be given to an exclusive jurisdiction clause in a contract. Pending the coming into force, and widespread adoption, of the *Hague Choice of Court Convention*, the determination of whether such a clause should lead the court not chosen to decide not to exercise its jurisdiction, requires the formulation of a judgment in which values can intrude.

There is considerable scope for differences of opinion on such issues as:

- Whether the purported contract, with an exclusion clause, was formed at all.
- Whether the agreement is vitiated or voidable *ab initio* or by subsequent conduct.
- Whether a liberal approach should be adopted to the interpretation of the clause.¹³
- Whether a mandatory law of the forum overrides the clause.
- Whether matters such as the involvement in the proceedings of persons not party to the contract should be given overriding effect.¹⁴

Similarly, values can intrude into the process of determining the proper law of a contract where there is neither an express choice nor a clear inference available from the contract itself.¹⁵ Where there is an express choice of law clause there is similar scope for differences in approach to the interpretation of the clause:

- Does a clause expressed in the terms of “this contract shall be interpreted in accordance with the law of X nation” only pick up that nation’s law of interpretation of contracts or does it adopt the substantive principles of contract law.¹⁶
- Can parties to a contract validly choose the law of a nation which has no relationship whatsoever with the contract.¹⁷
- Is a law of the forum mandatory so that it will override the choice of law in the contract.¹⁸

In this last respect, I note that one factor that significantly inhibits the selection of Australian law in an international contract is the existence of the *Trade Practices Act* 1974, pursuant to which courts can, in substance, rewrite any contract. International parties are not likely to subject themselves to that.

Furthermore, the possibility that the *Trade Practices Act* may apply as a mandatory law of the forum, which remains uncertain,¹⁹ inhibits the willingness of international parties to adopt an exclusive jurisdiction clause nominating an Australian court or selecting Australia as the site of an arbitration. The sooner this is fixed by legislation, in the case of international commercial contracts of significant scale, the better.

Enforcement of Judgments

A particularly problematic area is the enforcement of foreign judgments. There are a number of different kinds of regime for enforcement.²⁰

Money judgments can be enforced in Australia for a small number of nations pursuant to the *Foreign Judgments Act*. The statutory provision which is most clearly at the cosmopolitan end of the spectrum is the recognition of New Zealand judgments pursuant to the treaty as implemented by the *Trans Tasman Proceedings Act 2010*.

In addition to statute, a foreign judgment can be enforced at common law. This requires the local court to consider issues concerning the jurisdiction that had been exercised by the foreign court and a range of traditional defences. There are some clear rules, eg, an Australian court will recognise a foreign judgment on the basis that personal service within the jurisdiction of the foreign court. However, there are elements which require the formulation of judgments on which different views can reasonably be held.

There remains considerable scope for the application of the predisposition to which I have referred when determining questions that arise in the context of enforcement of a foreign judgment:

- Whether the foreign judgment is “final and conclusive”.
- Whether the relevant party submitted to the jurisdiction of the foreign court.
- Whether a judgment with respect to property is to be recognised as a judgment *in personam* or as a judgment *in rem*, with the effect in the latter case that the *lex situs* applies.
- Whether the foreign judgment has been obtained by fraud, including equitable fraud, even if that matter had been determined by the foreign court.²¹
- Whether the foreign judgment is contrary to the public policy of the forum.
- Whether the foreign court denied procedural fairness to the relevant party.
- Whether the foreign law should be classified as “penal” for relevant purposes.²²

Lord Denning suggested a cosmopolitan test: that the overriding principle should be reciprocity so that the local court recognises a judgment of a foreign court made in the exercise of a jurisdiction of the same character as the local court would assert.²³ This approach has not found favour.²⁴

The Supreme Court of Canada adopted a “real and substantial connection” test, originally developed for the interprovincial enforcement of judgments,²⁵ for foreign judgments.²⁶ This standard is clearly more cosmopolitan than the traditional approach which requires consideration of the scope and quality of the business conducted in the foreign nation.²⁷ It is, in my opinion, possible for Australian courts to follow the Canadians in this respect.

Judicial Co-operation

Over a significant and growing sphere of disputation courts are asked to assist each other with matters such as service, evidence, preservation of assets and of records. In any such context the predisposition of particular judges to act in a manner consistent with international comity will often be determinative. Important differences have emerged, for example, in the context of

freezing orders and search orders in support of foreign proceedings.

At first the English courts took a narrow approach to their ability to act in this manner.²⁸ This had to be overturned by legislation. Australian courts have readily given such assistance in exercise of the inherent jurisdiction. Our approach in this respect is at the cosmopolitan end of the spectrum of values to which I have referred.²⁹ This is affirmed by harmonised Rules of all Australian superior courts. The position in other jurisdictions varies considerably but, particularly with respect to orders in support of commercial arbitration, has required legislative intervention.³⁰

The field requiring judicial co-operation in which the difference in values has been most clearly identified is that of cross border insolvency.³¹ In this context there is a spirited debate between advocates of “universalism” and advocates of “territorialism”. These are broadly equivalent to my characterisation of cosmopolitanism and parochialism. There is now a considerable literature advocating various intermediate positions suggesting a spectrum of views. I note that what is often

referred to as “modified universalism”, depending on the degree of “modification”, may prove to be indistinguishable in practice from what is called “co-operative territorialism”, depending on the degree of “co-operation”.³²

The UNCITRAL Model Law, which Australia and a number of major nations have adopted, is the principal global initiative for establishing judicial co-operation when cross border insolvency issues arise. This regime is of limited application because it applies to individual corporations, rather than to groups. Many corporate groups are required, or as a matter of convenience or of tax law, are structured, in the form of independent operating subsidiaries in each law area. Other principles of co-operation are required in this respect to reduce “ring fencing” of the assets of a local subsidiary solely for the benefit of the local creditors or to minimise other impediments to the effective and speedy determination of the insolvency of the group as a whole.

The UNCITRAL Model Law is an act to be adopted, rather than a treaty. It is not, accordingly, based on the principle of reciprocity which is of such significance in all international negotiations on commercial matters. When adopted, the Model

Law operates as a law of the state. It requires co-operation between courts. The very act of adopting the Model Law is a cosmopolitan rather than a parochial legislative choice.

In circumstances where the UNCITRAL Model Law has not been adopted there are other longstanding arrangements for regional or traditional co-operation, eg, within the Commonwealth. These permit, but do not require, co-operation. The degree to which such will be proffered will depend upon the decisions of the judges who are asked to do so.

Again there is much scope for differences in approach to these matters. It is noteworthy that in recent years judicial co-operation with respect to cross border insolvency has emerged as judge made law, even in the absence of express statutory authority.³³ Courts have invoked the inherent jurisdiction.³⁴ In this context the principle of “modified universality” has been identified as the policy of the common law.³⁵

The treatment of this issue in the House of Lords involved recognition in England of the primacy of liquidation of HIH, a major Australian insurance group being conducted in the Supreme Court

of New South Wales. Two of their Lordships affirmed that there was such an inherent jurisdiction. Two concluded that there was not and the fifth found it unnecessary to decide.³⁶ However, subsequently in an extra judicial address Lord Neuberger, who was one of the Law Lords who had found that the statute was a code, appeared to have changed his mind and acknowledged the existence of an inherent jurisdiction.³⁷

The scope of the inherent jurisdiction to act in support of a foreign court also arises in the context of freezing orders and search orders. The recognition by the House of Lords of an inherent jurisdiction in the cross border insolvency context may have wider implications for other fields where assistance is required, notably freezing and search orders.

Determining Questions of Foreign Law

I indicated earlier that it may be undesirable to have the same court decide questions of local and foreign law. However, that is what happens when a court assumes jurisdiction over the whole of a dispute. It is the way these things have always been done.

As is well known, in Australian practice, our courts will, in such circumstances, decide what the applicable foreign law is and how it applies to the facts. Foreign law is treated as a question of fact, not of law. This is a process with significant limitations.

As one observer has noted:

“Like a language, foreign law is difficult to learn by anyone who has not been born and bred in the social environment in which it is used ... Most judges dealing with foreign law in a conflicts case are unaccustomed to its vernacular, unaware of its various layers of meaning, insensitive to its subtleties, ignorant of its usage, oblivious to its context. Small wonder that they are apt to make mistakes that their colleagues abroad would avoid instinctively”.³⁸

Where the issue of foreign law is complex or there is a real dispute about its content and applicability, such limitations are particularly undesirable.

The determination of foreign law by an Australian court, on the basis of conflicting expert evidence, can often be wrong, in the

sense that a court in the foreign jurisdiction would not have decided the question the same way. The result depends on the quality of the experts and on the persuasiveness of their exposition of the law. In any event, particularly where translation from a foreign language is required, significant nuances and subtleties may be lost.

Additional inadequacies may arise from treating foreign law as fact, rather than law. Our practice is that evidence of the content of the law can be given, but how the law would be applied to the facts of a particular case cannot be the subject of evidence. This has been criticised, but appears to be the dominant view.³⁹

A further problem arises when the issue is how a discretion conferred upon a court under foreign law would have been exercised by that court. The better view is that general evidence about the manner of the exercise of the discretion may be admissible, but not as to how it would be exercised in a particular case.⁴⁰

It was in a case of this latter character that the Supreme Court of Singapore referred a question of law to the High Court of

Justice of England and Wales, for its determination as to how a discretion under the English Act would be exercised.⁴¹ The case concerned the enforcement in Singapore of an English judgment.

The contract under consideration was between a Panamanian incorporated company that had provided advisory services to a Serbian corporation with respect to the sale of armoured vehicles to Kuwait. The consultant had invoked the arbitration procedures under the contract and received an award which was upheld by the Swiss Federal Tribunal. The award was apparently equivalent to about 50 percent of Serbia's foreign currency reserves.

The company sought to enforce the judgment in numerous jurisdictions throughout the world, including England and Singapore. It had obtained judgment in England. The Singapore Court had to determine whether it was "just and convenient" for that judgment to be enforced in Singapore. For that purpose it wished to know what would have happened in England in a specific respect. It directed the judgment creditor to apply to the English courts for declaratory relief. It did so in part because the

experts called by the parties disagreed as to whether or not the English judgment was enforceable in England.⁴²

I was unaware of this 2008 precedent when I made an address in January this year at the Second Judicial Seminar on Commercial Litigation in Hong Kong, a conference organised jointly by the Supreme Court of New South Wales and the High Court of Hong Kong. In that address I put forward for debate what I thought was a new idea for one court to refer a question of foreign law for an authoritative statement by the court of the relevant jurisdiction. I said that determining such matters by expert evidence:

“ ... is a costly process and leads to significant ‘lost in translation’ problems, with a real prospect that an incorrect understanding of the foreign law will be adopted and applied.”⁴³

As a result of further consideration of these issues, the Uniform Rules Committee of Court has this week adopted new rules with respect to determination of issues of foreign law. Pursuant to these rules. The Supreme Court will be able, with the consent of the parties, to direct that an issue of foreign law which

arises in proceedings in the Court be determined by the courts of the relevant jurisdiction. Furthermore, the Supreme Court will, by declaration, answer a question about Australian law, which is otherwise within its jurisdiction, for purposes of foreign judicial proceedings.

This procedure will in many cases not be preferred by the parties. Often it will prove to be more expensive than expert evidence. In cases of sufficient substance and in which the foreign law is not clear, this option may be preferred. It establishes an opportunity to ensure that the answer to the question of foreign law is authoritative.

The new rules also make provision for the Court to exercise its powers to refer a matter for determination by a referee, with the usual provisions for adoption of a referee's report by the Court. The Court has established clear practices for such references over a period of some three decades. It has not, so far as I am aware, hitherto been deployed for the determination of an issue of foreign law. This may well prove to be a more cost effective process than calling expert evidence.

My further researches have indicated that this idea has a more noble heritage than I imagined when I put it forward in January. In 1533 the beneficiary under an English will which had to be interpreted by a court in the Duchy of Brabant, more or less in what we now know as Belgium, sought an authoritative interpretation of one of the clauses of a will according to English law. The Court of Common Pleas, pursuant to a writ issued by Henry VIII, explained to the foreign court the distinction between moveable and immoveable goods in English law and provided a running commentary on the terminology of the will to that court.⁴⁴

As Professor J H Baker, who discovered this precedent, emphasised, historically there were overlapping systems of law applicable in England, notably the law merchant, admiralty law and canon law. In contexts such as marriage and probate as well as commercial relationship, English courts had to determine what these laws, which were “foreign” to the common law, required. In such cases English courts acted on certified answers from relevant authorities or received submissions from legal experts, not as witnesses, but as *amici curiae*.⁴⁵ In substance, foreign law was treated as law, not as a fact. That did not change, it appears, until the 19th Century.

During the reforming zeal of the mid 19th Century, Parliament intervened. Pursuant to the *British Law Ascertainment Act 1859* a court in one part of Her Majesty's dominions was empowered to state a case to one of the superior courts in another dominion for its opinion upon the law, rather than by taking evidence. This Act was used, particularly by English courts referring questions of Scottish law to a Scottish court.⁴⁶ In another case when the Rajah of Coorg, who had been deposed by the East India Company, died in England, the Master of the Rolls stated a case for the opinion of the Supreme Court of Judicature in Bengal on matters of Hindu law.⁴⁷

The Act has been invoked in various contexts since that time.⁴⁸ Even a few years ago Justice Barrett was asked to exercise this jurisdiction, which his Honour suggested no longer existed by force of the *Imperial Act Application Acts 1969*.⁴⁹

With respect to those courts not regarded as Her Majesty's dominions in the middle of the 19th Century, the British Parliament passed the *Foreign Law Ascertainment Act 1861* as a companion to the 1859 Act. It was never brought into operation and no

enabling convention was ever entered into by the United Kingdom. It had never been used prior to its repeal in 1973.

More recently the *European Convention on Information on Foreign Law* 1969, known as the “London Convention”, contained a procedure by which judicial authorities could correspond with other judicial authorities. However, this Convention has not been adopted into the domestic law of England and it has apparently never been used.⁵⁰

It has been suggested by certain authors that in an appropriate case the English courts could act in the same way as the Convention provides in the exercise of an inherent jurisdiction.⁵¹ There is some judicial support for such a jurisdiction.⁵²

In the United States such issues arose with respect to the means by which Federal courts determine state law. The Supreme Court of the United States determined that a Federal court, when exercising its diversity jurisdiction, must apply state substantive law.⁵³ However, a federal court’s determination was often subsequently disapproved by the state court. This led to the

adoption of what became known as the *Pullman* abstention,⁵⁴ pursuant to which a Federal court would abstain from exercising its jurisdiction on a question of State law, until the question was resolved by a State court.

Over the years, various states adopted statutes authorising the Supreme Court of the State to answer questions certified for their determination by Federal courts, and in many cases, by other State courts. A uniform system was developed in the form of a *Unified Certification of Questions of Law Act 1967* which is, with various amendments, widely adopted.

Issues still arise with respect to the American system as to whether or not a statute is required or whether there is an inherent power to accept questions on certification.⁵⁵ There are also issues to whether or not a certified question constitutes an unconstitutional advisory opinion.⁵⁶ Overall it appears that the system works effectively.⁵⁷

Of course in Australia, with a final court of appeal that has jurisdiction over both federal and state courts, together with the adoption of an accrued jurisdiction by the federal courts and the

cross vesting scheme which, subject to constitutional limitations, operates effectively, a certification system is not required within the Australian federal context. However, something of this character could easily be developed pursuant to a treaty arrangement with nations that have closely analogous legal systems. The obvious candidate is New Zealand and this could be a matter placed on the agenda for the next round of updating our interrelationship in legal matters.

The new rules of the New South Wales Supreme Court turn on the consent of the parties to take proceedings in a foreign court for the purpose of determining a question of foreign law that arises in the local proceedings. No such consent is required, although in practice it is obtained, for the invocation of the court's power to refer matters out.

It may be that, as this alternative mechanism becomes established, arrangements could be made with particular nations to adopt a more direct form of court-to-court communications with respect to such matters. This would, however, require validation by statute.

Conclusion

The objectives to be served by the processes which I have discussed in this paper have been well stated by one author who identified three objectives of the law of international commercial litigation as follows:

- (i) To provide functional responses to the modern international commercial context in which cross border problems arise;
- (ii) To provide effective and fair remedies in civil disputes when those disputes cross national borders; and
- (iii) To resolve the otherwise irreconcilable conflicts between national legal systems in order to do substantial justice between the parties.⁵⁸

I endorse these objectives and believe that they can be pursued by courts acting in collaboration.

The success of the globalised market economy, together with the greater facility for communication amongst lawyers and judges, has transformed the attitudes of judges throughout the world about acting in support of each other's jurisdiction. It has also transformed knowledge of each other's jurisdictions and

practices. There is now a definite sense of international collegiality amongst judges of different nations of a character that simply did not exist a few decades ago. This is part of the phenomenon that has been called “judicial globalisation”,⁵⁹ or the creation of a “global community of courts”.⁶⁰ The recognition of mutual interdependence between courts for the attainment of the above objectives will evolve in this context.

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- ¹ See J J Spigelman “Transaction Costs and International Litigation” (2006) 80 *ALJ* 435; J J Spigelman “International Commercial Litigation: An Asian Perspective” (2007) 37 *Hong Kong Law Journal* 859 at 866-867; (2007) *Australian Business Law Review* 318; reprinted in Tim Castle (ed) *Speeches of a Chief Justice: James Spigelman 1998-2008* Sydney 2008; J J Spigelman “Cross Border Insolvency: Cooperation or Conflict” (2009) 83 *ALJ* 44; J J Spigelman “The Hague Choice of Court Convention and International Commercial Litigation” (2009) 83 *ALJ* 386; J J Spigelman “Cross Border Issues for Commercial Courts: An Overview” Address to the Second Judicial Seminar on Commercial Litigation, Hong Kong, 13 January 2010; J J Spigelman “Freezing Orders in International Commercial Litigation” (2010) *Singapore Academy of Law Journal* (forthcoming). All of these addresses are accessible at www.lawlink.nsw.gov.au/sc under “speeches”.
- ² *James Hardie Industries Pty Ltd v Grigor* (1998) 45 NSWLR 20; *Hyde v Agar*; *Worsley v Australian Rugby Football Union Ltd* (1998) 45 NSWLR 487; *Raguz v Sullivan* [2000] NSWCA 240; (2000) 50 NSWLR 236; *James Hardie & Coy Pty Ltd v Barry* [2000] NSWCA 353; (2000) 50 NSWLR 357; *Brear v James Hardie & Coy Pty Ltd* [2000] NSWCA 352; (2000) 50 NSWLR 388; *Damberg v Damberg* [2001] NSWCA 87; 2001) 52 NSWLR 492; *Julia Farr Services Inc v Hayes* [2003] NSWCA 37; (2003) 25 NSWCCR 138; *European Bank Ltd v Citibank Ltd* [2004] NSWCA 76; (2004) 60 NSWLR 153; *Robb Evans v European Bank Ltd* [2004] NSWCA 82; (2004) 61 NSWLR 75; *Dalton v NSW Crime Commission* [2004] NSWCA 454; (2004) 62 NSWLR 77; *British American Tobacco Australia Services Limited v Sharon Y Eubanks for the United States of America* [2004] NSWCA 158; (2004) 60 NSWLR 483; *Hamilton v Merck & Co Inc*; *Hutchinson v Merck Sharp & Dohme (Australia) Pty Ltd* [2006] NSWCA 55; (2006) 66 NSWLR 48; *Amaca Pty Ltd v Frost* [2006] NSWCA 173; (2006) 67 NSWLR 635; *Garsec Pty Ltd v His Majesty the Sultan of Brunei* [2008] NSWCA 211; (2008) 250 ALR 682; *Murakami v Wiryadi* [2010] NSWCA 7; at the time of delivering this address judgment was reserved in the case of *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq) & Ors*.
- ³ UNCITRAL, *Model Law on International Commercial Arbitration* (1985).
- ⁴ United Nations, *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1959) 330 UNTS 38;
- ⁵ United Nations, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1966) 575 UNTS 159.
- ⁶ See Martin Davis, Andrew Bell and Paul Le Gay Brereton *Nygh’s Conflict of Laws in Australia* (8th ed) LexisNexis, 2010, at [19.8].
- ⁷ For an historical overview see Harold J Berman “The Law of International Commercial Transactions *Lex Mercatoria*” (1988) 2 *Journal of International Dispute Resolution* 235. See generally Berger *The Creeping Codification of the Lex Mercatoria* Klumer Law International, 1999.
- ⁸ For an historical overview see Yves Dezday and Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* Uni of Chicago Press, Chicago, 1996.
- ⁹ See, eg, *Amin Rasheed Shipping Corp v Kuwait Insurance Co* (1984) AC 50 at 65; *Wanganui-Rangitikei Electric Power Board v Australian Mutual Providence Society* (1934) 50 CLR 581 at 604; *Kahler v Midden Bank Limited* (1950) AC 24 at 42.
- ¹⁰ Derived from *Spilliada Maritime Corporation v Cansulex Ltd* (1987) AC 460.
- ¹¹ Derived from *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538. For a detailed critique of the test see Andrew Bell “Transnational Commercial Litigation and the Current

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- State of Australian Law” in K E Lindgren (ed) *International Commercial Litigation and Dispute Resolution* Ross Pearson Centre, Sydney, 2010.
- 12 See C McLachlan, “International Litigation and the Reworking of the Conflict of Laws” (2004) 120 *LQR* 580.
- 13 See, eg, *Comandate Marine Corp v Pan Australian Shipping Pty Ltd* (2006) 157 FCR 45 at [164]-[165]; *Fiona Trust Holdings Corp v Privalov* [2007] UKHL 40; (2008) 1 Lloyds LR 254 at [12]-[13].
- 14 See, eg, *Donohue v Armco* [2001] UKHL 64; (2002) 1 Lloyds LR 425 esp at [23]-[27], [60]-[61]; *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association* (1997) 41 NSWLR 559 at 569-571.
- 15 See Davis, Bell and Brereton, supra at [19.28]-[19.37].
- 16 See Davis, Bell and Brereton, supra at [19.11].
- 17 See Davis, Bell and Brereton, supra at [19.15]-[19.19].
- 18 See Davis, Bell and Brereton, supra at [19.39]-[19.49].
- 19 See W Jo-Mei Ma “What’s My Choice: deciphering the provisions on conflict of laws in the Trade Practices Act” (2001) 11 *Trade Practices Law Journal* 149. Note also Davis, Bell and Brereton, supra at [19.47]-[19.48].
- 20 See “Transaction Costs and International Litigation” supra fn 1 at pp 449-450.
- 21 There is a conflict between Australian and English decisions in this respect. See *Keele v Findley* (1990) 21 NSWLR 444 and the analysis of Davis, Bell and Brereton supra at [40.64]-[40.71].
- 22 See Davis, Bell and Brereton supra at [18.16]-[18.21], [18.34],[40.78].
- 23 *Re Dulles’ Settlement No 2* (1951) Ch 842 at 851..
- 24 See the cases considered in Davis, Bell and Brereton at [40.21]-[40.22].
- 25 See *Morguard Investments Ltd v De Savoye* (1993) SCR 107; (1997) 6 DLR (4th) 256.
- 26 See *Beals v Saldanha* (2003) SC 70; (2003) 234 DLR (4th) 1.
- 27 See, eg, Davis, Bell and Brereton at [40.8]-[40.10]. See also “The Great Canadian Comity Experiment Continues” (2004) 120 *LQR* 365.
- 28 See *Siskina v Distos Compania Naviera SA (“The Siskina”)* [1979] AC 210; *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* (1993) AC 334 at 362.
- 29 See *Riley McKay Pty Ltd v McKay* (1982) 1 NSWLR 264 esp at 276; *Patrick Stevedore Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1; *Pelechowski v Registrar, Court of Appeal, NSW* [1999] HCA 19; (1999) 198 CLR 435 at [45] and [52]; *Cardile v LED Builders Pty Ltd* [1999] HCA 18; (1999) 198 CLR 380 at [41]-[42]; *Australian Broadcasting Corporation v Lenah Meats Pty Ltd* [2001] HCA 63; (2001) 208 CLR 199; *Davis v Turning Properties Pty Ltd* [2005] NSWSC 742 at [22]-[35]; *Celtic Resources Holdings PLC v Arduina Holdings BB* [2006] WASC 68; (2006) 32 WAR 276; See also the Honourable Justice Peter Biscoe *Freezing and Search Orders: Mareva and Anton Piller Orders* LexisNexis Butterworths, Australia, 2008 esp at [1.17]-[1.18]. [2.28], [1.28], [2.58]-[2.62]; J Tarrant “Mareva Orders: Assisting Foreign Litigants” (2007) 27

Australian Bar Review 314; Lee Aitken “Jurisdiction, Substantive Relief and the Asset Preservation Order” (2007) 81 *ALJ* 453.

30 See generally my address “Freezing Orders in International Commercial Litigation” supra fn 1 which contains a comparative analysis of the law of different jurisdictions in this respect. With respect to search orders see Campbell McLachlan “The Jurisdictional Limits of Disclosure Orders in Transnational Fraud Litigation” (1998) 47 *ICLQ* 3.

31 See generally my paper on “Cross Border Insolvency” referred to in fn 1 above.

32 See J L Westbrook “A Global Solution to Multinational Default” (1999-2000) 98 *Michigan Law Review* 2276; L M Lo Pucki “The Case for Co-operative Territoriality in International Bankruptcy” (1999-2000) 98 *Michigan Law Review* 2216; L M Lo Pucki “Universalism Unravels” (2005) 79 *American Bankruptcy Law Journal* 143; R K Rasmussen “Where are all the Transnational Bankruptcies?: The Puzzling Case for Universalism” (2007) 22 *Brooklyn Journal of International Law* 983; A M Kipnis “Beyond UNCITRAL: Alternatives to Universality in Transnational Insolvency” (2008) 36 *Denver Journal of International Law and Policy* 155.

33 See *Dicey, Morris and Collins on the Conflict of Laws* (14th ed) vol 2, London, Sweet & Maxwell, 2006 at par [30-103] p 1389; J J Spigelman “Cross Border Insolvency” fn 1 at 49-50; John Martin “Cross Border Insolvency and the Common Law” in K E Lindgren *International Commercial Litigation and Dispute Resolution*, supra esp at pp 221-223. See also Ian F Fletcher *Insolvency and Private International Law: National and International Approaches* (2nd ed), Oxford University Press, Oxford, 2005 Ch 4 esp at [4.01]-[4.03]

34 See *Al Sabah v Groupo Torras SA* (2005) UKPC 1; (2005) 2 AC 333 at [35]; *R v Cavell Insurance Co* (2005) 25 CCLI (4th) 230, esp at [20] and on appeal (2006) 39 CCLI (4th) 159; 269 DLR (4th) 679 at [34]-[38], [48]-[54], [60].

35 See, eg, *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Ltd* (2007) 1 AC 508; (2006) UKPC 26; *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21; (2008) 1 WLR 812; *R v Cavill Insurance Co* (2005) 25 CCLI (4th) 230 and on appeal (2006) 39 CCLI (4th) 159; 269 DLR (4th) 679.

36 See *Re HIH General Insurance Limited McGrath v Riddell* (2008) UKHL 21; (2008) 1 WLR 852.

37 Lord Neuberger of Abbotsbury “Insolvency, Internationalism & Supreme Court Judgments”, 11 November 2009, published as “The International Dimension of Insolvency” (2010) *Insolvency Intelligence* p 42.

38 ThM De Boer, “Facultative Choice of Law: The Procedural Status of Choice-of-Law, Rules and Foreign Law” (1996) 257 *Recueil des cours de l’Academie de droit international de La Haye* 222 at 305.

39 See Jane McComish “Pleading and Proving Foreign Law In Australia” (2007) 31 *MULR* 400 at 418-422.

40 See Davis, Bell and Brereton, supra at [17.8]; *National Mutual Holdings Pty Ltd v Sentry Corp* (1989) 19 FCR 155; *Idoport Pty Ltd v National Australia Bank* (2000) 50 NSWLR 640 at 644.

41 See *Westacre Investments Inc v Yugoimport SDPR* (2008) UWHC EWHC 801 (Comm) as adopted and applied in *Westacre Investments Inc v The State-owned Company Yugoimport SDPR (aka Yugoimport-SDPR)* (2009) 2 SLR (R) 166.

42 See *ibid* (2009) 2 SLR(R) supra at [10].

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- 43 See “Cross Border Issues of Commercial Courts” supra fn 1 at p 13.
- 44 See J H Baker “Ascertainment of Foreign Law: Certification to and by English Courts Prior to 1861” (1979) 28 *International & Comparative Law LQ* 141 esp at 148.
- 45 See Baker *ibid* *passim*.
- 46 See, eg, *Lord v Culvan* (1860) 1 Drew and Sm 24; (1862) 62 ER 287; *Topham v Duke of Portland* (1863) 1 De GJ and Sm 517; (1863) 46 ER 205.
- 47 *Login v The Princes Victoria Gouramma of Coorg* (1862) 32 Beav 632; (1862) 54 ER 1035.
- 48 See, eg, *In Re a Debtor; Ex parte Viscount of the Royal Court of Jersey* (1980) 1 Ch 384; (1980) 3 WLR 758; *MacDougall v Chitnavis* (1937) SC 390; (1937) SL 2421.
- 49 See *Official Trustee in Bankruptcy v Udowenko* [2004] NSWSC 890.
- 50 See B Rodger & J Doorn “Proof of Foreign Law: The Impact of the London Convention” (1997) 46 *ICLQ* 151.
- 51 A Layton and H Mercer, *European Civil Practice* (2nd ed) Thompson, Sweet & Maxwell, London 2004 at [8.014].
- 52 See *Panayotou v Sony Music Entertainment (UK) Ltd* (1994) 2 WLR 241; see also Richard Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* Oxford Uni Press Oxford (1998) esp at 240-244.
- 53 *Erie Railroad Co v Thompkins* 304 US 64 (1938).
- 54 *Railroad Commission v Pullman Co* 312 US 496 (1941).
- 55 See, eg, *Re Elliott* 446 P.2d 347 (Wash 1968); *Sunshine Mining Co v Allendale Mutual Insurance Co* 666 P.2d 1144 (Idaho 1983).
- 56 See, eg, *Grantham v Missouri Department of Corrections* (1990) WL 602159 (Mo. 1990).
- 57 See, Corr & Robbins “Interjurisdictional Certification and Choice of Law” (1988) 41 *Vanderbilt Law Review* 411; Jane Nass “Examining the Power of Federal Court to Certify State Law” (2003) 88 *Cornell Law Review* 1672; R Corcoran “Federal Courts Certification of Questions of Law to State Courts” (2003) 29 *Journal of Legislation* 157; Wendy L Watson, McKinzi Craig and Daniel Orion Davis “Federal Court Certification of State Law Questions: Active Judicial Federalism” (2007) 28 *The Justice System Journal* 98.
- 58 See Campbell McLachlan “The Jurisdictional Limits of Disclosure Orders in Transnational Fraud Litigation” (1998) 47 *ICLQ* 3 at 3; Campbell McLachlan “International Litigation and the Reworking of the Conflict of Laws” (2004) 120 *LQR* 580 at 581-582.
- 59 Anne-Marie Slaughter, “Judicial Globalisation” (2000) 40 *Va J. Int’l L* 1103.
- 60 Anne-Marie Slaughter, “A Global Community of Courts” (2003) 44 *Har Int’l LJ* 191; see generally Anne-Marie Slaughter, *A New World Order* Princeton University Press, Princeton (2004) esp Ch 2.

**ANNOTATIONS TO THE CORPORATIONS ACT
LAUNCH OF AUSTIN AND BLACK'S ANNOTATIONS
BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
SYDNEY, 9 JUNE 2010**

The principal virtue of a text structured in the order of the sections of an Act is its practical utility. The relevant section is often the quickest way into a legal issue. The identification of the principal cases on the section, together with a pithy but accurate summary of the propositions established in the case law, is an invaluable tool for both practising lawyers and for judges.

The volume which I launch this evening bears the somewhat inauspicious title *Austin & Black's Annotations to the Corporations Act*. The reason I say it is inauspicious is because it is usual for an author's surname to become included in the title of the work only after the author has died, or, at least, has ceased involvement with the work. The authors are, as you can see, very much with us.

I have known Bob Austin for longer than I care to remember. We started off together in the Bachelor of Arts degree at the

University of Sydney in 1963. He progressed to the Law School in the usual way in the third year, whereas I stayed on campus to complete an Arts Honours degree and our student paths diverged.

I found out later that it was during his articles with Leslie Winter, the principal of a small firm, that he first came engaged with the practical reality of corporate law. When Bob was sworn in as a Justice of the Supreme Court in 1998, to fill the first vacancy in the Equity Division that occurred after my appointment as Chief Justice, Leslie Winter told me that he remembered me as a three-year-old boy on *The Continental*, the ship on which my parents brought me out to Australia in 1949.

Bob Austin has taught company law either at undergraduate or postgraduate levels since 1973. He practised law as a solicitor for some nine years and as a judge for some 11 years. He has published numerous articles and a number of books. Most notably, Bob joined Professor Harold Ford for the fifth edition of his *Principles of Company Law* in 1990, and remains a co-author of that publication, co-authoring the 14th edition of *Ford's Principles of Corporations Law* with Professor Ian Ramsay.

Ashley Black, whom I have come to know only by reputation, became interested in company law at Sydney Law School in 1985 and pursued an LLM course in 1998. In 1999 he joined the firm then known as Stephen Jacques in its corporations law sandpit where he has played ever since, producing books and numerous articles in the field.

Between them, the co-authors bring to this task about seven decades of reading, teaching, advising, drafting, writing and adjudicating corporations law. This is a formidable combination of intellectual assets to be deployed for the distillation of the pith and substance of the case law. Only the profoundly learned, or the foolhardy, can have the confidence to undertake such a task. The former appears to be the case here.

It is, of course, impossible to comment this evening on the *Annotations* by means of considering the treatment of particular sections. There are simply too many of them and it would be invidious to privilege some sections rather than others. However, I do wish to express my disappointment that there is no annotation for my very favourite section of the Act, section 7.

That section provides that “most of the interpretation provisions for this Act are to be found in” Part 1.2. However, it goes on to state that interpretation provisions relevant to a particular Part, Division or Subdivision may be found at the beginning of the Part, Division or Subdivision. Furthermore, section 7 tells us that an individual section may contain its own interpretation provision and, the draftsman is careful to note, in such a case the interpretation provision is “not necessarily” found “at the beginning” of the section.

This is an entire section of the Act dedicated solely to establishing the proposition: It could be anywhere. I refer to this as the “Happy Hunting Section” and it should not go unannotated.

There has not been an annotated corporations act of this character since the 7th edition of Ken Robson’s volume appeared in 2002.¹ I understand a new edition of that work is likely to be published later this month by the other legal publisher who, out of politeness on this occasion, I will not name. This is a competition that has a long and honourable history.

The first such volumes were published in 1937. Judging only by the dates of the Foreword and Preface it appears that in 1937, as now, Butterworths won the publishing race, also probably by about a month.

The first annotated Australian book was Butterworth's Pilcher, Uther and Baldock *The Australian Companies Acts: Reconciled and Annotated*.² The authors were a barrister, one solicitor who had been parliamentary draftsman, and another solicitor. I am not aware of their subsequent careers. Unlike the rival book that came out in the same year, I have found no subsequent references to the volume. Indeed, its immediate publication was ignored by the *Australian Law Journal*, published by the rival company, which noted only the publication of its own volume that year.³ Not even the fact that the Butterworths version had a Foreword by Sir John Latham, then Chief Justice of the High Court of Australia, ensured its longevity. As the author of the Foreword to the volume I am launching today, I do not regard this as a happy omen.

The rival 1937 volume had a much more distinguished lineage. Its authors were Percy Spender KC and Gordon Wallace. It was entitled *Company Law and Practice*.⁴

Percy Spender, the son of a locksmith and a Fort Street boy, worked at the New South Wales Crown Solicitor's office whilst studying Arts and Law at the University of Sydney. As a man without family connections or wealth, his subsequent career in the law, politics and international relations was an extraordinary achievement. It was shortly after the publication of *Company Law and Practice* that, in the election of October 1937, he entered Parliament for the federal seat of Warringah. He stood as an independent, defeating the Defence Minister in the then government of the United Australia Party. He became a founding member of its replacement, the Liberal Party.

Spender held a number of ministries in the Menzies wartime government and was a member of the War Cabinet. When Menzies returned to power in 1949 he became Minister for External Affairs. He was the principal force behind the development of the Colombo Plan (to which some referred as "The Spender Plan") and a principal negotiator of the ANZUS Pact. He

became Australia's second Ambassador to the United States,⁵ an appointment which many interpreted as Sir Robert Menzies removing a rival for the leadership. Spender became the first Australian appointed to the International Court of Justice in The Hague, where he served as a judge between 1958 and 1964, becoming the President of that Court from 1964 to 1967. This is a career of unsurpassed attainment for an Australian lawyer.⁶

It is, however, his legal career as a barrister in the 1930s which is of significance for present purposes. A young man with no social or legal connections, he had only his drive, initiative and capacity to commend him. After graduating from Sydney Law School with the University Medal in 1922 he went straight to the Bar and then, as now, the meritocratic culture of the Sydney Bar allowed competence to prosper. In 1935 he was appointed a Kings Counsel, aged only 37, the youngest KC in Australia and, possibly, in the British Empire.⁷ As the co-author of a book of annotations on Corporations Law, he is a formidable precursor for Austin and Black.

Spender's co-author was a younger barrister, Gordon Wallace, who would become a Judge of the Supreme Court in

1960 and, in 1966, the first President of the Court of Appeal, the creation of which was attended by some friction.⁸ On his appointment as President, Wallace rose from fifteenth position in the order of seniority to second. These status issues were a source of great anxiety at the time.

Wallace's legal career was a distinguished one, although not as distinguished as Spender's. He was born Gordon Isaacs, educated at Sydney Boys High School and the University of Sydney, graduating in 1927. He went to the Bar the next year. In 1933 he changed his family name by deed poll to his mother's maiden name. It is said that some unkind members of the Sydney Bar began referring to Sir Isaac Isaacs, the former Chief Justice of the High Court, then Governor-General of Australia, as Sir Wallace Wallace.

Spender and Wallace was followed in 1940 by *Victorian Company Law and Practice*, annotated by Bernard O'Dowd, a former parliamentary draftsman and legal author – although best known as a poet – and a young barrister, D I Menzies, later a judge of the High Court.⁹

The annotation lineage of *Spender and Wallace* and *O'Dowd and Menzies*, continued in 1965 as a joint venture of New South Wales and Victoria when, the then Mr¹⁰ Justice Wallace and the Victorian silk, John Young QC, published *Australian Company Law and Practice*.¹¹ The joint venture manifested the national aspirations of the 1961 *Uniform Companies Acts*.

Continuing the legal lineage of high distinction, Sir John Young was to serve as the Chief Justice of the Supreme Court of Victoria from 1974 until 1991. Young had his 15 minutes of Warholian fame in June 1941. As a young lieutenant he was on guard duty at a detention camp in Surrey when Rudolf Hess, Hitler's deputy who had flown to Britain to negotiate a peace, leaped from a third storey window in either an escape or suicide attempt. It was Young who detained him.

A notable connection between *Wallace and Young* and the predecessor volume of *Spender and Wallace* was the fact that a young barrister who was part of the team for *Wallace and Young* was Sir Percy's son, John Spender. He has informed me that his principal role was compiling the index under supervision.

The quality of *Wallace and Young* was such that it remained a frequent source of reference for me as a barrister even in the years that it fell increasingly out of date. I made primary use of the Butterworths loose-leaf annotations service, being the sombre, dark brown volumes of Patterson and Ednie, eventually superseded by Patterson, Ednie and Ford for the 1981 Companies Code, its light brown volumes, no doubt, intended to herald the new dawn of the first national corporations law scheme.

Its successor, the austere black and green volumes of *Australian Corporations Law*, was structured by subject matter not sections, with Austin as Chair of the Editorial Board and many chapters written by Black. My own subscription was frozen at May 1998, upon my appointment as Chief Justice. This proved rather fortunate when I had to prepare a judgment setting out the regulatory scheme for “prescribed interests” under the *Corporations Law* as at about mid 1998, when the relevant contracts for a managed investment scheme were entered into.¹²

Nevertheless, *Wallace and Young*, fixed by glue in hardback, and updated by a single 1967 Supplement, remained a work which

I have had frequent occasion to refer when tracing a point of fundamental principle.

Australian legal literature has a noble tradition of corporations law scholarship of the highest order. The practical utility of annotations has long been recognised and the recent gap in the market, now filled, was an aberration. The utility is now enhanced by the instantaneous links available from the electronic version, which Spender, Wallace, O'Dowd, Menzies and Young would have regarded with wonder. Austin and Black stands in a fine tradition and I have much pleasure in declaring it well and truly launched.

¹ K. G. Robson *Ken Robson's Annotated Corporations Act* (7th ed, 2002) CCH Australia.

² N.G. Pilcher, A. H. Uther and W. J. Baldock *The Australian Companies Acts: Reconciled and Annotated* (1937) Butterworths.

³ See 'Book Review' (1937) 11 *Australian Law Journal* 57.

⁴ P. Spender and G. Wallace *Company Law and Practice* (1937) Law Book Company

⁵ The first three Australian diplomatic representatives in Washington – Lord Casey, Sir Owen Dixon and Sir Frederic Eggleston – were styled as ministers. As a loyal member of the British Empire, we accepted that the Ambassador of the United Kingdom ought to hold the rank of ambassador. The United States and Australia established full ambassadorial relations in 1946, with Norman Makin the first to be commissioned as Ambassador.

⁶ See, generally, David Lowe *Australian Between Empires: The Life of Percy Spender* (2010) Pickering and Chatto, London.

⁷ *Ibid*, p 33.

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- ⁸ See Michael Kirby "Judicial Supersession: The Controversial Establishment of the NSW Court of Appeal" (2008) 30 *Sydney Law Review* 177.
- ⁹ B. O'Dowd and D. I. Menzies *Victorian Company Law and Practice* (1940) Law Book Company.
- ¹⁰ As judges of the Court were then redundantly known.
- ¹¹ G. Wallace and J. M. Young *Australian Company Law and Practice* (1965) Law Book Company.
- ¹² See *Gardiner v Agricultural and Rural Finance Pty Ltd* [2007] NSWCA 235 at [25]–[34].

**FREEZING ORDERS IN INTERNATIONAL COMMERCIAL
LITIGATION
SINGAPORE ACADEMY OF LAW
DISTINGUISHED SPEAKER SERIES
INAUGURAL LECTURE
BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
SINGAPORE, 6 MAY 2010**

The kernel of commercial law is an elementary, indeed simple, proposition. People should keep their promises. The rest of commercial law is just detail. This may appear a trite proposition. Sometimes it is necessary to be trite to keep in mind the fundamental. Making people keep their promises is the great contribution which the legal system makes to commercial certainty and therefore to economic prosperity.

Law and Commerce

All advanced economies have developed a sophisticated set of rules and mechanisms for the identification and enforcement of promises made in the course of commerce. Without a high level of assurance that such rules and mechanisms will operate effectively

and efficiently, the global market economy that has enhanced the economic welfare of so many people, would simply not be possible.

More than anything else, a successful market economy is the product of good government and of the law. In the Town Hall of Sienna there are two wonderful frescos by Lorenzetti: Allegories of Good Government and of Bad Government. Even a cursory glance of the latter, with its depiction of decay and chaos, would convince anyone that, without the law, there can be no market system.

In his great classic *The Wealth of Nations*, Adam Smith said:

“Commerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of their property, in which the faith of contracts is not supported by law, and in which the authority of the state is not supposed to be regularly employed in enforcing the payment of debts from all those who are able to pay. Commerce and manufactures, in short, can seldom flourish in any state

in which there is not a certain degree of confidence in the justice of government.”¹

All forms of economic interaction are impeded by the degree to which personal and property rights are subject to unpredictable and arbitrary incursion so that people act on the basis of fear and suspicion rather than on the basis that others will act in a foreseeable manner and honour their promises. What the law must deliver is a high level of predictability so that economic actors can proceed with confidence that their reasonable expectations will be met. It is only if individuals and corporations believe that they can transact business with a high degree of assurance that promises will be kept and debts paid, that a market economy can effectively operate. The legal profession, and its many different manifestations in roles, constitutes a legal infrastructure which is as sophisticated, and as necessary, as the physical infrastructure involved in economic activity.

One commentator has described business lawyers as “transaction cost engineers” who facilitate commercial intercourse by reducing future transaction costs.² Well drafted commercial agreements avoid conflict with regulatory regimes, anticipate and

therefore avoid disputes, and create structures for dealing with the unknown or the unexpected. By their involvement, business lawyers add value to commercial transactions. Legal devices minimise transaction costs in the future, circumvent constraints on conduct, avoid liabilities, pursue strategic objectives and allocate the risks associated with commercial transactions.

All of this, of course, requires a facility with words. Indeed, we lawyers, both practitioners and judges, are traffickers in words. Words are the vehicle by which the law and legal relationships are necessarily conveyed. Words are our basic tools of trade.

All lawyers who draft texts attempt to be as clear and comprehensive as they can be. However, as Sir James Fitzjames Steven put it:

“... it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain, if possible, to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it.”³

Of course, this objective can never be completely achieved. This leads to disputes and litigation about what words mean. Commercial lawyers would have little to do if everyone agreed on what they had promised and kept those promises.

In this address I will focus on one important aspect of the law of remedies – freezing orders – which is a surprisingly recent development in the common law.

Preserving Assets

Over the centuries in which the principal form of property was real estate and physical property, rather than services, dominated the economy, the ability to dissipate and hide assets from prospective creditors was less than it has become in comparatively recent times. Changes in the economy, in technology and in public policy, notably the easing of exchange controls, have transformed the ease and speed with which assets, particularly liquid assets and records, can be moved and hidden. In many cases, all that is now needed is the click of a mouse.

Driven by the needs of their commercial clients, English lawyers developed ideas, new to the common law system, which

they successfully urged on English judges in the mid-seventies by way of adaptation to these new challenges to the enforcement of commercial promises. They drew on other legal traditions to assist this development. Attachment of assets prior to the determination of legal proceedings on the part of unsecured creditors was well established in civil law jurisdictions. The Germans called it *arrest*. The Italians called it *sequestio*. The French called it *saisie conservatoire*. This was an international project from its commencement.

Originally the new commercial remedies were known by the names of the cases which first adopted them – Mareva injunctions and Anton Piller orders – but are now generally known as freezing and search orders, respectively. The need for this innovation was verified by the immediate proliferation of such cases throughout the common law world. Courts developed a range of criteria for the availability of these new remedies.

Combating international fraud and corruption is a multifaceted process. Of critical significance is the ability to enforce the disclosure of assets. Orders requiring disclosure are frequently a concomitant of applications for freezing orders.

Search orders are directed to discovery of documentation which is capable of disclosing fraudulent conduct and tracing of proceeds of fraud. The object of search orders is to preserve evidence for trial.

Transnational disclosure orders, directed to disclosing documentary evidence for the purposes of proceedings, involve a similar range of issues to those which arise in the context of freezing orders.⁴ They are of growing importance because of the capacity to hold databases in safe jurisdictions and to transmit electronic databases almost as rapidly as cash.

There is, however, one application which caused difficulty: the extension of such orders beyond the territorial jurisdiction of the court requested to provide remedies. This has two dimensions. First, the making of orders which apply to assets held abroad. Secondly, the making of orders, with respect to assets within the jurisdiction, in aid of foreign judicial proceedings. In this address I will focus on the latter.

Despite the manifest commercial imperative which lay behind the continuing stream of applications to preserve assets

from dissipation, some common law judges adopted the traditional reluctance of the common law to interfere with property rights prior to a final judgment that determined who owed what to whom. There was longstanding authority which validated this position. However, this instinctive response no longer served the needs of contemporary commerce. It was quickly overcome with respect to domestic legal proceedings, although, it was reflected, entirely properly, in the detailed guidelines worked out in the authorities of many common law nations before such relief was granted.

However, there remained, and to some degree remains, reluctance to take such measures in support of foreign legal proceedings. Additional barriers of an inappropriately technical character were erected in cases where the only link with the jurisdiction in which relief was sought was the presence of assets. Many of the cases in which this issue has arisen involved applications for freezing orders in support of a foreign commercial arbitration.

As this audience is well aware, there is in existence a coherent, international system for the resolution of commercial disputes by arbitration which stands in marked contrast to the

complex, incoherent and diverse provisions for what has been described as the “jungle” of international litigation in courts.⁵ I refer, of course, to the UNCITRAL *Model Law*; the New York *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* and the Washington *Convention on the Settlement of Investment Disputes*. These international instruments have been so widely adopted as to constitute a separate regime for dispute resolution in commercial matters.

Courts are called upon to support this regime, relevantly for this address, in two ways. First, courts may be called upon to enforce interim measures awarded by an arbitral tribunal. Secondly, courts may be asked to make such orders in support of an actual or prospective arbitration, often *ex parte*. This address will be concerned with the second matter.

The 1985 *Model Law* authorised provisions for interim measures by arbitrators and for courts to order interim measures in support of an arbitration. National laws were enacted which incorporated these provisions of the *Model Law*, including in Australia and Singapore. The issue of *ex parte* interim measures, for a proposed Revision of the *Model Law*, was so controversial

that the procedure of the Working Group was described as being “at times close to breaking point”.⁶ Following the 2006 Revision, the *Model Law* now provides for a comprehensive regime relating to interim measures.⁷ In the event, no international consensus could be reached to require the enforceability of interim measures ordered by an arbitrator on an ex parte basis, as distinct from such an order on notice.⁸ The courts will continue to be called on to act in support of an arbitration.

The *Model Law* enables ratifying nations to “opt out” of the provision allowing enforceability of ex parte interim measures made by an arbitrator. Amendments shortly to be enacted, I trust, to the Australian *International Arbitration Act* 1974 (Cth) provide that interim measures made on notice by an arbitrator will be enforceable pursuant to the UNCITRAL regime. However, ex parte freezing orders will need to be made by a court. I note that the new s 12A of the *International Arbitration Act* of Singapore also expressly authorises the Court to grant interim measures in support of a foreign arbitration.

England

Throughout the common law world, the principal barrier to effective relief in a cross border case was the House of Lords judgment in *The Siskina*.⁹ Lord Denning, who described the development of the Mareva injunction as “the greatest piece of judicial reform in my time”,¹⁰ went on to describe *The Siskina* as the most disappointing reversal of his judgments.¹¹ This puts it at the top of a long list.

The Siskina involved a claim by cargo owners of a “one ship” company whose only asset was insurance monies payable by London underwriters for the loss of the ship. The foreign cargo owners were held not to be entitled to interim relief by way of a freezing order on a basis which significantly limited the ability of English courts to give such relief in aid of any foreign proceeding. Their Lordships treated the application solely through the prism of the law of injunctions. They concluded that, what had come to be called the “Mareva injunction” was simply a form of an interlocutory injunction. Their Lordships rejected Lord Denning MR’s suggestion that an English court had an inherent jurisdiction to attach assets so that they could be available to satisfy a future judgment of a foreign court.

To some degree this was Lord Denning's own iconoclastic fault.¹² He brought to the task of statutory interpretation techniques that were not merely unorthodox but plainly impermissible. However, the focus on statutory interpretation was, in my opinion, misplaced in two respects. First, by the failure to recognise that what was involved was not just an "injunction" as traditionally understood. Secondly, by rejecting the alternative that Mareva orders could be justified on the basis of the exercise of the inherent jurisdiction. This was not merely a task of statutory interpretation.

Subsequently, in the *Channel Tunnel* case, Lord Mustill stated *The Siskina* principle in the following terms:¹³

"... the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependent on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action. If the underlying right itself is not subject to the jurisdiction of the English court, then that court should never exercise its power under s 37(1) by way of interim relief."

The *Channel Tunnel* case modified *The Siskina* principle in one respect. Freezing orders in aid of a foreign proceeding can be granted if the dispute could have been adjudicated in England, even if it would not be by reason, relevantly, of an arbitration agreement choosing a foreign venue. The principle in *The Siskina* has been further qualified in other subsequent decisions.¹⁴ However, as one author has put it, *The Siskina* is “listing not sunk”.¹⁵

On appeal from Hong Kong, in the *Mercedes Benz* case, the Privy Council applied *The Siskina* and affirmed the proposition that an application for a Mareva injunction is not a cause of action, nor is it available as a stand alone order.¹⁶ Of particular note, is the strong dissent of Lord Nichols in that case.

His Lordship commenced his judgment with the following observation:

“The first defendant’s argument comes to this: his assets are in Hong Kong, so the Monaco court cannot reach them; he is in Monaco, so the Hong Kong court cannot reach him. That cannot be right. That is not acceptable today. A person operating internationally

cannot so easily defeat the judicial process. There is not a black hole into which a defendant can escape out of sight and become unreachable.”¹⁷

Lord Nichols identified an alternative test for specifying the requisite territorial link. A freezing order could be granted by a Hong Kong court if the anticipated judgment of the foreign court would be recognised and enforceable in Hong Kong. This test would, in large measure, albeit not entirely, ensure that the court could provide appropriate assistance, in order to maintain the integrity of the legal system of the foreign court.

The position with respect to what the basic English text refers to as “freestanding Mareva relief”¹⁸ is now determined by statutory reform. Such relief is available:

- Since 1982 in aid of proceedings brought in a contracting state to the Brussels Convention and Lugarno Convention (s 25 of the *Civil Jurisdiction and Judgments Act 1982*).
- Since 1997 in relation to “proceedings”, regardless of where they are commenced and whether their “subject matter” comes within the Brussels Convention (pursuant to the *Civil*

Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997).

- Pursuant to Rules of Court which permit service out of the jurisdiction in aid of s 25(1) interim proceedings (LCPR r 6.20(4)).
- In relation to arbitral proceedings, wherever the seat of the arbitration is or even if no seat has been designated (s 44 of the *Arbitration Act* 1996). (Not extending, subject to a Ministerial Order, to proceedings under the ICSID Convention.¹⁹⁾)

Australia

In 1996, the Australia Law Reform Commission in a comprehensive report on *Legal Risks in International Transactions*²⁰ recommended that consideration be given to fixing *The Siskina* problem by legislation equivalent to that adopted in England. Like the rest of this farsighted report, it was ignored. However, Australian courts have developed the common law of Australia in a way which bypasses *The Siskina* principle and which has rendered legislation unnecessary.²¹

Although *The Siskina* was sometimes applied at first instance in the early years, Australian courts did not force freezing order relief into the mould of the injunction traditionally given by a court of equity and relied instead on the court's inherent jurisdiction to protect the integrity and efficacy of the court's processes.

In New South Wales, the earliest authoritative decision invoked the court's inherent jurisdiction, including the manifestation of that traditional jurisdiction in s 23 of the *Supreme Court Act* 1970, which provides that: "The court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales". The court focused on preventing the abuse inherent in any attempt to dispose of property which was intended to, or would have the necessary effect of, frustrating the plaintiff in proposed proceedings.²²

This approach was affirmed by the High Court of Australia in a number of judgments which established that a Mareva order or an asset preservation order, now called a freezing order, was not an injunction.²³ This different perspective has permitted a more

flexible approach to the availability of such relief, without the statutory intervention that was needed in England.

The High Court has affirmed that interlocutory *injunctive* relief, of the kind historically given by the Court of Chancery, cannot be granted unless there is an underlying cause of action. However, it has expressly distinguished the position with respect to freezing orders (and also anti-suit injunctions).²⁴ The juridical basis of a freezing order is the court's inherent power to prevent the frustration of its process.²⁵ I note that reliance on the inherent jurisdiction was precisely the approach Lord Denning took in *The Siskina* in the Court of Appeal, which the House of Lords rejected.²⁶

In Australia, this alternative foundation led to the conclusion that the terminology of "injunction" is inappropriate for a freezing order. I reiterate that the critical difference between the Australian case law and English case law turns on the fact that in England freezing orders are regarded as a species of injunction, whereas in Australia they are expressly not regarded as such.²⁷

There is a distinction between interim relief directed to assets which are the subject matter of proceedings and interim relief directed to ensuring the efficacy of the judicial determination of actual or prospective proceedings. Plainly, freezing orders are sought because they serve the interests of plaintiffs. In this respect they do not differ from injunctions. However, any attempt by a defendant to make itself judgment proof also raises public policy considerations, namely, to protect the integrity of the administration of justice. For this function, a different jurisdictional foundation is appropriate.

As Justices Gummow and Hayne observed, with reference to the Australian line of authority:

“The distinctions drawn in the above decisions are not readily to be perceived in the judgments in the English cases which preceded them.”²⁸

The reliance on the “interlocutory injunction”, in the traditional sense, in the line of authority stemming from *The Siskina*, was manifest in the House of Lords refusal to allow a liquidator to preserve the assets of the former directors of a South African company who, allegedly, had stripped those assets from

the company. The application was refused because it did not identify the precise substantive relief which the plaintiff would ultimately seek.²⁹

The position in Australia is different. The Supreme Court of New South Wales has issued injunctions to ensure the availability of property acquired by the controllers of a company in the Bahamas, whom it was alleged had stolen its assets.³⁰ Justice Campbell was satisfied, on the balance of probabilities, that proceedings would be begun by the plaintiff, although there was no express undertaking to do so. His Honour's orders are a clear case of freestanding relief.

His Honour observed:

“The administration of justice in New South Wales is not confined to the orderly disposition of litigation which is begun here, tried here and ends here. In circumstances where international commerce and international monetary transactions are a daily reality, and where money can be transferred overseas with sometimes as little as a click on a computer mouse, the administration

of justice in this State includes the enforcement in this State of rights established elsewhere.”³¹

Jurisdiction of this character is more readily assumed by a court, such as the Supreme Court of New South Wales, which has an inherent jurisdiction. The High Court has also held that a superior statutory court, which has an implied but not inherent jurisdiction, has equivalent powers.³²

Australian superior courts have restated the Australian case law in a form which offers clear guidance and certainty to commercial litigants. This has been done by means of harmonised Rules of Court and a harmonised Practice Note, which have been adopted by all superior jurisdictions in Australia.

The Council of Chief Justices of Australia and New Zealand has a standing Harmonisation Committee which attempts, not always successfully, to ensure that important aspects of procedure are uniform throughout the Australian jurisdictions. This has proven to be successful in the case of freezing orders and search orders.

The Rules refer to the purpose of a freezing order as being to prevent: “the frustration or inhibition of the court’s process by seeking to meet a danger that a judgment or prospective judgment of the court will be wholly or partly unsatisfied”.³³ The Rules also expressly state that they apply “if there is a sufficient prospect” that another court will give judgment and that the Australian court will register or enforce that judgment.³⁴

The accompanying Practice Note to the Rules states:

“The rules of court confirm that certain restrictions expressed in *The Siskina* [1979] AC 210 do not apply in this jurisdiction. First, the Court may make a freezing order before a cause of action has accrued (a ‘prospective’ cause of action). Secondly, the court may make a freestanding freezing order in aid of foreign proceedings in prescribed circumstances. Thirdly, where there are assets in Australia, service out of Australia is permitted under a new ‘long arm’ service rule.”³⁵

The last sentence is a reference to a rule which provides that a freezing order may be served on a person outside Australia if

any of the assets to which the order relates are within the jurisdiction of the court.³⁶

The circumstances in which the court will register and enforce a foreign judgment is itself a large subject. It is sufficient for present purposes to say that it is not universally available.³⁷ Furthermore, reliance on the inherent jurisdiction suggests that the ability to act in support of foreign proceedings will not be limited to such a situation with respect to stand alone freezing orders. However, that is a step which is not yet clearly taken, although the reasoning of Justice Campbell in the case to which I have referred could support such a development. I will return to this issue below.

Canada

The case law of Canada initially followed *The Siskina*. However, an expansion of the jurisdiction to grant stand alone freezing orders occurred in 1996 when McLachlan J (as the Chief Justice then was) upheld the jurisdiction to grant such relief pursuant to what her Honour described as the “residual discretionary power” found in s 36 of the British Columbia *Law and*

Equity Act which empowered the Court to grant interlocutory relief where “just and convenient”.³⁸

As in England, the jurisdictional foundation of the Canadian exercise of the jurisdiction remained the concept of an interlocutory injunction. However, numerous courts in Canada have granted stand alone freezing orders, though the Canadian position is that a justiciable right must exist in the court asked to order such relief. This arises by reason of the focus on the traditional concept of an injunction as contained in the statutory provisions.

Although there does not appear to have been any reliance on the inherent jurisdiction, a detailed analysis of the Canadian case law suggests that the decisive consideration is the probability of eventual enforcement of a foreign judgment in Canada. In substance, this is a recognition of a broader basis for stand alone relief of the kind advanced by Lord Nicholls in *Mercedes Benz* and expressly recognised in the Australian Rules and Practice Note to which I have referred.³⁹

Malaysia

Malaysian courts have exercised the jurisdiction to make freezing orders and search orders on a regular basis since the 1980s.⁴⁰ This jurisdiction was based on statutory provision in the traditional form empowering the making of an injunction. However, a first instance court has determined that the court's inherent jurisdiction also supports such orders. The case in which that was accepted referred to the then recent New South Wales decision to which I have referred.⁴¹

The inherent jurisdiction, if any, is based on Order 92 of the *Rules of the High Court* and Order 137 of the *Rules of the Federal Court* which provide:

“For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.”

The Court of Appeal has given some support to the existence of such a basis for a freezing order, albeit not definitively deciding the issue.⁴²

It would appear that it is open, on the basis of this legislative structure and case law, for a Malaysian court to grant freezing orders in circumstances which would be denied by *The Siskina* principle. Nevertheless, the Court of Appeal recently stated, in relation to an injunction to prevent a party commencing an arbitration in Singapore:

“In our judgment the injunction applied for should have not been granted because there was no pleading against the appellant on which the injunction could issue. It is settled law that the right to obtain an interlocutory injunction is not a cause of action. There must be a cause of action pleaded in the usual fashion before an interlocutory injunction may be applied for and obtained.”⁴³

The court went on to refer to the relevant passage from Lord Diplock in *The Siskina*, which had been applied in other cases.⁴⁴ The focus of this authority is on the concept of the injunction in a traditional sense, as reflected in the legislation of both England and Malaysia. *The Siskina* principle has been applied to refuse relief in support of an arbitration.⁴⁵

The principal line of authority does not give consideration to the exercise of the inherent jurisdiction to grant orders of a character that do not fall within the traditional concept of the injunction. The possibility that this could broaden the circumstances in which relief can be given in support of an arbitration or other foreign proceedings has not been further considered.

Hong Kong

The position in Hong Kong has been that *The Siskina* line of authority was accepted. Indeed, as I mentioned, *Mercedes Benz* was a Privy Council appeal from Hong Kong. Subsequent case law in Hong Kong expressed doubt as to whether or not that line of authority applied to arbitrations.⁴⁶

The matter has now been put beyond doubt in Hong Kong by legislative reform.⁴⁷ The *High Court Ordinance (Cap 4)* has been amended to make it clear that the Court is able to order interim remedies in relation to proceedings that have been or are to be commenced in a place outside Hong Kong.⁴⁸ One clause of the ordinance expressly states that the relevant power is conferred: “for the purpose of facilitating the process of a court outside Hong Kong that has primary jurisdiction over such proceedings”.⁴⁹

At the same time the *Arbitration Ordinance (Cap 341)* was amended to expressly state that the orders that could be made in support of an arbitration occurring outside of Hong Kong, include freezing orders. The section expressly abolishes the requirement

that a claimant must establish a cause of action and that orders sought should be ancillary to arbitration proceedings in Hong Kong.⁵⁰

Singapore

The English line of authority on this issue has been influential in Singapore. *The Siskina* was adopted as the law of Singapore by the Court of Appeal in *Karaha Bodas* (2006).⁵¹ Shortly thereafter two High Court judges reached different conclusions with respect to the continuing effect of *The Siskina* in cases in which a freezing order was sought in support of a foreign arbitration. Each case addressed the general power to issue Mareva orders under s 4(10) of the *Civil Law Act*.

In the first case, *Swift-Fortune*, Justice Judith Prakash set aside a Mareva injunction.⁵² Shortly thereafter Justice Belinda Ang Saw Ean reached a different conclusion in *Front Carriers*. Her Honour's reasoning included observations that the *Channel Tunnel* case had modified *The Siskina* doctrine in a relevant manner.⁵³

On appeal from the judgment in *Swift-Fortune*, the Court of Appeal discussed both judgments. As Chief Justice Chan Sek Keong pointed out, with reference to the difference of approach of Justice Judith Prakash in that case and Justice Belinda Ang Saw Ean in *Front Carriers*:

“That two cases on the same legal issues relating to international arbitrations have come before the courts within such a short span of time may be indicative of the potentially high incidence of similar cases in the future. That two experienced commercial judges have expressed different views on the applicability of the relevant statutory provisions relating to Mareva injunctions also indicates the need for clarity, certainty and predictability in an important area of Singapore commercial law, viz, the statutory power of the court to grant interim orders or relief to assist international arbitrations ...”⁵⁴

The Court left open the possibility that the *Channel Tunnel* approach would be adopted and stated that Justice Belinda Ang Saw Ean was correct in granting a Mareva injunction on the basis that the plaintiff had a cause of action in Singapore.

The position with respect to commercial arbitrations has been clarified, both by the judgment of the Court of Appeal in *Swift-Fortune* and a subsequent statutory amendment inserting s 12A into the *International Arbitration Act*, which came into force in January this year. I am not aware whether or not similar amendments are under consideration for other forms of commercial disputes.

The position with respect to such other disputes appears to depend on the continued applicability of the analysis of the Court of Appeal in *Karaha Bodas* and *Swift-Fortune* itself. In the subsequent case of *Wu Yang Construction Group*, the Court of Appeal returned to the issue and Chief Justice Chan Sek Keong reaffirmed the basic proposition for the law of Singapore in this respect.⁵⁵

These authorities were subject to a detailed analysis by Justice Chan Seng Onn in *Multi-Code Electronics Industries*. His Honour adopted the reasoning in *Channel Tunnel* and the approach of Justice Belinda Ang Saw Ean.⁵⁶ Another first instance judgment has relied on the applicability of *The Siskina* principle.⁵⁷

It is noteworthy that the analysis in the Singapore courts focuses on the English case law from *The Siskina*.⁵⁸ In *Swift-Fortune*, Chief Justice Chan Sek Keong set out the different legislative history of the provisions in England and in Singapore and the differences in the way the law has developed in the two jurisdictions. The Chief Justice left open the possibility of interpreting s 4(10) in a more expansive manner.⁵⁹

I would not pretend to address an audience of the Singapore Academy of Law on what, if any, scope there is for the exercise of an inherent or implied jurisdiction. However, I note that Justice Chan Seng Onn in *Multi-Code Electronics* refers to the exercise of inherent powers to grant a stay.⁶⁰ Perhaps in the future, the Court of Appeal will be asked to consider the Australian line of authority on freezing orders.

In the closely analogous field of cross border insolvency, there is a body of authority in support of the proposition that a court will assist a foreign insolvency even in the absence of express statutory authority.⁶¹ A number of cases support the existence of such a jurisdiction.⁶² However, the most recent

treatment of this issue in the House of Lords involved recognition in England of the primacy of the liquidation of HIH, a major Australian insurance group, being conducted in the Supreme Court of New South Wales. Two of their Lordships affirmed that there was such an inherent jurisdiction. Two concluded that there was not and the fifth found it unnecessary to decide.⁶³ However, subsequently, in an extra judicial address Lord Neuberger, who was one of the Law Lords who had found that the statute was a code, appeared to have changed his mind and acknowledged the existence of an inherent jurisdiction.⁶⁴

Judicial Assistance

Intervention by means of a freezing order in order to support the integrity of the administration of justice by a foreign court is only one sphere in which judicial assistance between courts is of significance, indeed of growing significance, in many areas of the law, particularly in the commercial context. These problems are not new.⁶⁵ However they are of a qualitatively different order by reason of the multifaceted process known as globalisation. A range of international conventions and model laws provide for judicial assistance. However they are not comprehensive and

each has limitations. I have addressed these matters, particularly the limitations, on a number of occasions.⁶⁶

The disparate fields in which judicial assistance are required include:

- Service of process: The *Hague Service Convention*, whilst widely adopted, is not universal and, in any event, has some difficulties arising from the cumbersome process of making requests through a Central Authority.
- Assistance with evidence: Similarly, the *Hague Evidence Convention* is widely but not universally accepted and has the same procedural problems.
- Cross border insolvency: The UNCITRAL *Model Law* has been adopted by a number of major economies. However it is not universal. A number of alternative mechanisms exist for communication between courts, particularly through the mechanism of protocols agreed by the parties.
- Enforcement of judgments: There are a wide variety of approaches to the enforcement of judgments. The Hague Conference's attempt to formulate a general Convention proved impossible by reason of this diversity. The *Hague*

Choice of Court Convention is a step in the right direction but is not yet in force.

The significance in all of these fields of co-operation between courts, particularly with respect to court to court communications, is a subject capable of development in the various ways in which international collaboration has occurred in the past:

- A treaty basis
- A model law basis
- A regional or a bilateral arrangement.

The position with respect to judicial co-operation may be distinctively different in common law jurisdictions than it is in civil law jurisdictions. The latter have a quite different approach to the status of courts. The concept of an inherent jurisdiction in the way that common lawyers understand it would be unacceptable. Common law judges have an inheritance of judge-made law and, despite the considerable expansion and significance of statutes, judicial authority is not entirely derived from other legislative acts.⁶⁷

The critical significance of cross border judicial co-operation for the preservation of assets and of records was identified by Lord Millett when he said:

“In other areas of law, such as cross border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention. International fraud requires a similar response. It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other’s jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former.”⁶⁸

Subsequently Lord Millett said, with particular reference to freezing orders:

“The commercial necessity resulting from the increasing globalisation of traders encourage the adoption of measures to enable national courts to provide

assistance to one another, thereby overcoming difficulties occasioned by the territorial limits of their respective jurisdictions. But judicial comity requires restraint, based on mutual respect not only for the integrity of one another's process, but also for one another's procedural and substantive laws. ”⁶⁹

To look at this from my perspective, a superior court in Australia has, in the exercise of its own jurisdiction, a clear interest in ensuring that its own orders will be rendered effective by an overseas court in the exercise of the jurisdiction of that overseas court. Where the other court will, in fact, act in support of the Australian court then the Australian court should itself reciprocate, in my opinion, even if it can point to no express statutory power. To put the matter more precisely, this manifestation of the inherent jurisdiction should be recognised as a common law principle by reason of the significance of reciprocity in the international law of nations. It is a manifestation of the way the common law can develop to accord with principles of international law.

In my earlier addresses on this subject, I advocated the recognition of the barriers to effective international commercial

litigation as a form of non-tariff barrier to trade and investment. This arises because dispute resolution in international commerce or investment is subject to inhibitions and transaction costs to which domestic commerce and investment is not subject including:

- uncertainty about the ability to enforce legal rights;
- additional layers of complexity;
- additional costs of enforcement;
- risks arising from unfamiliarity with foreign legal process;
- risks arising from unknown and unpredictable legal exposure;
- risks arising from lower levels of professional competence, including judicial competence;
- risks arising from inefficiencies in the administration of justice and, in some cases, of corruption.

These additional transactions costs of international trade and investment are of a character which do not operate, or operate to a lesser degree, with respect to intra-national trade and investment. They impede mutually beneficial exchange by means of trade and investment.

I advocated the inclusion of such matters in the negotiations for bilateral free trade agreements. That appeared to me to be logical. I have not yet been able to interest the Australian Government in doing so.

It appears that the only way forward may be from within the legal community itself. Any of the models above could be developed, ie, treaties, model laws or bilateral arrangements. The significance of such co-operation was recognised many years in ago in the 1999 Seoul Statement on Mutual Judicial Assistance in the Asia Pacific Region, signed by or on behalf of virtually all the Chief Justices of the region. By reason of the enthusiasm of the then Chief Justice of South Korea, a treaty between South Korea and Australia has been entered into with respect to the provision of mutual judicial assistance. There seems to me to be no reason why a similar treaty could not be entered into between Australia and Singapore.

In the absence of any such formal treaty, there are spheres in which the courts are masters of their own destiny, at least in most common law nations, eg, in the making of Rules of Court.

Pursuant to such powers, important mechanisms for judicial assistance can be developed following discussions between courts or amongst regional groupings of courts.

The objectives to be served by co-operation between courts and the provision of judicial assistance in various contexts, including freezing orders, has been well stated by one author who identified three objectives of the law of international commercial litigation as follows:

- (i) To provide functional responses to the modern international commercial context in which cross border problems arise;
- (ii) To provide effective and fair remedies in civil disputes when those disputes cross national borders; and
- (iii) To resolve the otherwise irreconcilable conflicts between national legal systems in order to do substantial justice between the parties.⁷⁰

I endorse these objectives and believe that they can be pursued by courts acting in collaboration with respect to the matters that I have addressed in this paper.

The success of the globalised market economy, together with the greater facility for communication amongst lawyers and judges, has transformed the attitudes of judges throughout the world about acting in support of each other's jurisdiction. It has also transformed knowledge of each other's jurisdictions and practices. There is now a definite sense of international collegiality amongst judges of different nations of a character that simply did not exist a few decades ago. This is part of the phenomenon that has been called "judicial globalisation",⁷¹ or the creation of a "global community of courts".⁷² The recognition of mutual interdependence between courts for the preservation of the jurisdiction of each may evolve in this context.

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- ¹ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (1952) Encyclopaedia Britannica Inc, at 403.
- ² R Gilson, “Value Creation by Business Lawyers: Legal Skills and Asset Pricing” (1984) 94 *Yale Law Journal* 239; see also L Bernstein, “The Silicon Valley Lawyer as a Transaction Cost Engineer” (1995) 74 *University of Oregon Law Review* 239 and D Driesen and S Ghosh, “The Functions of Transaction Costs: Rethinking Transaction Cost Minimisation in a World of Friction” (2005) 47 *Arizona Law Review* 61.
- ³ *In Re Castioni* [1891] 1 QB 149 at 167-8. I have developed this theme in J J Spigelman, “Words, Words, Words” (2007) 81 *Australian Law Journal* 601.
- ⁴ See Campbell McLachlan “The Jurisdictional Limits of Disclosure Orders in Transnational Fraud Litigation” (1998) 47 *International and Comparative Law Quarterly* 3.
- ⁵ See *Airbus Industry GIE v Patel* [1999] 1 AC 119 at 132 per Lord Goff.
- ⁶ Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (3rd ed, 2010) Sweet & Maxwell, at 232.
- ⁷ For a comparison of the 1985 and 2006 Revisions see Justice Clyde Croft and Bronwyn Lincoln, “The Role of Courts: Enforcement of Arbitration Awards and Anti-Arbitration Injunctions” in K E Lindgren (ed), *International Commercial Litigation and Dispute Resolution* (2010) Ross Parsons Centre, Sydney Law School.
- ⁸ See Article 17C(5) of the UNICITRAL Model Law (2006).
- ⁹ *Siskina (Owners of Cargo Lately Laden on Board) v Distos Compania Naviera S.A.* (“*The Siskina*”) [1979] AC 210.
- ¹⁰ Lord Denning, *The Due Process of Law* (1980) Butterworths, at 134. See also John Stevens “Equity’s Manhattan Project: The Creation and Evolution of the Mareva Injunction” (1999) 14 *Denning Law Journal* 25.
- ¹¹ Lord Denning, *The Due Process of Law* supra at 141.
- ¹² *The Siskina* supra at 258 G-H and 260 B per Lord Diplock.
- ¹³ *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 362.
- ¹⁴ See, eg, *British Airways Board v Laker Airways Ltd* [1985] AC 58 at 81; *South Carolina Insurance Co v Assurantie Maatschappij “De Zeven Provinciën” N.V.* [1987] AC 24 esp at 40 and cf at 44-45.
- ¹⁵ See Peter Devonshire, “Listing not Sunk: The Siskina in the House of Lords” (2007) 123 *Law Quarterly Review* 361 and see Peter Devonshire “Freezing Orders Disappearing Assets and the Problem of Enjoining Non Parties” (2002) 118 *Law Quarterly Review* 124 at 127.
- ¹⁶ *Mercedes Benz A.G v Leiduck* [1996] AC 284.
- ¹⁷ *Ibid* at 305.
- ¹⁸ See Stephen Gee, *Commercial Injunctions* (5^h ed, 2004) Sweet & Maxwell, at [1.025].
- ¹⁹ See *ETI Euro Telecom International NV v Republic of Bolivia* [2008] EWCA Civ 880; [2009] 1 WLR 665.

20 Australian Law Reform Commission, *Legal Risk in International Transactions* (1996) Report No 80.

21 The fullest treatment of Australian law is Peter Biscoe, *Freezing and Search Orders: Mareva and Anton Piller Orders* (2nd ed, 2008) LexisNexis Butterworths, esp Ch 5. See also John Tarrant “Mareva Orders: Assisting Foreign Litigants” (2006) 27 *Australian Bar Review* 314 and Devonshire, “Freezing Orders Disappearing Assets and the Problem of Enjoining Non Parties” supra esp at 136-139. The Australian approach has been criticised. See Alistair Wyvill “Law of Fraudulent Conveyance as the Jurisdiction Foundation for Mareva Injunctions” (1999) 73 *Australian Law Journal* 672; Stephen Pitel and Andrew Valentine, “The Evolution of the Extraterritorial Mareva Injunction in Canada: Three Issues” (2006) 2 *Journal of Private International Law* 339 at 362-364.

22 See *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 esp at 276.

23 See, eg, *Patrick Stevedore Operations No 2 Pty Ltd v Maritime Union of Australia* [1998] HCA 30; (1998) 195 CLR 1; *Pelechowski v Registrar, Court of Appeal, NSW* [1999] HCA 19; (1999) 198 CLR 435 at [45] and [52]; *Cardile v LED Builders Pty Ltd* [1999] HCA 18; (1999) 198 CLR 380 at [41]-[42]; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63; (2001) 208 CLR 199. In *Cardile* the Court preferred reference to “Mareva Orders” in lieu of “Injunctions” at [42].

24 See *Lenah Game Meats* supra esp at [12], [94]-[95].

25 See, eg, *Cardile* supra at [41]-[42]; *Lenah Game Meats* supra at [94].

26 *The Siskina* supra at 233-234, 236.

27 See the detailed analysis by Campbell JA in *Davis v Turning Properties Pty Ltd* [2005] NSWSC 742; (2005) 222 ALR 676 at [22]-[34]. See also the Biscoe, *Freezing and Search Orders* supra esp at [1.17]-[1.18], [2.28], [1.28], [2.58]-[2.62].

28 *Lenah Game Meats* supra at [95].

29 *Fourie v Le Roux* [2007] UKHL 1; [2007] 1 WLR 320.

30 See *Davis v Turning Properties* supra. See also Tarrant supra; Lee Aitken “Jurisdiction, Substantive Relief and the Asset Preservation Order” (2007) 81 *Australian Law Journal* 453.

31 *Davis v Turning Properties* supra at [35]. See also the similar position taken by the Supreme Court of Western Australia in *Celtic Resources Holdings PLC v Arduina Holdings BV* [2006] WASC 68; (2006) 32 WAR 276.

32 See *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612.

33 Uniform Civil Procedural Rules 2005 (NSW) r 25.11(1).

34 *Ibid* r 25.14(2) and (3).

35 “Freezing Orders”, Practice Note No. SC Gen 14,

36 Uniform Civil Procedural Rules r 25.16.

37 I have discussed this in J J Spigelman, “Transaction Costs and International Litigation” (2006) 80 *Australian Law Journal* 438 at 449-451.

38 See *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v Canadian Pacific Limited* (1996) 2 SCR 495; 136 DLR (4th) 289.

39 Pitel and Valentine, *supra* esp at 353-358.

40 See generally Mark S W Hoyle, *Freezing and Search Orders*,(2006) Informa London, at [11.74]-[11.82].

41 See *Pacific Santo SDN Bhd v United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143 citing *Riley Mackay Pty Ltd* *supra*. As to search orders see *Bank Bumiputra Malaysia v Lorraine Osman* [1985] 2 MLJ 236.

42 See *Aspartra SDN BHD v Bank Bumiputra Malaysia* [1988] 1 MLJ 97.

43 *Nishimatsu Construction Co Ltd v Kecom Sdn Bhd* [2009] 2 MLJ 404.

44 *Dial Kaw A/P Tara Singh v Mann Foong Realty SDN BHD* [2000] 3 MLJ 153; *Khoo Soo Teong v Khoo Siew Ghim* [1991] 3 MLJ 158.

45 *Eternal Construction v Balfour Beatty Cementation* [2004] 7 MLJ 537.

46 See, eg, *Leviathan Shipping Co Ltd v Sky Sailing Overseas Co Ltd* [1998] 4 HKC 347.

47 These reforms were based on a detailed consideration of the issue by the Chief Justice’s Working Party on Civil Justice Reform (see *Civil Justice Reform: Final Report of the Chief Justice’s Working Party on Civil Justice Reform*, Section 12). For a consideration of the background to these proposals see Henry Suen and Sai On Cheung “The Power to Grant Mareva Injunctions in Aid of Foreign Proceedings: Principles, Recent Developments, and the Civil Justice (Miscellaneous Amendments) Bill 2007 in Hong Kong” [2008] *The International Construction Law Review* 232.

48 Sections 21L, 21M and 21N.

49 Section 21N(1)(d).

50 Section 2GC, esp subsection (1B).

51 *Karaha Bodas LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR 112 at [31]-[43].

52 *Swift-Fortune Limited v Magnifica Marine SA* [2006] 2 SLR 323.

53 *Front Carriers Limited v Atlantic & Orient Shipping Corp* [2006] 3 SLR 854.

54 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 at [6].

55 *Wu Yang Construction Group Limited v Mao Yong Hui* [2008] 2 SLR 350 at [28].

56 *Multi-Code Electronics Industries (M) BHD v Toh Chun Toh Gordon* [2009] 1 SLR 1000 at [55] et seq.

57 See *Petrovil v Staindy Overseas Limited* [2008] 3 SLR 856 esp at [16].

58 See, eg, *Swift-Fortune* [2007] 1 SLR 629 *supra* at [72]-[85].

59 See *Ibid* [92]-[94]. I note that there was reference to a decision from the Court of Appeal of the Bahamas as well as English authority.

60 *Multi-Code Electronics* *supra* at 1041.

61 See Collins, L (ed), *Dicey, Morris and Collins on the Conflict of Laws* (14th ed, 2006) Sweet & Maxwell at par [30-103]; J J Spigelman “Cross Border Insolvency: Co-operation or

-
- Conflict?” (2009) 83 *Australian Law Journal* 44 at 49-50; John Martin “Cross Border Insolvency and the Common Law” in K E Lindgren (ed) *International Commercial Litigation and Dispute Resolution* supra at pp 221-223. See also Ian F Fletcher *Insolvency and Private International Law: National and International Approaches* (2nd ed, 2005) Oxford University Press, Ch 4 esp at [4.01]-[4.03]
- 62 See *Al Sabah v Grupo Torras SA* [2005] UKPC 1; [2005] 2 AC 333 at [35]; *R v Cavell Insurance Company* [2005] 25 CCLI (4th) 230, esp at [20] and on appeal [2006] 39 CCLI (4th) 159; 269 DLR (4th) 679 at [34]-[38], [48]-[54], [60].
- 63 See *In re HIH Casualty and General Insurance Limited; McGrath & Ors v Riddell* [2008] UKHL 21; [2008] 1 WLR 852.
- 64 Lord Neuberger of Abbotsbury “Insolvency, Internationalism & Supreme Court Judgments”, Speech to the Insolvency Law Dinner, 11 November 2009, published as Lord Neuberger, “The International Dimension of Insolvency” (2010) 23 *Insolvency Intelligence* 42.
- 65 See, eg., H L Jones “International Judicial Assistance: Procedural Chaos and a Program for Reform” (1953) 62 *Yale Law Journal* 517; Dean Maclean *International Judicial Assistance* (2002) Clarendon Press, Oxford; B A Ristau *International Judicial Assistance (Civil and Commercial)* (1984) International Law Institute (2 vols).
- 66 J J Spigelman, “Transaction Costs and International Litigation” (2006) 80 *Australian Law Journal* 435 at 453; J J Spigelman, “International Commercial Litigation: An Asian Perspective” (2007) 37 *Hong Kong Law Journal* 860 at 866-867; (2007) 35 *Australian Business Law Review* 318 reprinted in Tim Castle (ed) *Speeches of a Chief Justice: James Spigelman 1998-2008* (2008) CS2N Publishing, Sydney; J J Spigelman “Cross Border Insolvency: Co-operation or Conflict” (2009) 83 *Australian Law Journal* 44; J J Spigelman “The Hague Choice of Court Convention and International Commercial Litigation” (2009) 83 *Australian Law Journal* 386. See also J J Spigelman “Cross Border Issues for Commercial Courts”, 13 January 2010, accessible (as are all the other papers) at www.lawlink.nsw.gov.au/sc under “Speeches” (Spigelman CJ).
- 67 For an analysis of the different approaches of the two systems in this respect see P Schlosser “Jurisdiction and International Judicial Administrative Co-operation” (2000) 284 *Recueil Des Cours* 9.
- 68 *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 at 827.
- 69 *Refco Inc v Eastern Trading Co* [1999] 1 Lloyd’s Rep 159 at 175.
- 70 See McLachlan supra at 3. See also Campbell McLachlan “International Litigation and the Reworking of the Conflict of Laws” (2004) 120 *Law Quarterly Review* 580 at 581-582.
- 71 Anne-Marie Slaughter, “Judicial Globalisation” (2000) 40 *Virginia Journal of International Law* 1103.
- 72 Anne-Marie Slaughter, “A Global Community of Courts” (2003) 44 *Harvard International Law Journal* 191; see generally Anne-Marie Slaughter, *A New World Order* (2004) Princeton University Press, esp Ch 2.

THE GLOBAL FINANCIAL CRISIS AND AUSTRALIAN COURTS
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In September 2008 I spent Lehman Brothers weekend in Shanghai attending an international conference of insolvency practitioners. A highlight of the conference was the sudden departure of a significant number of American insolvency practitioners who were scheduled to speak. Many of them were part of the Lehman Brothers Chapter 11 team which, having completed the work for Chapter 11 option, had confidently left New York for Shanghai not expecting to be called on. They were.

It is fair to say that the insolvency practitioners from all over the world who were left behind in Shanghai were not engulfed by any sense of gloom about their immediate prospects in the practice of the black arts of a commercial undertaker. The crisis, as we all know, escalated, not least because the deal that had been worked

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out to save AIG, which was virtually everybody's counterparty, unravelled by reason of the decision to let Lehman Brothers go.

Although, like every other nation involved in the global financial system, the freezing of global credit markets had a substantial impact in Australia, it was considerably less than in other nations. The national government had run budget surpluses through the good years and had no net debt. None of the major commercial banks had any substantial exposure to the financial instruments, the opacity of which caused the freeze. The economy, particularly the resources sector, was connected to economies that were continuing to grow, notably China.

Although a number of emergency measures were required, they did not involve the scope or scale of those which came to be adopted in other advanced economies. No financial institution required government support by way of a bail-out or capital injection or the acquisition of distressed loan portfolios. The only such government intervention was in fact based on social considerations.

No Australian financial institution fell into the category of “too big to fail”. However, for social reasons, the operator of 12,000 child care centres in Australia and New Zealand, about 25 percent of all child care services provided in Australia, was regarded as “too big to fail”. Accordingly, the Commonwealth Government appointed receivers to a non-trading subsidiary, which contained all the unviable centres, much along the lines of many proposals to create a “good bank” – “bad bank” structure.¹

The principal substantive governmental intervention in the financial sector was an extended Commonwealth government guarantee for bank borrowings. This came at a significant commercial cost to the banks who drew on the guarantee and, now that the crisis has passed, the guarantee has been withdrawn. The other significant government financial support was for car dealers after international finance companies withdrew from that market.

As a result of the comparatively mild impact of the GFC in Australia, there was also comparatively little need for the urgent intervention of the courts in the form of real time litigation. However, the significant impact that the crisis has had on

commercial relationships within Australia and, of course, the continuing global impact, is already having its natural consequences in the flow of legacy litigation to assert rights and to claim compensation, with all of the interlocutory procedures that such litigation inevitably spawns.

It is too early to tell the full extent of the litigation that will emerge by reason of the GFC. It is likely to include criminal proceedings which will arise from the various investigations that are being undertaken by corporate liquidators and government regulatory agencies. The general pattern of civil litigation is, however, beginning to emerge. First, the full range of proceedings that accompany a corporate collapse. Secondly, the efforts of investors to restore some or all of their losses. This litigation is primarily a consequence of the global credit crunch. The corporations and the financial schemes that have collapsed as a direct result of the credit crunch have included highly geared companies, companies with a business model dependent on short term liquidity and tax driven investment schemes dependent on a continuing flow of investment funds.

Lehman Brothers

The direct exposure of Australian investors to sub-prime backed securities has been limited, but there is some. In many respects, the most interesting litigation that has arisen from losses suffered by Australian investors is being played out in the courts of England and the United States, rather than in Australia. This reflects the global interconnectiveness of the finance sector. Appropriately enough, the litigation concerns the collapse of Lehman Brothers.

In a financial instrument issued by Lehman Brothers, Australian investors claim a proprietary interest in collateral held by a UK domiciled custodian. A “flip clause” in the agreement was activated upon Lehman Brothers insolvency. The English Court of Appeal has upheld the claim by the trustee representing the Australian investors. That decision is now subject to an appeal to the Supreme Court of the UK.²

The US incorporated Lehman Brothers entity involved is in Chapter 11. A US Bankruptcy Court has held that the *US Bankruptcy Code* prohibits the enforcement of such a clause in the circumstances of the insolvency of a counterparty and, as a matter

of US law, Lehman Brothers is entitled to the collateral. These proceedings have adopted a detailed protocol for court to court communications which cross border insolvency issues often require for their effective resolution. The end result is by no means clear. However, if the United States position is affirmed, in substance preferring US creditors over international investors, it would have significant flow-on effects for numerous such contracts held by investors throughout the world.

The Lehman Brothers collapse has also spawned litigation within Australia. Insolvencies generally give rise to a conflict between the orderly administration of the assets of an insolvent company in the interests of all unsecured creditors, on the one hand, and the claims to priority or recognition by particular creditors, on the other hand. So it has proved with the Lehman Brothers Australian subsidiary.

Australian investors in collateralised debt obligation instruments have made claims based on common law and statutory grounds against Lehman Brothers companies with respect to the losses occasioned in that investment. Pursuant to the Australian statutory provisions for a deed of company

arrangement, an attempt was made to create a collective solution for the full range of claims against the Australian Lehman Brothers subsidiary, which solution would bind dissenting claimants. The High Court of Australia has recently held that the statutory scheme could not be used in such a way as to enable claims of dissenting creditors against a third party, being another Lehman Brothers subsidiary, to be compromised as part of the arrangement between the Australian subsidiary and its creditors.³

Collective Solutions

In the Lehman Brothers case, the High Court left open the efficacy of the alternative statute based structure to implement collective solutions to resolve multiple claims in such a way as to bind dissenting claimants, namely by means of a scheme of arrangement. This route had been accepted in litigation involving the collapse of a broker, *Opes Prime*, which arranged loans for its clients from mainstream financial institutions.⁴ Although subject to some criticism at intermediate Court of Appeal level in the Lehman Brothers litigation,⁵ this alternative mechanism has been approved in a case involving another broker and awaits further review on appeal from that decision.⁶

The *Opes Prime* case concerned investors who thought they had taken out margin loans on the security of their shares, but had in fact executed an agreement to transfer the shares to the broker in exchange for the loan. When the broker fell into breach of its arrangements, the banks sold the shares, often at the bottom of the market, without the knowledge of the investors who thought they owned the shares.

ANZ and Merrill Lynch, the two principal lenders, sought to resolve their exposure at an early stage by establishing a settlement fund from which a proportion of all claims would be met on an equitable basis. The corporate regulator, the Australian Securities Investment Commission, played an important role in initiating the settlement.

A similar approach was adopted by the Commonwealth Bank with respect to the collapse of a major financial planning business known as Storm Financial. The Commonwealth Bank, which was a major financier of Storm, set up a compensation scheme for a substantial proportion of claimants. The scheme operates under a comprehensive set of rules and is supervised by a panel of eminent retired judges. Again the financial regulator was involved.

Indeed, the company, which was already in administration, was wound up on the rare application of ASIC which, acting in the public interest to protect the interest of creditors, intervened to replace the statutory administration process by an immediate liquidation.⁷

These two examples reflect an important characteristic of the response of Australia's major financial institutions, particularly the major banks, to the effects of the global financial crisis upon investors. It is notable that Australia's major financial institutions are reacting in a completely different manner to such claims than they have in the past. For example, in the 1990s, persons who had lost substantial amounts on Swiss currency loans, the liability under which had significantly increased as the Australian dollar declined, were faced with the obdurate insistence by banks on their strict legal rights. This is not replicated in the response to similar issues that have been thrown up by the GFC.

In many such cases it appears that Australian financial institutions have preferred to adopt a collective approach to the resolution of disputes in search, perhaps in some cases in a vain search, for a comprehensive settlement of all claims at an early

time. The length, complexity and delays involved in such litigation, during which contingent liabilities will require provision and, perhaps, a sense that the drift of judicial and legislative opinion has moved in favour of borrowers and investors at the expense of large financial institutions, plays an important role in this development. Lenders and insurers have long been subject to such claims but the developments of the common law and, perhaps most significantly, of legislative intervention have broadened the bases upon which they may be held liable. There are now numerous means by which persons who have lost money in investments can search for a deep pocket somehow related to the process of investment.

To some degree the approach of the financial institutions may have been determined by the emphasis that is now given to corporate social responsibility values, as distinct from insistence on strict legal rights. This is, no doubt, reinforced by comparatively recent experience with major reputational damage to the long term interests of a corporate group that can be occasioned by such insistence as witnessed in Australia most dramatically in the context of liability to asbestos claimants.

However, and I say this with no element of cynicism, an important factor for this approach of the major financial institutions may be the fact that they can do so. The strength of their balance sheets, the improvement of their competitive position by reason of the elimination of less financially viable financial intermediaries and the withdrawal from the Australian market of a number of international institutions, have underpinned the capacity of the major banks to be more generous than the assessment of the probabilities of defeating potential litigation may suggest is required.

Investment Schemes

Of particular significance for a large number of Australian retail investors is the GFC-induced collapse of a number of tax driven, managed investment schemes, particularly involving timber and agricultural products – notably Timbercorp and Great Southern – but also international real estate and share funds. The cash flow shock after the GFC has sent many of these schemes into insolvency, accompanied by the insolvency of the fund managers and related corporations. Creditors, including investors, are enmeshed in a web of multiple, interlocked contractual relationships with a number of companies associated with the

manager. These are complex by reason of the tax driven origins of these investments.

Important conflict of interest issues have arisen, and will continue to arise, because these structures give rise to interlocked dealings with related companies. Overlaying this is the possibility of tension between liquidators of the corporations and persons appointed, as Australian corporate law permits, to wind up the investment scheme itself.

The litigation that has already been generated in these respects includes:

- The appointment of persons to wind up particular schemes.⁸
- Applications for approval to dispose of scheme assets.⁹
- Applications concerning the restructuring of the scheme and the convening of meetings of members.¹⁰
- Applications in a context of possible conflict, leading to appointment of a special purpose conflict liquidator.¹¹
- An application to determine whether a receiver and manager in a conflict situation should be appointed as liquidator.¹²

- Applications for leave to proceed against a company in liquidation for damages for breach of duty in the administration of managed investment scheme.¹³

Insolvent Trading

When a company has a liquidity problem Australian law creates significant difficulties for directors. Our corporations law contains a particularly severe regime for insolvent trading, whereby directors become personally liable for the debts incurred, including taxation liabilities, by a corporation which is at risk of insolvency. By reason of the personal risks of not doing so, directors are under significant pressure to appoint administrators to the company prematurely. This pressure contradicts the entire thrust of recent insolvency practice, which emphasises the desirability of pursuing workouts of companies under stress in such a way as to preserve the value of the company's assets.

Furthermore, in Australia, even financiers are subject to legal risk if they participate in restructure arrangements. The greater the degree of intervention and supervision by the financier, naturally required in such a situation, the higher the risk that it will be held to be a "shadow director". This could subject the financier to the

range of special liabilities imposed upon directors by Australian corporate law, including liability for insolvent trading.¹⁴

There are mechanisms for the exoneration of directors from the liability that would otherwise attach to them from insolvent trading. However, the exercise of the discretion by judges to grant such relief cannot be predicted in advance.¹⁵

So far as I am aware, Australia's insolvent trading laws are more severe than those of any other nation except that of Germany and Germany suspended the operation of its laws as part of that nation's early measures to deal with the GFC. This was not one of the emergency measures taken in Australia. The difficulties which arise whenever a company is faced with a cash flow constraint are well recognised. Detailed proposals to ameliorate the situation have been forward by the government.¹⁶ It is likely that reform will occur in this regard.

The Litigation Landscape

As a result of comparatively recent developments in Australian litigation practice, the courts can expect a steady flow of significant litigation. Class actions and representative proceedings

are now an important part of the litigation landscape compared with the past. Such litigation is driven by entrepreneurial law firms and litigation funders. Although the situation is not analogous to that which prevails in the United States, nevertheless litigation has become a marketable commodity to a degree that has not traditionally been the case. So far, GFC caused litigation has not dramatically increased.

Australia has avoided the worst effects of the GFC. The strength of our governmental and corporate balance sheets was such that the effects have been considerably less than has been the case elsewhere. Nevertheless, constraints of liquidity of the character that we have experienced as a result of the global credit crunch have had, and will continue to have, significant effects. They will be reflected in a continuing stream of commercial disputes, many of which will come before the courts.

After the customary delays, this year has seen the commencement of a number of liquidator examinations of directors and officers of corporations that collapsed during the GFC.¹⁷ In Australia such examinations are a traditional mechanism for acquiring the information basis for pursuit of litigation.

One of the special considerations driving Australian litigation in this field has been a judicial decision which unsettled the traditional relationship between shareholders and creditors of an insolvent corporation. The High Court held that certain statutory rights of action by a shareholder against the company would, if successful, transform the shareholder into an unsecured creditor.¹⁸ This disrupts the traditional relationship in which creditors were entitled to be paid out ahead of shareholders. The government has indicated its intention to restore the traditional relationship by legislation.¹⁹

In Australia, until very recently, there were no signs of a systematic increase in corporate insolvencies. Indeed, in a number of major insolvencies,²⁰ where the banks trusted the current management, they have avoided the substantial costs of external liquidation by allowing management to sell the assets. Generally, banks and the taxation authorities have been slow to use the remedy of liquidation in the light of the perceived severity of the GFC. There are indications, however, that there may now be some catch up commencing in this respect. Legacy litigation will be with us for some years to come.

In addition to the effects of corporate insolvency and investors compensation claims, to which I have already referred, we can expect disputes in a wide range of contexts, particularly finance agreements, including the interpretation of various covenants, the determination of whether an event has caused a material adverse change, whether or not there has been force majeure, how price review clauses are to be applied in the circumstances and whether or not events of default have occurred, particularly the interpretation of insolvency events.

The Cross Border Dimension

In accordance with the global dimension of the commercial disputes which have arisen, many of the disputes which will fall to be resolved by courts and arbitrators will have a cross border element. This is already apparent in the Lehman Brothers cases to which I have referred. Other such cases now arise frequently. For example, proceedings were launched in the Supreme Court of New South Wales by a Cayman Islands manager of an English limited partnership against two Australian corporations, one of which is in liquidation, another Cayman Island corporation and a Delaware corporation.²¹

The necessity of international collaboration is manifest in the difficulties of tracing assets of one of the fund managers that has collapsed in the wake of the GFC. *Trio Capital*, and the managed investment schemes which it conducted primarily on behalf of various Australian superannuation funds, directed over \$100 million into complex, offshore financial instruments with corporations domiciled in a number of regulatory and tax havens such as the British Virgin Islands, Anguilla, St Lucia, the Cayman Islands, Belize, the Cook Islands and Nevis. The process of untangling the chain of what happened to these funds has only just begun. Whilst this will be conducted under the general supervision of the Supreme Court of New South Wales, it will require international co-operation both to trace the funds and, if any assets are located, to seek support by way of freezing orders and enforcement of judgments.²²

It is likely that in this and other contexts Australia will need to seek collaboration beyond the cross border insolvency provisions of the UNCITRAL *Model Law* which Australia has adopted and/or under other regimes, in the case of jurisdictions that have not adopted the UNCITRAL *Model Law*, on cross border insolvency.

Important issues will arise in the admiralty sphere with respect to a conflict between the well established international regime of remedies in maritime law and the Cross Border Insolvency *Model Law*.²³

It is not clear that the particular Australian regime for winding up investment schemes, as distinct from the management entities, will receive the benefit of the established mechanisms of court to court collaboration. However, the management companies will themselves be wound up and such assistance may therefore be able to be rendered indirectly.

There has already been one successful application by an Australian insolvency practitioner for recognition as a foreign main proceedings under the parallel US Cross Border Insolvency Legislation²⁴ from the Bankruptcy Court in Nevada. By reason of the fact that most foreign companies that operate in Australia do so through subsidiaries, rather than by means of a branch office, there have been comparatively few applications under the recently enacted *Cross Border Insolvency Act* which applied the UNCITRAL *Model Law*.²⁵

It is likely that the full range of extant arrangements for international co-operation in commercial disputes will be invoked. Australian courts will be asked to provide assistance, or foreign courts will be asked to assist Australian proceedings, in various ways, including:

- Assistance with service of process and evidence, particularly pursuant to the *Hague Service Convention* of 1965 and the *Hague Evidence Convention* of 1970. (Although many nations in the Asia Pacific region have not ratified these Conventions.)
- Enforcement of judgments, particularly money judgments, under the patchwork quilt of national provisions of variable efficacy. These are inadequate but all that we are likely to be able to achieve of an international level. The only substantive progress capable of being achieved is the adoption of the *Hague Choice of Court Convention*, not yet in force.
- Applications for freezing and search orders in support of foreign litigation or a foreign arbitration will be of considerable significance, in view of the ease with which assets, particularly liquid assets, and electronic records can be dissipated and hidden. Australian Rules of Court

and practice operate under clearly stated principles in which an Australian court will act in support of such foreign proceedings.²⁶ Primarily by reason of statutory amendment, numerous other jurisdictions will assist in the same way, but not all of them.

- Applications for interim measures by or in support of any commercial arbitration will also feature significantly in future dispute resolution. The 2006 Revision of the *UNCITRAL Model Law on International Commercial Arbitration*, which Australia is about to adopt, establishes a comprehensive regime for interim measures both by arbitration tribunals, on notice, and by courts in support of an arbitration, on an *ex parte* basis.
- Applications for harmonious resolution of cross border insolvency issues. These must be processed expeditiously so that the dead capital frozen by the liquidation process is released for effective use as soon as possible. The harmonised Australian Practice Note on Cross Border Insolvency, issued by all Australian superior courts, adopts the guidelines for court to court communication protocols promulgated by the American Law Institute and the International Insolvency Institute.

Co-operation between courts with nations who have not enacted the UNCITRAL *Model Law* requires an alternative jurisdictional base, which does exist in important jurisdictions.²⁷

Despite these avenues of co-operation it is clear that there remains a complete disconnect between the willingness and ability of commercial corporations to operate and interact across borders in a seamless manner, on the one hand, and the restrictions that are imposed upon public authorities, both regulatory and judicial, from acting in a similar manner. The freedom of commercial communication and transaction stands in marked contrast with the inhibitions upon communication and transaction between public authorities. Anything that can be interpreted as impacting upon the sovereignty of the nation, by reason of the intrusion of *any* manifestation of the sovereign power of another nation, is subject to restrictions that have been abolished with respect to private actors, including State owned commercial actors.

In the regulatory context, these difficulties have been addressed to a degree not hitherto thought possible as a result of the GFC. Much work still needs to be done. There has been

virtually no recognition of the desirability of enhancing judicial co-operation. My own suggestions in this respect – that such issues should be considered in bilateral free trade agreements – have not succeeded in placing them on the Australian international agenda.²⁸

Failing such measures we can expect an acceleration of the scope and intensity of venue disputation for commercial dispute resolution. Parties to international commercial arrangements believe that venue matters. Frequently venue disputes have arisen in a commercial context where there is an express choice of law and/or choice of jurisdiction provision in the contractual documentation. The possibility of time consuming and costly ancillary litigation remains a significant impediment to international trade and investment.

One of the barriers to trade and investment, as significant as many of the tariff and non-tariff barriers that have been modified over recent decades, arises from the way the legal system impedes transnational trade and investment by imposing additional and distinctive burdens including:

- uncertainty about the ability to enforce legal rights;

- additional layers of complexity;
- additional costs of enforcement;
- risks arising from unfamiliarity with foreign legal process;
- risks arising from unknown and unpredictable legal exposure;
- risks arising from lower levels of professional competence, including judicial competence;
- risks arising from inefficiencies in the administration of justice and, in some cases, of corruption.

These additional transactions costs of international trade and investment are of a character which do not operate, or operate to a lesser degree, with respect to intra-national trade and investment. These increased transaction costs impede mutually beneficial exchange by means of trade and investment.

These problems may be ameliorated to a certain extent by the growing sense of collegiality amongst judges from different nations. Understandably, there remains some turf battle considerations between the judges, and their supporting legal

professions, who wish to exercise their jurisdiction and keep the legal fees at home, at least in interesting cases. Some nations support their local economy by providing a regulatory or tax haven, that is attractive to persons with substantial resources, particularly those who have engaged in fraud or corruption. These nations pretend to sell financial services, but their true export industry is the service of opacity.

Conclusion

Australia is an active participant, especially in the G20 process, directed to enhancing the global financial system both with respect to prudential requirements and further regulation of the financial sector on a globally harmonious basis. Australia is experiencing the same kind of pressures apparent elsewhere, with respect to excessive executive remuneration, particularly in the banking sector. These statutory developments are unlikely to engage the courts in the short term, but will constitute a principal long term legal effect of the GFC.

As we all face the predictions of doom, from banks and corporate executives, if any of these measures are carried into law, it is pertinent for us to bear in mind the observations of Charles

Dickens in his novel *Hard Times* about the mill owners of his fictional Coketown; with which I will conclude.

“Surely there never was such fragile china-ware as that of which the millers of Coketown were made ... They were ruined, when they were required to send labouring children to school; they were ruined, when inspectors were appointed to look into their works; they were ruined, when such inspectors considered it doubtful whether they were quite justified in chopping people up with their machinery; they were utterly undone, when it was hinted that perhaps they need not always make so much smoke.

Whenever a Coketowner felt he was ill used – that is to say, whenever he was not left entirely alone, and it was proposed to hold him accountable for the consequences of any of his acts – he was sure to come out with the awful menace, that he would ‘sooner pitch his property into the Atlantic’. This has terrified the Home Secretary within an inch of his life, on several occasions.”

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- ¹ See *Commonwealth of Australia v ABC 2 Group Pty Ltd* [2008] NSWSC 1383; (2008) 69 NSWLR 228. See generally Steve Parbery and Mark Bryant “Children for Sale – No Reasonable Offer Refused” *INSOL World-First Quarter 2010* at 12-14.
- ² See *In the matter of Lehman Brothers International (Europe) (in Administration)* (2009) EWCA Civ 1161.
- ³ See *Lehman Brothers Holdings Inc v City of Swan* [2010] HCA 11.
- ⁴ See *Fowler v Lindholm* [2009] FCA FC 125; (2009) 178 FCR 563.
- ⁵ In *City of Swan v Lehman Brothers* [2009] FCA FC 130; (2009) 179 FCR 243.
- ⁶ See *Re Lift Capital Partners Pty Ltd* [2010] FCA 84.
- ⁷ See *Australian Securities and Investment Commission v Storm Financial Limited* [2009] FCA 569; (2009) 71 ACSR 81.
- ⁸ Pursuant to s 601NF(1) of the *Corporations Act 2001*: See *Re Orchard Aginvest Ltd as the responsible entity for the primary Agribusiness Fund* [2008] QSC 002; *Re Rubicon Asset Management Limited* [2009] NSWSC 1068; (2009) 74 ACSR 346; *Shepard (as Receiver and Manager of Environ Invest Limited) (in liq) v Downey (as liquidator of Environ Invest Limited)* [2009] VSC 33; (2009) 69 ACSR 530 and on appeal *Capelli v Shepard* [2010] VSCA 2; (2010) 264 ALR 167 *Trio Capital Ltd v ACI Superannuation Management Pty Ltd* [2010] NSWSC 286.
- ⁹ *Timber Corp Securities Limited (in liq)* [2009] VSC 597; *Timber Corp Securities Limited (in liq)* [2009] VSC 510; (2009) 74 ACSR 626; *ITC Limited v Timber Corp Limited (in liq)* [2009] SASC 342; *Timber Corp Securities Limited (No 4)* [2009] VSC 530; *Timber Corp Securities Limited (in liq)* [2009] VSC 590.
- ¹⁰ See *Great Southern Managers Australia (Receivers and Managers Appointed) (in liq)* [2009] VSC 557; 76 ACSR 1446; *Re Great Southern Managers Australia (Receivers and Managers Appointed) (in liq)* [2009] VSC 627.
- ¹¹ *Timber Corp Securities Limited (in liquidation) (No 2)* [2009] VSC 411.
- ¹² *Shepard v Downey* supra.
- ¹³ *Woodcroft-Browne v Timber Corp Securities Limited* [2010] VSC 68; *Snellgrove v Great Southern Managers Australia Limited (in liquidation) (Receivers and Managers Appointed)* [2010] WASC 51.
- ¹⁴ For a recent discussion of the law with respect to shadow directors see *Model Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* [2010] NSWSC 233.
- ¹⁵ See recent applications of this character *Hall v Poolman* [2007] NSWSC 1330; (2007) 215 FLR 243; *MacLelland in the matter of Stake Man Pty Ltd v Carroll* [2009] FCA 1415.
- ¹⁶ See the proposals of the Minister for Financial Services, Superannuation and Corporate Law *Insolvent Trading: The Safe Harbour for Reorganisation Attempts outside of External Administration: Discussion Paper*. Canberra, January 2010 accessible at www.treasury.gov.au/documents/1713/PDF/Insolvent_Trading_SaveHarbour_DP.pdf.
- ¹⁷ Notably ABC Learning, Octaviar and Allco.

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- 18 See *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160.
- 19 See 2010 Corporate Insolvency Reform, Canberra, January 2010 accessible at www.treasury.gov.au/documents/1713/PDF/2010_InsolvencyReforms.pdf
- 20 *Babcock and Brown, Allco*.
- 21 *Global Partners Fund Ltd v Babcock & Brown Ltd (In liquidation)* [2010] NSWSC 270.
- 22 See *Trio Capital Limited (Admin App) v ACT Superannuation Management Pty Ltd* [2010] NSWSC 286.
- 23 See Justice Steven Rares “Admiralty Law – The Flying Dutchman of Cross Border Insolvency” in K E Lindgren *International Commercial Litigation and Disparity Resolution*, Ross Parsons Centre, Sydney Law School, Sydney, 2008.
- 24 See *In Re Betcorp Limited (in liq)* 400 B.R. 266 (Bankr.D.Nev. 2009).
- 25 See *Re Tucker; Aero Inventory (UK) Limited v Aero Inventory (UK) Limited (No 2)* (2009) FCA 1481; *Re Tucker; Aero Inventory (UK) Limited v Aero Inventory (UK) Limited* (2009) FCA 1354; (2009) 76 ACSR 19; *Levy v Reddy* (2009) FCA 63; *Hur v Samsun Logix Corp* (2009) FCA 72.
- 26 See Peter Biscoe, *Freezing and Search Orders: Mareva and Anton Pillar Orders*, LexisNexis, Butterworths, Australia, 2008, esp Ch 5; I will discuss the position in this respect in my Address “Freezing Orders in International Commercial Litigation” delivered to the Singapore Academy of Law on 6 May 2010 to be published in the *Singapore Academy of Law Journal* and accessible at www.lawlink.nsw.gov.au/sc under “Speeches” (Spigelman CJ).
- 27 Eg, Hong Kong, see *Re Maguire* (2008) NSWSC 780; see also John Martin “Cross Border Insolvency and the Common Law” in K E Lindgren (ed) *International Commercial Litigation and Dispute Resolution*, Ross Parsons Centre, Sydney Law School, Sydney, 2010.
- 28 J J Spigelman, “Transaction Costs and International Litigation” (2006) 80 *ALJ* 435 at 453; J J Spigelman, “International Commercial Litigation: An Asian Perspective” (2007) 37 *Hong Kong Journal* 859 at 866-867; (2007) *Australian Business Law Review* 318 reprinted in Tim Castle (ed) *Speeches of a Chief Justice: James Spigelman 1998-2008*, Sydney, 2008; J J Spigelman “Cross Border Insolvency: Co-operation or Conflict” (2009) 83 *Australian Law Journal* 44; J J Spigelman “The Hague Choice of Court Convention and International Commercial Litigation” (2009) 83 *ALJ* 386. See also J J Spigelman “Cross Border Issues for Commercial Courts”, 13 January 2010, accessible (as are all the other papers) at www.lawlink.nsw.gov.au/sc under “Speeches” (Spigelman CJ).

“CONFLICT OF LAWS IN AUSTRALIA”

LAUNCH BY THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

SYDNEY, 16 APRIL 2010

Peter Nygh was my lecturer in conflicts and in family law at Sydney Law School. I remember him with considerable fondness, particularly for the intellectual stimulation that he provided in such of his lectures as I attended, in the detailed notes of his lectures which my friends prepared for me, in the printed notes that the University provided for subjects at that time and, perhaps most significantly, our text was the first edition of this great work, *Conflict of Laws in Australia*, published in 1968, which was very much up to date at the time I took the course.

Its merit was obvious to us all. Of particular significance was that, as the first Australian text on the subject, it provided us with an Australian focus, notably with respect to the conflicts issues that arise in our federal system. It is with a sense of warmth and nostalgia that I launch this, the 8th edition, the first not to be directed by Peter himself.

The first sentence of the 7th edition was:

“The overwhelming majority of cases that are litigated in our courts are domestic in character.”

This was maintained by Peter for three decades through six editions from the 2nd in 1971 to the 7th in 2002.

The opening sentence of the new 8th edition deletes the word “overwhelming”, so that it reads:

“The majority of cases that are litigated in our courts are domestic in character.”

This brings to mind a competition held a few years ago inviting entrants to change the first sentence of any famous novel in such a way as would dramatically alter the import of the work itself. The winner was a proposal to rewrite the classic opening sentence of *Pride and Prejudice*.

Jane Austen wrote:

“It is a truth universally acknowledged, that a single man in possession of a good fortune, must be in want of a wife.”

The winner of the competition suggested the following:

“It is a truth universally acknowledged, that a single man in possession of a good fortune, must be gay.”

The proposed change would have given virtually everything after the first sentence a different meaning. I hasten to assure you all, that the change in the first sentence of Nygh’s *Conflict of Laws* does not have the same dramatic impact on the rest of the book. Deleting the word “overwhelming” does, however, explain the twenty-five percent increase in the size of the volume. The continuing flow of case law and of legislation, in response to the multifaceted phenomenon of globalisation, has required substantial additions in order to keep this text, as it was and will continue to be, the first port of call for any Australian lawyer with a conflicts problem.

Notwithstanding the necessary updating, the core content and structure of this text continues to reflect prior editions. The hand of Peter Nygh remains prevalent throughout the text. One of the co-authors of this new edition, Martin Davies, was, of course, the co-author of the previous edition with Peter Nygh. The other two co-authors, Andrew Bell and Justice Paul Brereton, clearly recognise their inheritance in the chapters for which they accept principal responsibility.

In the preface to the volume, the authors recognise that English texts and precedents are, in the authors' words, "of ever-decreasing utility for Australian lawyers as they understandably focus on the relationship between the United Kingdom and its European neighbours rather than on the traditional common law conflict of laws".

The English common law is now proceeding within the confines of European canals, in which most of the locks have been constructed by civil lawyers. Traditionally, the common law finds the constraints of barge life too restrictive. Lord Judge, the Lord Chief Justice of England recently remarked:

“The primary responsibility for saving the common law system of proceeding by precedent is primarily a matter for us as judges. And while we are about it, perhaps we should reflect on the way in which I detect that our Australian colleagues (and those from other common law countries) seem to be claiming bragging rights as the custodians of the common law. Do they have a point? ... We must beware. It would be a sad day if the home of the common law lost its standing as a common law authority.”¹

The development of the common law of conflicts in Australia has been significantly influenced by the existence of multiple law areas in our federal system. Our continuing integration into the Asia Pacific region, in terms of commerce, communications and movement of people, will give rise to a steady flow of conflicts issues. This text is, and will remain, the principal source of guidance and instruction for Australian lawyers in this burgeoning area.

Amongst the distinctive features of the new edition is a fuller treatment of interlocutory relief, which receives a chapter of its own and a much longer treatment of transnational freezing injunctions. The 7th edition dealt with these issues as part of the ancillary jurisdiction. The chapter formerly described as “The Inappropriate Forum” is, by reason of significant developments in case law, now divided into three chapters. One chapter is concerned with the clearly inappropriate forum test. The comparatively minor treatment given to anti suit injunctions is now contained in a chapter of its own, reflecting the obsession of one of the co-authors. Furthermore, there is a substantially new treatment of international arbitration, including a separate chapter on forum selection and arbitration agreements and a new chapter on choice of law in arbitration. The 8th edition contains a longer treatment of insolvency, which also reflects important developments since the 7th edition. There is also a new chapter on restitutionary claims and equitable obligations.

These are updates and expansions of considerable practical utility. In each of these respects this new edition does what each of the previous editions had done for its predecessor volume. In this it remains faithful to Peter Nygh’s original vision and ensures

the continued utility of the text for legal practitioners throughout Australia.

Perhaps the most definitive characteristic of a conflict of laws text is the diversity of the spheres of legal discourse in which its authors must be skilled. This simply reflects the fact that the field has no core jurisprudential logic. Its organising principle is the existence of a multi-state or multi jurisdictional element. That, as this new edition testifies, is a criterion of rapidly expanding application.

To some degree the requirement of breadth of scholarship is met by a clear, expressed division of labour amongst the three co-authors with respect to the respective chapters in this wide ranging work. The level of erudition required by each author for the subjects each covers is of a high order. An important intellectual contribution is derived from such multi-skilling. It allows cross fertilisation so that issues which arise in one context can inform the resolution of analogous issues in a different context. Such cross fertilisation is one of the great strengths of conflicts scholarship.

It takes a special kind of lawyer to develop the requisite range of skills. Dean William Prosser, most famous as the author of *Prosser on Torts* and as the Reporter of *The Second Restatement of Torts*, once summarised the field in the following way:

“The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorise about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer is quite lost when engulfed and entangled in it.”²

This evening, the three co-authors are present and open to interrogation for signs of eccentricity and gibberish.

Prosser was particularly concerned with the difficulties occasioned for defamation practice arising from multiple publications in a federation. Writing at a time when the “single publication rule” was less widely adopted by the State courts of the USA than it is today, Prosser went on to say:

“In connection to interstate publication, [conflicts law] offers peculiar and baffling difficulty. There are at least

ten different and inconsistent theories as to the applicable law, which from time to time have been adopted by some court or suggested by learned writers. No one of them, unless it be the last, can be said to have prevailed, and that one only by default.”³

These observations can be applied to other conflicts issues.

As the authors of *Nygh’s Conflict of Laws* indicate, multiple publication still bedevils Australian defamation law and practice.⁴ One would have thought that a single publication rule could be adopted in a comparatively simple federation like Australia. The position is, however, different for international publications. A single publication rule in that context would lead to what plaintiff lawyers would come to call “libel havens”, a functional equivalent to tax havens. On the other hand defence lawyers have come to deride “libel tourism”. I predict that the 9th edition of this text will have a separate chapter on defamation.

We are only at the beginning of the dramatic changes which the internet will bring to commerce and information exchange. The proportion of transactions and interactions which have an

international element will continue to grow exponentially. In the field of commerce I agree with the following observation by one author:

“The Silk Road linking the ancient world’s civilisations wound through deserts and mountain passes, traversed by caravans laden with the world’s treasures. The modern Silk Road winds its way through undersea fiber optic cables and satellite links, ferrying electrons brimming with information. This electronic Silk Road makes possible trade in services heretofore impossible in human history. Radiologists, accountants, engineers, lawyers, musicians, filmmakers, and reporters now offer their services to the world, without boarding a plane (or passing a customs checkpoint). Like the ancient Silk Road, which transformed the lands that it connected, this new trade route promises to remake the world.”⁵

Such developments in society, commerce and technology will, I have no doubt, give rise to more and more conflicts issues. I congratulate the authors on choosing a growth industry. You had better start thinking about a loose leaf service. I am happy to launch this authoritative text.

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- ¹ Lord Judge, "The Judicial Studies Board Lecture" 17 March 2010, accessible at www.judiciary.gov.uk/docs/speeches/lcj_jsb_lecture_2010.pdf.
- ² W Prosser, "Interstate Publication" (1953) 51 *Michigan Law Review* 959 at 971.
- ³ Ibid.
- ⁴ M Davies, A S Bell & P L G Brereton, *Nygh's Conflict of Laws in Australia* (8th ed), 2010 LexisNexis at 20.13-20.17.
- ⁵ Anupam Chander, "Trade 2.0" (2009) 34 *Yale Journal of International Law* 281 at 281.

**VIOLENCE AGAINST WOMEN: THE DIMENSIONS OF FEAR
AND CULTURE
INAUGURAL ADDRESS
TO THE LAW, GOVERNANCE AND SOCIAL JUSTICE FORUM
FACULTY OF LAW, UNIVERSITY OF NEW SOUTH WALES
BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
SYDNEY, 15 APRIL 2010**

The cultural and social bases for violence against women have been a focus of public attention for at least four decades. Women's refuges were amongst the earliest manifestations of the feminist revival that commenced about that time. There is no doubt there has been progress. There is also no doubt that much remains to be done.

On the best figures available, derived from the ABS Personal Safety Survey in 2005, one in three women experience at least one incident of physical violence during their lifetime and about one in five women experience sexual violence during their lifetime.¹ Some women are more at risk than others. For example, it is well established that indigenous women are more

likely to be the victims of all kinds of violence than other women, including domestic violence, sexual assaults and homicides.² An Aboriginal woman is ten times more likely to die from assault than a non-Aboriginal woman and 35 times more likely to be hospitalised for injuries caused by violence.

The establishment in 2008 of a National Council to Reduce Violence Against Women and their Children, created a new focus for co-ordinated action between Commonwealth and State agencies with respect to family violence. The Australian Government adopted the Council's proposal for a National Plan of Action to Reduce Violence. The Australian and New South Wales Law Reform Commissions are each currently conducting an inquiry into family violence as part of the response to the 2009 Report of the National Council. Terms of reference to the two Law Reform Commissions were agreed after consideration of that report by the Standing Committee of Attorneys-General. The Australian Law Reform Commission last reported on domestic violence in 1984.

These developments reflect the continuing emphasis given at international, national and state level to the elimination of acts of

violence against women by a range of measures, including, but by no means limited to, the operation of the criminal justice system. This is not a task that is over, as the current Law Reform Commission inquiries indicate.

Violence against women is a multifaceted issue. Numerous initiatives are being taken by State and Commonwealth agencies, many of which will no doubt be reviewed in the current Law Reform Commission inquiries.

Criminal Justice

Gender issues affect a wide range of aspects of the criminal justice system. In an address such as this it is not possible to refer to more than a few.

A good example of the complexities that arise in this respect is the continuing debate about the role of provocation as a defence to murder. Historically it has operated as an excuse for men who kill women, an excuse which juries used often to accept on the basis that men were expected to react with aggression to slights to their sexual prowess. This “boys will be boys” approach is no longer acceptable.

The same legal principles have been applied to women who kill their abusive partner after a long period of domestic violence.³ I am not suggesting an equivalence in moral culpability between the two situations. However, it is hard to change the law in one respect without impinging on the other. The most difficult issue for a judge is to determine when it is permissible to leave provocation to the jury, which represents community values, including community prejudices. An important task for counsel and the judge is to do what they can to ensure that the jury does not proceed on the basis of outdated gender role models.

New South Wales was the first Australian jurisdiction to criminalise stalking in 1993. The first common law jurisdiction to enact such legislation was California in 1991. Other States in Australia followed and the UK and New Zealand Acts were enacted in 1997. In 2007 by the *Crimes (Domestic and Personal Violence) Act* the New South Wales Act relocated the AVO provisions and removed the offence of stalking intimidation from the *Crimes Act 1900* into this new Act. There were also some substantive changes. Perhaps the principal role of such separate legislation was to emphasise the significance of domestic violence

for purposes of clear denunciation. The legislation was updated by the *Crimes (Domestic and Personal Violence) Amendment Bill* 2008.

One pilot programme that was developed in New South Wales is the Domestic Violence Intervention Court Model, trialled since 2005 with an evaluative report released in 2008.⁴ The key features of the programme include:

- Domestic violence evidence kits for police use – including digital cameras, etc;
- Victims advocate service, with automatic referral from the police;
- Specific Local Court Practice Note requiring prosecution to serve the defence with a “mini brief” no later than the first mention date in court;
- Domestic violence perpetrator programme which the offender could be required to attend;
- Facilitation of regular meetings and information sharing between the Police Force, Victims Advocates and the New South Wales Department of Corrective Services and Department of Community Affairs.

These measures were designed to increase prosecution rates and make the justice system more accessible and efficient. The evaluative report notes overall satisfaction with the pilot programme but could not detect any particular changes in rates of assault or reporting of prosecutions.

It is well established that a significant factor inhibiting the effective application of the criminal justice system in this context is the degree of under reporting of incidents of violence against women. The 2005 ABS Study indicated that 66 percent of women did not report assaults to the police.

One of the reasons for such underreporting is fear of retaliatory violence by the original perpetrator and/or his relatives and friends, together with other forms of retaliation capable of being enforced by close communities, ranging from discrimination to ostracism through to retaliatory rape and honour crimes. Particular social groups, including indigenous communities and some ethnic communities, can manifest such forms of retaliation.

The dominant European culture in this nation has developed, admittedly only over recent decades, a broadly based set of

policies directed to ensuring substantive equality between men and women, including in personal and family relations. The legal system increasingly reflects these values in terms of substantive law and procedures. Nevertheless, there are communities within Australia who have a cultural background that is quite inconsistent with many aspects of the majority position. I will return to this issue.

Human Rights Discourse

The way in which violence and the fear of violence is directed to women in a form and for purposes that go beyond that to which men may be subject, raises significant human rights issues. It is only in recent years that this particular dimension has been recognised.

A number of submissions to the recently published *National Human Rights Consultation* identified violence against women as a human rights issue.⁵ The recommendations of the Consultation do not, however, separately refer to the position of women in this respect. The relevant reference is, probably, to the recommendation that a Human Rights Act protect the right to liberty and security of persons, which may encompass an

individual right to be protected from violence, although this is not well established in human rights discourse.

The human rights instrument directed expressly to the position of women is the *Convention on the Elimination of All Forms of Discrimination Against Women* of 1979 (“CEDAW”). This is an acceptable, but flawed, international model. It is flawed because of the necessity to obtain agreement from a wide range of nations whose cultures permit conduct towards women which we would regard as discriminatory.

CEDAW was originally modelled on the *Convention on the Elimination of All Forms of Racial Discrimination* (“CERD”). However, the scope and range of the nations, particularly in Africa and the Islamic world, with customary and social practices which were problematic in terms of gender bias, was such that the drafting process led to major compromises of a character which did not afflict CERD.⁶

The differences between CERD and CEDAW include the following:

- With respect to enforcement and reporting mechanisms the Committee established under CEDAW, as originally adopted, had much weaker powers than under CERD. It could not hear complaints from State or individual parties, relying only on State self-reporting. It could not even meet for more than two weeks each year;
- CERD is specific and aspirational whereas CEDAW is too broad, encompassing references to a new international economic order, to self-determination and development;
- In its definition of discrimination, CEDAW does not include “preference” as a type of discrimination which has significant practical effects, eg, in employment opportunities;
- Both Conventions provide that reservations contrary to the spirit of the Convention are invalid for incompatibility, but CEDAW has no definition of incompatibility and this restriction is never invoked. By contrast CERD contains an operational definition of incompatibility as reservations to which two-thirds of State parties to the Convention object.

Some of these difficulties were addressed in the 1999 Optional Protocol to CEDAW, which strengthens the complaint mechanisms by providing for complaints directly to the CEDAW

Committee after domestic remedies have been exhausted. The Protocol makes the CEDAW complaints process comparable with other international treaties such as CERD.

In December 2008 Australia acceded to the Optional Protocol. At that time, in a joint statement, the Attorney-General and the Minister for the Status of Women said:

“Acceding to the Optional Protocol will send a strong message that Australia is serious about promoting gender equality and that we are prepared to be judged by international human rights standards.”⁷

Much Australian commentary uses CEDAW as, in effect, a benchmark standard, including in the area of domestic violence. It is in respects such as this that the inadequacies of CEDAW need to be understood. CEDAW makes no reference to violence. Nor does it make any reference to acute forms of violence such as honour killings. This was not an accident. Many nations would have objected to anything of that character. If it had been included, the Convention may never have come into force.

Furthermore, CEDAW is subject to more extensive reservations than any other international human rights instrument.⁸ A particularly egregious example is the reservation of the Government of Bangladesh, together with similar reservations by Egypt and Libya, to Article II of the Convention, which is directed to eradication of discrimination by enacting new laws and policies, changing existing discriminatory laws and providing sanctions for discrimination where appropriate. The reservation states simply: “The Government ... of Bangladesh does not consider as binding upon itself the provisions of Articles II ... as they conflict with Sharia Law based on the Holy Quran and Sunna”. As I mentioned, CEDAW contains no effective mechanism for preventing incompatible reservations.

Notwithstanding its deficiencies, significant effort has been directed to expanding the reach of CEDAW by interpretation on the part of the Committee set up under the Convention. The Committee issued General Recommendation No 19 of 1992, which stated that “gender based violence” constitutes “discrimination” within the meaning of Article I of the Convention. This, the Committee declared, extends to any such violence which impairs other human rights, such as the right to life, the right not to

be subject to cruel, inhuman or degrading treatment or punishment, the right to liberty and security of the person, the right to equality in the family. There appears to me to be an institutional turf battle going on here. Many such complaints fall more clearly within the remit of the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights (“ICCPR”) First Optional Protocol.

There are respects in which violent conduct of this character is gender specific, but that varies considerably from one nation or culture to another. Notwithstanding the Committee’s attempt to extend its jurisdiction by interpretation, it is by no means clear that it can apply to each of the human rights protected by the ICCPR or the International Covenant on Economic, Social and Cultural Rights (“ICESCR”). Such conduct can be discriminatory but, for example, with respect to torture, and, save in the case of honour killings, the right to life, there is little evidence of systematically different treatment.

It is the deficiencies in the Convention which have resulted in the attempt to stretch the concept of discrimination beyond its natural borders. CEDAW is not an adequate international

standard. It seems to me to be inappropriate that violence against women is only regarded as a human rights issue insofar as it is “discriminatory”. Everyone has a right to be free from violence or the threat of violence.

Security of the Person

The recognition in human rights instruments of a right to “security”, often expressed in combination with a right to “liberty”, can be traced back to the earliest human rights instruments, such as the French *Declaration of the Rights of Man and of the Citizen* of 1789. Such a right is reflected in most contemporary human rights instruments commencing with Article III of the *Universal Declaration*, which protects the right to life, liberty, and security of a person”. In the *European Convention for the Protection of Human Rights and Fundamental Freedoms* of 1950 (“European Convention”), the right to life was separated in Article II and Article V made provision for the “right to liberty and security of a person”. It was in this form that the two rights were recognised in the ICCPR of 1966.

Notwithstanding this early recognition, save in certain jurisdictions, the idea of personal security as an individual right

has, in large measure, been lost. It is, perhaps, the least developed of any of the human rights protected by international human rights instruments. However, it is the only source in such instruments for the recognition of a right to be protected from violence which does not involve death, torture or cruel and unusual punishment.

Under the European Convention, which has been adopted in England, the right to personal security has been denuded of any operation independent of the protection of “liberty”. Specifically throughout Europe, and therefore in England, the idea that the State may acquire through its treaty commitments an obligation to protect individuals from violence has been expressly rejected. The position is somewhat different in South Africa and Canada under their human rights provisions, by reason of the particular text and history of the provisions in those two nations. I discussed the comparative case law of the various jurisdictions in an address I delivered last year.⁹

The human rights literature emphasises the responsibility of States under international law to take three kinds of action with respect to human rights protected by treaties to which the State is

a party or pursuant to customary international law. These three are: a duty to respect rights; a duty to fulfil rights by taking positive action; and a duty to protect rights from infringement by both State and non-state actors. How these matters are in fact reflected in domestic laws or legislation of course varies considerably from one jurisdiction to another.

An internationally derived obligation to protect citizens from violence is not well established, beyond the clear categories of life, torture or cruel and unusual punishment. The most likely source of the development of a right not to be subject to violence is the recognition of the right to security of the person as contained in numerous international instruments. Such a provision is reflected in the human rights legislation adopted in the Australian Capital Territory and Victoria. It is proposed by the National Human Rights Consultation.

Such instruments do not expressly identify the qualifications, which are necessarily implied in such an absolute statement. For example, the State has many reasons to deploy violence, particularly in the exercise of legitimate police functions.

More significantly, in the context of the human rights debate, is the tension that has always existed between liberty and security in political philosophy. Indeed, in critical respects, the tension between the power of the State as the protector of public security, on the one hand, and as the potential source of persecution, on the other hand, underpins liberal democratic political philosophy and determines much of the content of the rule of law.

Traditionally, in this respect, a contrast is usually drawn between liberty as an individual right and security as a public or collective interest. However, insofar as the security of the person is regarded as an individual right, what becomes involved is a conflict between rights, rather than a conflict between a right and an interest.

As I pointed out in my address last year, human rights advocates are very comfortable concluding that a right prevails over an interest. However, there is no generally accepted mechanism for dealing with a conflict between rights. As Jeremy Waldron has put it:

“Rights versus rights is a different ballgame from rights versus social utility. If security is also a matter of rights,

then rights are at stake on both sides of the equation ...

The business of conflicts of rights is a terribly difficult area – with which moral philosophers are only just beginning to grapple.”¹⁰

There is a distinct reluctance amongst human rights scholars to recognise the right to personal security as any kind of individual right.¹¹ Indeed, the reception my address received last year from some human rights scholars was distinctly cool. It appears that the recognition of a right to personal security may be seen to threaten the fullest recognition of other rights which may come into conflict with such a right.

Freedom from Fear

My address last year was entitled ‘The Forgotten Freedom: Freedom from Fear’. I sought to emphasise the dimension of fear, particularly fear of violence. Human rights discourse, in my opinion, had not given this dimension adequate attention. The fear dimension is of particular significance with respect to all forms of violence against women, particularly domestic violence.

The *Universal Declaration of Human Rights* of 1948 (“UDHR”) identifies four freedoms derived from the rhetoric of President Franklin Roosevelt. One of these four freedoms, expressly identified in the second recital of the UDHR and repeated in the preambles to the ICCPR and the ICESCR, was “freedom from fear”. The concept of “freedom from fear” has virtually disappeared from contemporary human rights discourse. That is why I referred to it as “the forgotten freedom”.

This is regrettable because, often, the most significant impact on personal freedom occurs through the mechanism of fear, rather than through actual direct interference. No social system, including any governmental system, can possibly operate by reliance on physical restraint or direct interference alone. This arises primarily because of the limitation on resources available to those who wish to interfere with the freedom of others.

The most effective, indeed the most common, form of interference with freedom arises from the self-imposed restraint on behaviour because of the threat of adverse consequences if the behaviour is engaged in. Furthermore, the restraint on behaviour is greater, indeed almost always much greater, than would occur

on the basis of a calculation of the probability of those consequences actually occurring.

The practical ability to enjoy the internationally recognised set of human rights can clearly be affected by threats. This is because persons are inhibited by fear of the infringement of a right. Actual interference is not the only way in which human rights can be abrogated in practice. The well-known “chilling effect” of constraints on the exercise of freedom of expression is an effect that can be replicated in virtually every other context protected by human rights instruments.

I do not suggest that freedom from fear is itself some form of freestanding right. Rather, it is a critical dimension of other rights. In my address last year I set out a long list of internationally recognised human rights which, in my opinion, have a fear dimension.

The significance of freedom from fear has long been recognised in political philosophy. I refer particularly to Montesquieu in his classic work *The Spirit of the Laws*. In Book XI, in the very chapter where Montesquieu made his most

influential contribution – the significance of the separation of legislative, executive and judicial power – he stated, by way of an introductory paragraph to that proposition:

“The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted, as one man need not be afraid of another.”¹²

Montesquieu’s clear link between liberty and tranquillity is reminiscent of Cicero’s aphorism: “Peace is liberty in tranquillity”.

Montesquieu also referred to the significance of tranquillity in terms of the language of “security”. These ideas were very influential, including on the common law. Blackstone identified three principal rights, which he described as the “rights of all mankind”, namely, personal security, personal liberty and private property. Blackstone’s idea of “personal security” is equivalent to Montesquieu’s use of the term “tranquillity of spirit”. Blackstone defined the right in the following way:

“The right of personal security consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.”¹³

It is pertinent to note, that Blackstone included both actual and threatened violence as falling within the right to personal security.¹⁴

All legal systems have well-established laws designed to protect persons from physical violence. Legal prohibition of threats of violence and other forms of fear inducing conduct which intimidate individuals, is not so clearly established. There is a patchwork quilt of criminal offences relating to intimidation, harassment, blackmail, threats and other such conduct. However, there is no systematic approach to these matters in any field of discourse, including threats of violence against women.

The recognition of the dimension of fear in terms of personal security is of particular significance for women. Numerous surveys have concluded that, although men are more likely to be victims of violent crime than women, women express greater fear of crime than men. In part this is a function of the fact that women are

more liable to be subject to sexual assaults than men and such assaults have an added terror going beyond physical injury. In part, it is recognition of women's sense of vulnerability including, most significantly, vulnerability to domestic violence.

Domestic violence has correctly been characterised as a form of "social entrapment" which extends to:

- Social isolation;
- Fear and coercion in women's lives;
- Indifference of institutions to women suffering;
- Structural inequalities of gender class and race aggravating men's coercive control.¹⁵

Even in the context of intimate relations, violence and the threat of violence is overwhelmingly gender specific, reflecting traditional forms of patriarchal domination that are not yet extirpated. That sense of vulnerability reflects both the high exposure to risk, the comparative lack of control (in part for physical reasons) and the perceived seriousness of the sexual dimension of violence. Furthermore, women often have a heightened awareness of risks to personal safety of other family members or close friends, what is sometimes referred to as a form

of “altruistic fear”. For all these reasons the fear dimension of threats to personal security is not gender neutral.¹⁶

As I emphasised in my address last year, the law cannot protect citizens from all subjective fears. The relevant test must have a high degree of objectivity. I referred to the now well developed doctrine of a “well founded fear of persecution” in refugee law.

The fear dimension does raise human rights considerations.

As one author put it:

“Domestic violence violates the principle that lies at the heart of [the] moral vision [of human rights]: the inherent dignity and worth of all members of the human family, the humane right to freedom from fear and want and the equal rights of men and women.”¹⁷

The author went on to argue forcefully for the recognition of domestic violence as a human rights issue.

To similar effect another author has emphasised the significance of recent human rights jurisprudence in responding to freedom from fear in the context of women's rights and concluded:

“Freedom from fear may be the most important goal for the new millennium.”¹⁸

The significance of fear was recognised in the Declaration on the Elimination of Violence Against Women adopted by the General Assembly of the United Nations in 1994 by defining “violence against women” to encompass threats of gender based violence and coercion.

Australia's accession to the Optional Protocol means that matters of this character can now be considered by way of complaint by Australians to the Committee for CEDAW, as has long been the case with respect to the Human Rights Committee under the ICCPR.

Apprehended Violence Orders

The most important mechanism directed to the dimension of fear in express terms is a system which exists in numerous jurisdictions and to which we refer in New South Wales as

Apprehended Violence Orders (“AVOs”). I had occasion to refer to this system in a judgment in which, if you will permit the sin of self-quotation, I said:

“The legislative scheme for Apprehended Violence Orders serves a range of purposes which are quite distinct from the traditional criminal law quasi-criminal jurisdiction of the Local Court. The legislative scheme is directed to the protection of the community in a direct and immediate sense, rather than through mechanisms such as deterrence. Individuals can obtain protection against actual or threatened acts of personal violence, stalking, intimidation and harassment. Apprehended Violence Orders constitute the primary means in this State of asserting the fundamental right to freedom from fear. The objects served by such orders are quite distinct from those that are served by civil adversarial proceedings or proceedings in which an arm of the State seeks to enforce the criminal law.”

The principal objective of AVOs was clearly enunciated by the then Premier, Neville Wran QC MP, when introducing the original legislation in 1982. He said:

“I believe that this law reform will provide effective and immediate relief for those women who spend their lives worrying when the next battering will be.”¹⁹

A comprehensive report by the New South Wales Law Reform Commission stated:

“1.1 Apprehended Violence Orders (“AVOs”) are the primary legal means by which people may seek protection from actual or threatened acts of personal violence, stalking, intimidation and harassment. As the name suggests, AVOs are intended not only to put a stop to ongoing violence, but to prevent or apprehend potentially violent behaviour before it can escalate. The key factor in granting an AVO is fear: if the court is satisfied that a person fears on reasonable grounds that an act of violence, intimidation or harassment will be directed against them by another person, the court may issue an order to prevent such behaviour from occurring.”

Although not limited to violence against women, or indeed, to domestic violence, nevertheless AVOs have played an important

role in giving some measure of comfort to women in the context of threatened domestic violence. AVOs are not always effective. However, research suggests that AVOs have had a significant effect in reducing both acts of violence and threats of violence.²⁰

In its review of the AVO Scheme, the New South Wales Law Reform Commission referred to the difficulty of creating penalties for cases of genuine criminality, without encompassing behaviour which causes irrational fear. In New South Wales the mental element for the relevant offence is knowledge that fear is likely to result, whether that result is actually intended. The Commission identified as a difficult question the issue of whether or not the victim needs to have experienced fear, and if so, of what?²¹ No doubt the current Law Reform Commission inquiries will revisit such issues.

The Cultural Dimension

Sexism in the European cultural tradition has been attacked on a broad front, including with respect to violence against women. However, there are important racial, ethnic and religious minorities in Australia who come from nations with sexist traditions which, in some respects are even more pervasive than those of the West.

Furthermore, as I have noted above, violence against women is significantly greater in some social groups, whether based on cultural tradition or not. This dimension of the issue may well involve conflicts between values that are difficult to resolve.

Clearly, with respect to the criminalisation of physical violence the majority culture is not able to compromise, although sometimes difficult questions arise with respect to enforcement and sentencing. It is, however, difficult to know where to draw the line in terms of legislation and enforcement of laws based on the approach of the majority culture, where the policies underlying these laws conflict with other policies involving the recognition of the respect that should be given to minority cultures. This has become most acute, in the Australian context, in terms of the indigenous community, most clearly in the Northern Territory intervention triggered by revelations of physical abuse of women and children, mainly girls.

In this latter respect I take heart from the observations of Mick Dodson, when the issue first rose to prominence, when he said:

“We have no cultural traditions based on humiliation, degradation and violation.

...

Most of the violence, if not all, that our brittle communities are experiencing today are not part of Aboriginal tradition or culture.”²²

Throughout Europe significant issues have arisen, particularly with respect to Islamic and South Asian communities, extending to honour crimes and forced marriages. The English position in this respect is the most accessible to us and I will refer to it further below. We have significant communities from the Middle East and South Asia in Australia. We are unlikely to avoid similar issues arising.

One of the principal ways that the issue of forced marriages and of honour crimes, including killings, have arisen in the European legal system has been in the context of immigration law particularly with respect to refugee and asylum claims. That has also been the case in Australia. That is not a focus of this address.

There is now an extensive literature on crimes of honour, not only focussing on Islamic communities. Extensive research has been conducted with respect to these issues in Jordan, Palestine, Lebanon, Pakistan, Egypt and Iraq, but similar crimes of honour occur, or a legitimate defence of honour has been recognised, in Italy and in various jurisdictions of Latin America.²³

Although it is the case that men can be victims of honour crimes, nevertheless, the entire idea of “honour” in this context, is generally based on a historical legacy of women as, in substance, the property of their male relatives.

I first came across this issue in Australia in an appeal to the Court of Criminal Appeal. A man had attempted to engage a person to murder his niece. The young woman had entered into an unhappy and clearly forced marriage in Jordan. She formed a relationship with a man of whom the family did not approve. She had left her family home and moved to a refuge, taking out an AVO against her father, mother and husband.

The accused and his family were Jordanian. They were Orthodox Christians, a point which is worth emphasising. The

issues that arise in this context are cultural rather than religious. Indeed, the man with whom the niece had a relationship was Muslim. The uncle contacted a private investigation firm inquiring as to how much it would cost to have his niece killed.²⁴

The sentencing task posed acute issues as to the extent to which the cultural sense of disgrace experienced by the family should be taken into account in the exercise of the sentencing discretion. Furthermore, the proposed victim herself had given evidence in support of her uncle's case, which gave rise to considerations of the weight to be given to restorative justice in a context where restoring relationships with the family was entitled to some weight. Motive is always a matter of significance in sentencing, as is the requirement of personal deterrence in a situation, which is unlikely to recur. On the other hand, the requirement of general deterrence clearly points in the other direction.

These are difficult issues calling for judgment based on experience. However, that experience must also be informed by the broader social context, including the emphasis now being

given to preventing violence against women, even if motivated by cultural considerations.

In addition to honour crimes, the issue of forced marriages has received considerable attention throughout Europe.²⁵ That a marriage can only be entered into with “free and full consent” is recognised as a human right in Article 16(2) of the UDHR and in Article 23(3) of the ICCPR.

The practice of forced marriages, particularly of young women from Pakistan, India and Bangladesh, has become a significant issue in the United Kingdom. In 2001, the British Government created a Forced Marriage Unit to seek to prevent such marriages, on the basis that they constitute an abuse of human rights.²⁶ In 2008 over 16,000 incidents of suspected forced marriages were reported to the Unit.

In 2007 the UK passed the *Forced Marriage (Civil Protection) Act* which, inter alia, empowered family courts to make a Forced Marriage Protection Order including orders:

- To prevent a forced marriage from occurring;
- To relinquish passports;

- To stop intimidation and violence;
- To reveal the whereabouts of a person;
- To stop someone from being taken abroad.

Orders can be made *ex parte* in emergency situations; orders for arrest where violence is threatened or used can be issued and the failure to obey orders is a criminal offence.

In Australia, the *Marriage Act* 1962 (Cth) imposes civil penalties for persons marrying a partner without that partner's consent or when the partner is under age. It is not, however, a criminal offence to obtain consent through duress or other force, although other provisions of the criminal law could well be applicable in such situations. Under the *Marriage Act* it is an offence to traffic an under age person overseas for the purposes of a forced marriage.

Such issues have arisen in Australian courts. In one case, a young Sicilian girl had been abducted and kept by force in Italy. The dishonour to her family was such that her father would, by custom, have been obliged to kill her if she did not marry her

kidnapper. The Australian judge annulled the Italian marriage on the ground of duress.²⁷

There is a fundamental conflict between a human rights approach to these matters, on the one hand, and the tolerance of cultural traditions, based on an assumption of equality between cultures, on the other hand. The human rights approach is based on an assertion that, in certain defined respects, the values of one culture – because they are internationally recognised – are superior to those of another culture and entitled to overriding effect. There is no way of avoiding the dilemma arising from this conflict of values. We see it most acutely with respect to indigenous issues. However, such matters are likely to arise in other contexts.

The recognition that certain rights are fundamental will play an important role in establishing the basis for resolving the issues when they arise before the courts. This will occur in the migration context, particularly protection visas; family law decision-making processes, ranging from issues of consent through to questions of custody; issues in the criminal justice context including provocation based on cultural or religious factors to downgrade a

charge of murder to manslaughter and the weight to be given to considerations of this character in the exercise of the sentencing discretion.

I referred above to the defence of provocation. The issue has arisen in cases of honour killings in the UK.²⁸ Some years ago in Australia a trial judge left provocation to the jury in a case where the accused, a Turkish Muslim, killed his daughter in a confrontation over her alleged sexual relationship with her boyfriend.²⁹

The NSW law of provocation distinguishes two matters: first, the gravity and effect of the conduct said to constitute provocation and, secondly, the response of the accused by a loss of self control. It has been held that the cultural background is relevant to the first limb, but not to the second.³⁰ In any event, in most honour killings there is evidence of deliberation and planning which is inconsistent with the loss of self control limb.

However, some have argued that that failure to accept the internalised cultural response, which leads to a loss of self control, is contrary to the principle of equality before the law.³¹ In the past

this issue has arisen in the context of Aboriginal defendants.³² I repeat that such considerations have not been accepted as satisfying the loss of self-control limb of the test of provocation. Nevertheless, there is tension between gender bias considerations and cultural respect considerations in determining what the overriding value of equality before the law requires in a particular case. It is a very real challenge to balance the objective of cultural equality and diversity against the protection of women from gender based violence.³³

The difficulties involved have been highlighted with respect to the continuing debate about violence in Aboriginal communities and the extraordinary measures taken in recent years. One author who reviewed the range of reports on this matter concluded:

“ ... Typical ‘western’ responses to family violence like women’s refuges, criminal justice responses and programmes of the therapeutic nature have mostly been culturally inappropriate and ineffective. These approaches are largely based on western models of intervention that have sought to separate the victim from the perpetrator, which in the process has led to the division of indigenous families.

Whilst this option may grant some reprieve from the immediate danger of assault, indigenous family groups do not see separation as a viable long term option given that we have almost universally been subjected to forced removal since colonisation. Nor do we see the solution solely in terms of criminalising violence and institutionalising the offender to protect the victim ... Many women fear that they could face increasing levels of violence from their partner when they are released from custody.”³⁴

Similar issues could arise with respect to a number of ethnic and religious groups in our society. Human rights norms are, to a substantial degree, based on assumptions about individual autonomy, the full implications of which are not universally accepted, including by women members of these social groups. The demands of filial piety and the need for social inclusion are not simply imposed. They are often internalised and accepted. Many women will find it hard to resolve the conflict between their desire for personal freedom and fulfilment of their social and family obligations. Whatever their origins, the latter are deeply felt.

There can be no compromise with acts of violence. However, the enforcement of laws designed to minimise violence does give rise to a complex range of issues about which debate will continue.

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- ¹ Australian Bureau of Statistics, *Personal Safety Survey Australia 2005* at 17. See also Janet Phillips and Malcolm Park, *E-brief: Measuring Domestic Violence and Sexual Assault Against Women: A Review of the Literature and Statistics*, Parliamentary Library (Parliament of Australia), issued 6 December 2004, updated 12 December 2006.
- ² See the references in Chris Cunneen, ‘Criminology, criminal justice and Indigenous people: a dysfunctional relationship?’ (2009) 20(3) *Current Issues in Criminal Justice* 323 at 324.
- ³ See the New South Wales Law Reform Commission Discussion Paper 31: *Provocation, Diminished Responsibility and Infanticide* (1993) (“NSWLRC Discussion Paper 31”) esp at [3.8], [3.23], [3.141], [3.142]; Bernadette McSherry, ‘It’s a Man’s World: Claims of Provocation and Automatism in ‘Intimate’ Homicides’ [2005] *MULR* 28; (2005) 29(3) *Melbourne University Law Review* 905.
- ⁴ Laura Rodwell and Nadine Smith, NSW Bureau of Crime Statistics and Research General Report Series: *An Evaluation of the New South Wales Domestic Violence Intervention Court Model* 2008.
- ⁵ See National Human Rights Consultation Committee, *National Human Rights Consultation Report*, September 2009, Canberra at 85.
[http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/\(4CA02151F94FFB778ADAEC2E6EA8653D\)~NHRC+Report+\(Prelims\).pdf/\\$file/NHRC+Report+\(Prelims\).pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/(4CA02151F94FFB778ADAEC2E6EA8653D)~NHRC+Report+(Prelims).pdf/$file/NHRC+Report+(Prelims).pdf)
- ⁶ See Roberta Jacobson, ‘The Committee on Elimination of Discrimination Against Women’ in Phillip Alston (ed) (1992) *The United Nations and Human Rights: A Critical Appraisal* Oxford; Laura Donner, ‘Gender Bias in Drafting International Discrimination Conventions: The 1979 Women’s Convention compared with the 1965 Racial Convention’ (1994) 24 *California Western International Law Journal* 241.
- ⁷ Joint media release of the Attorney-General (The Hon Robert McClelland MP) and Minister for Housing & Minister for the Status of Women (The Hon Tanya Plibersek MP), ‘Australia becomes party to CEDAW Optional Protocol’, 24 November 2008.
- ⁸ See Rebecca Cook, ‘Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women’ (1989-1990) 30 *Virginia Journal of International Law* 643 at 644.
- ⁹ See J J Spigelman, ‘The Forgotten Freedom: Freedom from Fear’ accessible at www.lawlink.nsw.gov.au/sc, forthcoming publication in the *International Comparative Law Quarterly*.
- ¹⁰ Jeremy Waldron, ‘Security and Liberty: The Imagery of Balance’ (2003) 11 *Journal of Political Philosophy* 191 at 198-199.
- ¹¹ See, eg, Sandra Fredman, ‘The Positive Right to Security’ and Liora Lazarus ‘Mapping the Right to Security’ both in Benjamin Goold and Liora Lazarus (eds) *Security and Human Rights*, 2007, Hart Publishing. For the fullest treatment see the yet to be published thesis by Rhonda Louise Powell, *Security and the Right to Security of Person* (2008) D.Phil thesis, St Hilda’s College, Oxford University, 2008.
- ¹² Baron Du Montesquieu, *The Spirit of the Laws* (205) vol 1, Law Book Exchange, Book XI Ch VI at 185.
- ¹³ See Sir William Blackstone *Commentaries on the Laws of England* (18th ed 1829) Vol 1 at [129].

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- 14 Ibid at [134] [Emphasis added].
- 15 See Clare Connelly, 'Institutional Failure, Social Entrapment and Post-Separation Abuse' (2010) 1 *The Juridical Review* 43 esp at 44.
- 16 See generally Carlos Carcach and Satyanshu Mukherjee, Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice No 135: *Women's Fear of Violence in the Community*, November 1999; Janet Phillips and Malcolm Park, *E-brief: Measuring Domestic Violence and Sexual Assault Against Women: A Review of the Literature and Statistics*, Parliamentary Library (Parliament of Australia), issued 6 December 2004, updated 12 December 2006; House Standing Committee on Legal and Constitutional Affairs (Cth) *Inquiry into crime in the community: victims, offenders and fear of crime* (2004) esp at [1.13].
- 17 Dorothy Thomas and Michele Beasley, 'Domestic Violence as a Human Rights Issue' (1993) 15 *Human Rights Quarterly* 36.
- 18 Dorothea Beane, 'Human Rights in Transition - Freedom from Fear' (2000) 6 *Washington and Lee Race and Ethnic Ancestry Journal* 1 at 10.
- 19 New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard) 9 November 1982 at 2368.
- 20 See New South Wales Law Reform Commission *Report 103: Apprehended Violence Orders* (2003) ("NSWLRC Report 103") esp at [1.41]-[1.46]; Lily Trimboli and Roseanne Bonney, New South Wales Bureau of Crime Statistics and Research, *An Evaluation of the NSW Apprehended Violence Order Scheme* (1997) at vii.
- 21 NSWLRC Report 103 supra at [12.35].
- 22 Mick Dodson, Address to the National Press Club: *Violence Dysfunction Aboriginality*, 11 June 2003, Canberra.
- 23 See, eg, the compilation of case studies in Lynn Welchman and Sara Hossain (eds), *'Honour': crimes, paradigms and violence against women* (2005) Spinifex Press, Victoria.
- 24 See *R v Qutami* [2001] NSWCCA 353; (2001) 127 A Crim R 369.
- 25 See generally Catherine Dauvergne and Jenni Millbank, 'Forced Marriage as a Harm in Domestic and International Law' (2010) 73 *Modern Law Review* 57 (forthcoming).
- 26 See the Forced Marriage Unit's website, <http://www.fco.gov.uk/en/travel-and-living-abroad/when-things-go-wrong/forced-marriage>.
- 27 See *Di Mento v Visalli* [1973] 2 NSWLR 199; (1973) 1 ALR 351.
- 28 See *R v Shabir Hussain* [1997] EWCA Crim 2876; *R v Faqir Mohammed* [2005] EWCA Crim 1880.
- 29 *R v Dincer* [1983] 1 VR 460 at 468.
- 30 See, eg, *R v Baraghith* (1991) 54 A Crim R 240; *Green v The Queen* (1997) 191 CLR 334 esp at 353, 356, 381-382, 411.
- 31 See Stanley Yeo 'Power of Self Control in Provocation and Automatism' (1992) 14 *Sydney Law Review* 3; and the strong dissent by McHugh J in *Masciantonio v R* (1995) 183 CLR 58 at 73-74. See also James Sing, 'Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law' (1998-1999) 108 *Yale Law Journal* 1845.

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- ³² See, eg, *MacDonald* [1953] NTJ 186 at 189; *R v Muddarubba* [1956] NTJ 317; *Jabarula v Poore* (1989) 42 A Crim R 479 at 486-8, discussed in NSWLRC Discussion Paper 31 supra at [3.20].
- ³³ For a recent discussion of these issues see Rupa Reddy, 'Gender, Culture and the Law: Approaches to 'Honour Crimes' in the UK' (2008) 16 *Feminist Legal Studies* 305.
- ³⁴ Kylie Cripps, 'Indigenous Family Violence: From Emergency Measures to Committed Long Term Action' (2007) 11(2) *Australian Indigenous Law Reporter* 6 at 10-11.

THE CENTRALITY OF JURISDICTIONAL ERROR

KEYNOTE ADDRESS

BY THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

AGS ADMINISTRATIVE LAW SYMPOSIUM:

COMMONWEALTH AND NEW SOUTH WALES

SYDNEY, 25 MARCH 2010

The emergence of a constitutional dimension, indeed a constitutional foundation, for administrative law has been one of the most important developments of the last decade. The primary effect has, of course, been on Commonwealth administrative law. Notwithstanding the divergence between the constitutional dimension applicable to Commonwealth decision-making and the common law dimension applicable to State decision-making, a process of convergence is apparent. The former influences the latter by a process of what I have described on previous occasions as “gravitational pull”.¹

This process of convergence has taken a dramatic step forward in the High Court’s recent judgment in *Kirk v Industrial Relations Commission* [2010] HCA 1. It is not always the case

that, when the High Court overturns one of my own decisions, I respond with unmitigated admiration. That is, however, the case with *Kirk*. That is so, I suppose, in part, because none of the points on which the appellant succeeded were agitated in the Court of Appeal. The High Court expressly identified the particular issues that were argued in the Court of Appeal.² It is noteworthy, at least to me, that none of these issues are mentioned again in the High Court's judgment.

Kirk involved the exercise by the Industrial Court of New South Wales of its criminal jurisdiction under the *Occupational Health and Safety Act* 1983 ("the OH&S Act"). The Court found breaches of the Act had occurred when the manager of a family farm died. The employer company, and Mr Kirk its director, were convicted.

Two matters were raised by the High Court with counsel for the appellant. Each of them was held to be an error of law, indeed a jurisdictional error. The High Court proceeded to consider the constitutional validity of the privative clause in s 179 of the *Industrial Relations Act* 1996. It held that if this clause prevented

review for jurisdictional error, which as a matter of statutory interpretation it did not, it would be invalid.

In substance, the High Court has equated State administrative law, in this respect, with the position under s 75(v) of the Constitution. The gravitational force has done its work. Newton's apple is on the ground. In this address I wish to pick it up, polish it a little and check it for worms.

A Constitutional Expression

The central constitutional proposition in *Kirk* is that the phrase "The Supreme Court of any State" in s 73(ii) of the Commonwealth Constitution is a constitutional expression. It is not merely a descriptive term. The joint judgment in *Kirk* states that Chapter III of the Constitution requires "that there be a body fitting the description 'the Supreme Court of a state'" and that no legislation of a State Parliament can alter the character of a Supreme Court so that it ceases to "meet the constitutional description".³

In the landmark decision of *Kable*, which first imposed a limit arising from the Commonwealth Constitution upon a State

Parliament with respect to the jurisdiction of State courts, Gummow J characterised, as far as I am aware for the first time, the reference to “Supreme Court” in s 73(ii) of the Constitution as a “constitutional expression”. His Honour said the expression “identifies the highest court for the time being in the judicial hierarchy of the State and entrenches a right of appeal from that court to this Court”.⁴ This approach was affirmed in the joint judgment of Gummow, Hayne and Crennan JJ in *Forge*, when their Honours said:

“It is beyond the legislative power of a State so to alter the constitutional character of its Supreme Court that it ceases to meet the constitutional description.”⁵

In *Kirk* the High Court unanimously applied this textual characterisation and gave it substantive content. The idea that certain terms of the Constitution must be understood in a distinct constitutional sense has been an important development in recent High Court constitutional jurisprudence.

It reflects, in the context of constitutional interpretation, a fundamental proposition. In order to interpret the words of any text, it is always necessary to have in mind the nature of the

document being interpreted. A commercial contract requires a business like approach. A statute requires an understanding of the institutional structure of which it is a manifestation. A constitution is an instrument of government. As one US academic put it: “We ought not read the Constitution like a last will and testament, lest it becomes one”.⁶

The High Court has identified the significance of the constitutional dimension of a number of different terms found in the Commonwealth Constitution, including: “trial by jury” in s 80;⁷ “process” in s 51(xxiv) with respect to service and execution of process;⁸ “trading or financial corporations” in 51(xx);⁹ “subject of the Queen” in s 34(ii) and s 117;¹⁰ “acquisition of property” and “just terms” in s 51 (xxxi);¹¹ “trade, commerce and intercourse among the States” in s 92;¹² and “aliens” in s 51(xix).¹³ All of these terms have been characterised as constitutional expressions in recent years. Similarly, the word “jurisdiction” in Chapter III had been characterised as a “constitutional term”.¹⁴

Of particular significance for administrative law, of course, has been the re-characterisation of the remedies identified in s 75(v) of the Commonwealth Constitution as “constitutional writs”,

rather than in the traditional appellation of “prerogative writs”. This was originally proposed in a joint judgment of Gaudron and Gummow JJ.¹⁵

In an important extra judicial address, Justice Gummow has summarised the emergence of these “constitutional expression” references, without expressly acknowledging his own role, under the subheading “The Symbiotic Relationship”.¹⁶ This was a reference to some observations of Brennan J:

“ ... The Constitution and the common law are bound in a symbiotic relationship: though the Constitution itself and laws enacted under the powers it confers may abrogate or alter rules of the common law, the common law is a matrix in which the Constitution came into being and which informs its text.”¹⁷

The focus of the constitutional expression case law is on that part of the symbiotic relationship in which the Constitution changes or channels or preserves the common law. In administrative law that effect is not, after *Kirk*, confined to Commonwealth legislative or judicial power. A State Parliament cannot act so as to impinge on the constitutional idea of a Supreme Court of a State. I note, in

passing, that the term “Parliament of a State” is also a constitutional expression (eg, in s 51(xxxvii)), no doubt with parallel restraints.

The introduction and elaboration of the concept of a “constitutional expression” as a textual foundation for imbuing many constitutional provisions with new substantive content is one of Justice Gummow’s important contributions to constitutional jurisprudence.

The Kable Principle

As was made clear in *Fardon*,¹⁸ and re-emphasised in *Forge*,¹⁹ the fundamental basis for the *Kable* principle is the preservation of the institutional integrity of State courts, because of their position in the Australian legal system required by the Commonwealth Constitution.²⁰ As the joint judgment said in *Forge*:

“[63] ... [T]he relevant principle is one which hinges upon maintenance of ... the defining characteristics of a State Supreme Court. It is to these characteristics that the reference to ‘institutional integrity’ alludes.”

In *International Finance Trust Co Limited v New South Wales Crime Commission* [2009] HCA 49; (2009) 84 ALJR 31 the High Court applied the *Kable* doctrine. The Court adopted the statement by Gummow J in *Kable* that it is not constitutionally permissible to confer on a State court capable of exercising federal jurisdiction a jurisdiction which is “repugnant to the judicial process in a fundamental degree”.²¹

Until *International Finance Trust*, *Kable* was a dog that had only barked once. This was the characterisation of *Kable* deployed by Kirby J during the course of argument in *Forge*, a case concerned with the use of acting judges in the Supreme Court of New South Wales. On the second day, Kirby J repeated to Stephen Gageler SC, not yet Solicitor General, his observation on the first day that, “I suppose you say this is a dog that only barked once”. Gageler replied: “Yes, but in *Kable* it barked at a stranger. Now it has turned on the family”. The particular beauty of this witticism is that it went to the pith of the case. With the judgment in *Kirk*, this dog may need a bark collar.

Kirk extends the *Kable* doctrine beyond matters of procedure and appearance to matters of substance. The Court concluded

that it was constitutionally impermissible for the Parliament of a State to deprive a Supreme Court of a State of its supervisory jurisdiction with respect to both inferior courts and tribunals. It did so on the basis that it was a requirement of Chapter III of the Constitution that “there be a body fitting the description ‘the Supreme Court of a State’”.²²

Their Honours’ analysis was based on the essential characteristics of the constitutional concept of a Supreme Court:

“[98] The supervisory jurisdiction of the Supreme courts was at Federation, and remains, the mechanism for the determination and the enforcement of the limits of the exercise of State executive and judicial power by persons and bodies other than the Supreme courts. That supervisory role of the Supreme courts exercised through the grants of prohibition, certiorari, and mandavis (and habeas corpus) was, and is, a defining characteristic of those courts ...

[99] ... 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 remove from the relevant State Supreme court one of its defining characteristics.”

The recognition of this constitutional limitation on the power of a State Parliament is expressed in terms of the text of the Constitution by applying to the words ‘State Supreme court’ an understanding of the “defining” characteristics of this constitutional concept, to use the terminology from *Forge* and *Kirk* that I have quoted.

As the Court has said on another occasion:

“ ... an essential characteristic of the judicature is that it declares and enforces the law which determines the limits of the power conferred by statute upon administrative decision makers.”²³

With respect to any constitutional expression, the critical issue is the identification of the core content of the term. This may involve characterising a head of legislative power or identifying the characteristics which must be present in order to ensure that the

relevant matter answers the constitutional description. This latter task has often been expressed in terms of the identification of the “essential features” or “essential” or “defining characteristics” of the relevant constitutional expression.

This terminology can be traced back to *Huddart Parker and Moorehead*²⁴ and was first applied in contemporary constitutional jurisprudence in the joint judgment in *Cheatle*,²⁵ with respect to the constitutional expression “trial by jury”.²⁶ This terminology was later applied to the “constitutional writs” in s 75(v) in *Ex parte Aala*.²⁷ *Kirk* has now applied this terminology to the expression “State Supreme court”.

In the Mason court, such an analysis may have been characterised in terms of implications of the Constitution. However, the contemporary jurisprudence of the Court exhibits a proclivity to clearly anchor significant constitutional developments in the text and structure of the Constitution. The concept of a “constitutional expression” provides a textual basis for and, therefore, an aura of orthodoxy to, significant changes in constitutional jurisprudence. That aura dissipates when the Court undertakes the unavoidably creative task of instilling substantive

content to the constitutional dimension of a constitutional expression by identifying its “essential” features or characteristics.

The Effect of Kirk

The effect of *Kirk* is that there is, by force of s 73, an “entrenched minimum provision of judicial review” applicable to State decision-makers of a similar, probably of the same, character as the High Court determined in *Plaintiff S157* to exist in the case of Commonwealth decision-makers by force of s 75(v) of the Constitution.²⁸ In *Plaintiff S157*, the High Court referred to the constitutional writs as providing “textual reinforcement”,²⁹ for the reasoning of Dixon J in the *Communist Party* case, that the rule of law forms an assumption underlying the text of the Constitution.³⁰ The same assumption now extends to the States.

On earlier occasions, I have indicated that, because of the constitutional dimension of Commonwealth administrative law, authorities on s 75(v) must “be treated with care” before applying them to cases arising in State jurisdictions.³¹ No doubt, care is still advisable, but not as much as before. There is a line of authority which suggests that the “constitutional writs” are not necessarily attended by the same incidents as the prerogative writs.³² The

continuing authority of these cases is not clear. In recent years the High Court has rarely overruled earlier decisions. They are simply superseded.

I give one example of the differences. It has been suggested that the fact that the prerogative writ although “not a writ of course ... is a writ which goes of right” is based on the “prerogative features of the writ” because the impugned conduct encroached on the royal prerogative.³³ Have these remedies in State administrative law lost these “prerogative features” because of the new constitutional foundation for them? The answer is probably not because these features would remain part of the “constitutional expression” of a State Supreme court. The position is not, however, clear. It may be necessary to review at some stage the case law which indicates that, at common law, the prerogative writs go as of right, but that the writs in s 75(v) are discretionary.³⁴ In this, as in other respects, *Kirk* will engage administrative lawyers for many years.

Kirk requires a reappraisal of the legal options available to persons affected by administrative decisions in the contexts hitherto protected from judicial review by privative provisions.

Most would have been read down by traditional techniques of interpretation so as not to protect from review for jurisdictional error. However, the impact of *Kirk* will not be confined to s 179 of the *Industrial Relations Act*.

Until the judgment in *Kirk* there was, as far as I am aware, no judicial or academic commentary doubting the ability of a State Parliament to restrict review for jurisdictional error, within limits, by means of a properly drafted privative clause³⁵. The position was as stated in the joint judgment of Gaudron and Gummow JJ in *Darling Casino Limited v NSW Casino Control Authority* (1997) 191 CLR 602 at 633-634:

“A clause which provides only a decision may not be called into question in a court of law is construed as not as excluding review on the ground that the decision involved jurisdictional error, at least in the sense that it involved a refusal to exercise jurisdiction or that it exceeded the jurisdiction of the decision-maker. However and provided the intention is clear, a privative clause in a valid State enactment may preclude review for errors of any kind. And if it does, the decision in

question is entirely beyond review so long as it satisfies the *Hickman* principle.”

Over the years much ink has been spilt over the *Hickman* principle. It appears that, as a result of *Kirk*, the principle has little if any work to do at a State level. *Plaintiff S157* did that at a Commonwealth level, at least for the High Court.

The concept underlying the *Hickman* principle is that there was a core content of jurisdictional error, narrower than the full range of jurisdictional error, which would remain subject to judicial review, almost by way of a conclusive presumption of the law of statutory interpretation. The effect of *Kirk* will be that the full range of jurisdictional error must remain at both Commonwealth and State levels.

The solution that the High Court has now reached is principled and clear. Nevertheless, you will permit a certain element of nostalgia for all of the hours that I have myself had to spend struggling with the *Hickman* principle, eg, identifying imperative duties, inviolable restraints and determining whether conduct was reasonably capable of reference to the power.

For over a century, a privative provision had been contained in New South Wales industrial legislation and it had received, in its various formulations, a consistent interpretation. Prohibition of review of a “decision” of the Industrial Court or Commission had from the outset not been understood to protect from review for jurisdictional error.³⁶

In 1995, the ouster provision was re-enacted in a new form which extended the terminology from a “decision” to a “purported decision”. The introduction of the word “purported” was of potential significance, as suggested in a joint judgment of Gaudron and Gummow JJ in the *Darling Casino* case where their Honours drew a clear distinction between a decision “under” the Act and a decision “under or purporting to be under” the Act.³⁷ The distinction between a decision and a purported decision had been drawn in a number of other authorities. They were probably derived from a well-known passage of Jordan CJ,³⁸ which has frequently been cited by the High Court,³⁹ referring to a “purported” exercise of jurisdiction. Perhaps most relevantly for the 1995 legislation, the previous year the word was deployed in a

judgment of the Court of Appeal on an important application for judicial review of the Industrial Commission of New South Wales.⁴⁰

In view of this legislative history, the introduction of the word “purported” by way of an amendment to the longstanding reference to “decision” appeared to me to be intended to extend the provision so as to cover jurisdictional error. The result was that in New South Wales the issue that fell for consideration by reason of the application of s 179 was not whether there was jurisdictional error but whether the *Hickman* principle had been contravened.⁴¹

It is difficult to know what more the Parliament could have done to signal an intention to insulate the Industrial Commission from review for jurisdictional error. However, even inserting the word “purported” proved ineffective. The High Court held that the addition of the word “purported” did not extend the scope of s 179 beyond the word “decision”.⁴² *Kirk* affirmed this interpretation.⁴³ In substance, the privative provision was deprived of effect with respect to jurisdictional error, in the same way as the privative clause in the *Migration Act* 1958 (Cth) was so deprived in *Plaintiff S157*.⁴⁴

State privative clauses can no longer protect from jurisdictional error. The principal focus of attention, in both Commonwealth and State administrative law, is now the identification in any particular case of whether or not an error is jurisdictional.

Jurisdictional Error

Kirk is the most recent affirmation by the High Court of the resilience of the distinction between jurisdictional and non-jurisdictional error. The first emphatic confirmation of this traditional common law distinction was the High Court judgment in *Craig*,⁴⁵ which identified both the significance of this distinction and set out a list, affirmed in *Kirk* not to be a comprehensive list, of matters which constitute jurisdictional error.

It was in *Craig* that the High Court first refused to adopt the reasoning of the House of Lords in *Anisminic*,⁴⁶ which is generally understood to abolish the distinction between jurisdictional error and an error within jurisdiction.⁴⁷ The joint judgment of *Craig* did not, however, refer to the House of Lords subsequent affirmation of the reasoning in *Anisminic* as part of the ratio of its decision in

Page,⁴⁸ which has come to be regarded as the leading British authority on this issue. The reaffirmation of the distinction in Australian administrative law will mean that our law will continue to develop differently from that of other common law nations.

The constitutional dimension of the distinction between jurisdictional and non-jurisdictional error places it at the centre of our administrative law jurisprudence. The distinction is necessitated, in Australian law, by our separation of powers doctrine which is, in many respects more definitive, some would say more rigid, than that adopted by the constitutional law of other nations, including that of the United States. This is so despite the fact that Article III of their Constitution was the model for our Chapter III.

With respect to Commonwealth legislation, as acknowledged in *Kirk* itself,⁴⁹ the centrality of jurisdictional error was re-emphasised in *Plaintiff S157* where the joint judgment identified a “fundamental constitutional proposition” in the following terms:

“[98] ... The jurisdiction of this Court to grant relief under s 75(v) of the Constitution cannot be removed by or under a law made by the Parliament. Specifically, the

jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed.”⁵⁰

In *Kirk* the joint judgment extended this proposition to the Parliaments of the States, supplying constitutional reinforcement to the significance of the distinction at common law affirmed in *Craig*. After noting that there could be a valid privative provision enacted by State parliaments, the Court added in *Kirk*:

“[100] ... The observations made about the constitutional significance of the supervisory jurisdiction of the State’s Supreme courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power.”

The concept of what is or is not “jurisdictional” has long eluded definition. Justice Felix Frankfurter once described the idea of jurisdiction as “a verbal coat of too many colours”.⁵¹ On another occasion he referred to the “morass” in which one can be led by “loose talk about jurisdiction” and concluded that “‘jurisdiction’ competes with ‘right’ as one of the most deceptive legal pitfalls”.⁵²

Perhaps the most sustained attack on the distinction between jurisdictional and non-jurisdictional error came from the pen of D M Gordon with respect to jurisdictional facts.⁵³ Lord Cooke of Thorndon extended the attack to the distinction between jurisdictional and non-jurisdictional errors of law, commencing with his 1954 unpublished PhD thesis at Cambridge University,⁵⁴ and sustained by him in the New Zealand Court of Appeal and in the House of Lords. Justice Kirby on the High Court frequently reiterated this proposition.⁵⁵

It can readily be accepted that there is no single test or theory or logical process by which the distinction between jurisdictional and non-jurisdictional error can be determined.⁵⁶

Nevertheless, as Chief Justice Gleeson pointed out: “Twilight does not invalidate the distinction between night and day”.⁵⁷

Furthermore, as Justice Hayne put it in *Ex parte Aala*:

“The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error when the decision-maker makes a decision outside the limits of the functions and powers conferred on her or him, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision-maker is authorised to decide is an error within jurisdiction ... The former kind of error concerns departures from limits upon the exercise of the power the latter does not.”⁵⁸

This approach reflects the most frequently cited general proposition underlying contemporary Australian administrative law a proposition which, in the light of *Kirk*, must now be understood to apply both to the Commonwealth and State jurisdictions. I refer to

the frequently cited reasoning of Brennan J in *Attorney General v Quin*.⁵⁹

“The duty and jurisdiction of the Court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power. If, in so doing, the Court avoids administrative injustice or error, so be it, but the Court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent to which they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.”

This is a vital and indeed, in my opinion, central distinction often expressed in terms of the difference between merits and legality. As I have indicated on earlier occasions, in my opinion, it is a distinction that can be described in terms of the maintenance of the institutional integrity of courts, tribunals and executive decision-makers. I note that the concept of “institutional integrity” has been advanced as the explanation of the *Kable* doctrine in subsequent authorities, notably *Fardon*.

My own views on the integrity function were expressed in the *National Lecture Series* which I delivered on behalf of the Australian Institute of Administrative Law in 2004. In those lectures I emphasised that the idea of institutional integrity connoted an unimpaired or uncorrupted state of affairs. The function of integrity institutions, including judicial review by courts, was to ensure that the community-wide expectation of how governments should operate in practice was realised. This idea of integrity goes beyond matters of “legality”. Integrity encompasses maintenance of fidelity to the public purposes for the pursuit of which an institution is created and the application of the public values, including procedural values, which the institution is expected to obey.⁶⁰

The central proposition remains that there is a distinction between ensuring that powers are exercised for the purpose, broadly understood, for which they were conferred and in the manner in which they were intended to be exercised, on the one hand, and the reasonableness or appropriateness of the decisions made in the exercise of such powers on the other hand. Reasonable minds can and will differ as to where the line is to be

drawn. The former is an integrity function which is inherent in the concept of “jurisdictional error”.

Whatever the criticism that may be made about where this line can be drawn, Australian lawyers cannot refuse to attempt to do so. This has been clear for some time with respect to Commonwealth administrative law. It is now equally clear with respect to the whole of Australian administrative law.

Just as *Craig* affirmed the central significance of jurisdictional error, so the High Court judgment in the *City of Enfield*⁶¹ reaffirmed the viability of the concept of jurisdictional fact which may give rise to one kind of jurisdictional error. Indeed, Professor Mark Aronson referred to “the resurgence of jurisdictional facts”.⁶² As *Kirk* now makes clear, the “resurgence” of jurisdictional error is over. A more appropriate description is to use the word “triumph”.

The basic test has been formulated in numerous different ways as to whether or not the relevant element is:

- “A condition of jurisdiction”.⁶³

- “A preliminary question on the answer to which ... jurisdiction depends”.⁶⁴
- The “criterion, satisfaction of which enlivens the power of the decision-maker”.⁶⁵
- An “event or requirement” constituting “an *essential* condition of the existence of jurisdiction”.⁶⁶

The process of identifying what facts or opinions or procedural steps or judgments are jurisdictional is a matter which turns, primarily, on a process of statutory interpretation. All of the relevant principles of the law of statutory interpretation apply. The fact that different judges may reach different conclusions with respect to matters of this character is not surprising in view of the significant range of elements that must be taken into account.

The difficulty of determining whether a fact is jurisdictional, or whether an error of law constitutes a jurisdictional error, will always be with us. It is a matter which requires the judgment always involved in statutory interpretation. As Sir Frederick Jordan once said, such an issue:

“ ... commonly arises in relation to a statute conferring jurisdiction in which the legislature has made no express

pronouncement on the subject, and in which its intention has therefore to be extracted from implications found in inferences to be drawn from the language it has used.”⁶⁷

Shortly before the judgment of the High Court in *City of Enfield*, I expressed the view in *Timbarra* that the appellation “jurisdictional fact” was a convenient way of expressing a conclusion – the result of a process of statutory interpretation.⁶⁸ I remain of that opinion. The point has often been made, sometimes by way of criticism of the concept of jurisdictional error. It is, nevertheless vital for many reasons, now including constitutional reasons.

The issue is twofold. First, whether or not on the proper construction of the relevant power, a fact referred to must exist in fact, a test of objectivity. Secondly, whether the Parliament intended that the absence or presence of the fact would invalidate action under the statute, a test of essentiality.⁶⁹ Similarly, with respect to jurisdictional error of law, the test of essentiality can be stated in the form of whether or not Parliament intended that an error of that character was of sufficient significance to result in the invalidity of the decision.

The position is, in my opinion, the same as the High Court determined to be the case when discussing the question of breach of a procedural condition in the *Project Blue Sky* case.⁷⁰ The joint judgment adopted the analysis of the New South Wales Court of Appeal in *Tasker v Fullwood* and said:

“The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning ... a better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid.”⁷¹

Language of essentiality, extending as it does to words like “mandatory” and “jurisdictional”, directs attention to matters that are appropriately described as issues of institutional integrity. It directs attention away from the quality of the actual outcome which, save in exceptional circumstances, is not relevant to the inquiry.

The determination of whether or not a particular fact, matter or process has the requisite jurisdictional quality, namely the requisite element of essentiality, depends on the statute and the circumstances of the case. These are matters on which reasonable minds may differ.

As the joint judgment put it in *Project Blue Sky*, with respect to the question of whether it was “a purpose of the legislation that an act done in breach of the provision should be invalid”:

“Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.”⁷²

As Gummow J said in the course of a special leave application from *Timbarra*, which was refused and which was heard after argument in *The City of Enfield* case but before the Court handed down judgment in that case:

“The principles as to how one determines whether something is a jurisdictional fact are settled but necessarily imprecise. That must be so.”⁷³

Determining whether a fact or event, or combination of such, has the requisite quality of essentiality to be classified as jurisdictional, always requires a multiplicity of factors to be considered. Different judges may reach divergent conclusions. Such divergence is the result of the difficulties attendant on determining the will of Parliament when that is not readily apparent. I have attempted on other occasions to discuss the range of relevant matters.⁷⁴ The indicators and factors that have been developed in the case law lead me to the conclusion that the determination of whether a statutory reference or element is jurisdictional in the relevant sense is a principled process. It is not, contrary to some criticisms that have been made, a blank cheque to the judiciary to intervene whenever a judge believes the outcome to be undesirable. In my view the understanding that what is involved is the institutional integrity of the process assists in ensuring that proper boundaries are observed.

The Scope of Jurisdictional Error

An important aspect of the judgment in *Kirk* is the identification of the two distinct matters which were said to constitute both jurisdictional error and error of law on the face of the record. The proceedings in the Industrial Court involved alleged contraventions of the OH&S Act with respect to the alleged failure on the part of an employer to “ensure” a safe system of work. Certain defences were available to the employer. The matters found to constitute jurisdictional errors were first, misinterpretation of the Act manifest by the failure to provide proper particulars and, secondly, the admission of evidence that ought to have been excluded.

The High Court referred to the particulars that had been given. It concluded that they did not identify an act or omission which constituted a contravention of the two relevant sections of the OH&S Act, nor did they identify what measures the employer could have taken but did not take.⁷⁵ The absence of particulars was significant because, it was the act or the omission of the employer which constituted the offence and, for that reason, it was “necessary for the prosecutor to identify the measures which should have been taken”.⁷⁶

The joint judgment in *Kirk* referred to the identification in *Craig* of what constituted jurisdictional error in the case of an inferior court. It referred first to the general proposition from *Craig* that there is jurisdictional error on the part of an inferior court:

“If it mistakenly asserts or denies the existence of jurisdictional error or if it *misapprehends* or disregards the nature or *limits* of its *functions or powers* in a case where it correctly recognises that jurisdiction does exist.”⁷⁷

The Court repeated the reference in *Craig* that jurisdictional error is most obvious:

“Where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of *entertaining a matter or making a decision or order of a kind* which wholly or partly lies *outside the theoretical limits of its functions and powers*.”⁷⁸

The Court went on to say that despite the word “theoretical” the limits were real and went on to give the following three examples

from *Craig* of a court entertaining a matter outside the limits of its functions or powers:

- “(a) The absence of a jurisdictional fact;
- (b) Disregard of a matter that the relevant statute requires be taken into account as condition of jurisdiction (or the converse case of taking account of a matter required to be ignored); and
- (c) Misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case.”⁷⁹

The Court emphasised that the examples in *Craig* were “just that – examples”.⁸⁰

The Court held that the Industrial Court had committed the jurisdictional error identified in *Craig* in terms of “misapprehending the limits of its functions and powers”. This was because:

“[74] ... Misconstruction of s 15 of the OH&S Act led the Industrial Court to make orders convicting and sentencing Mr Kirk and the Kirk Company where it had

no power to do so. It had no power to do that because no particular act or omission, or set of acts or omissions, was identified at *any* point in the proceedings, up to and including the passing of sentence, as constituting the offences of which Mr Kirk and the Kirk Company were convicted and for which they were sentenced. And the failure to identify the particular act or omission, or set of acts of omissions, alleged to constitute the contravening conduct followed from the misconstruction of s 15. By misconstruing s 15 of the OH&S Act the Industrial Court convicted Mr Kirk and the Kirk Company of offences when what was alleged and what was established did not identify offending conduct.

[75] The explanation just offered also demonstrates that the error made by the Industrial Court was not only an error about the limits of its functions or powers. It was an error which led to it making orders convicting Mr Kirk and the Kirk Company where it had no power to do so. The Industrial Court had no power to do that because an offence against the OH&S Act had not been

proved. It follows that the Industrial Court made orders beyond its powers to make.”

The approach applied in *Kirk* is reminiscent of the reasoning of Jordan CJ in a classic case:⁸¹

“A magistrate has no jurisdiction to convict a person except for a statutory offence and it is contrary to natural justice to convict a person of a statutory offence with which he has not been charged.”

However, nothing in *Kirk* suggests that its reasoning is directed only to criminal proceedings. If misinterpretation of a statute is a step leading to the making of an order or other exercise of power, then it is a jurisdictional error. The practical difference with *Anisminic* may be small.

The second jurisdictional error arose from the fact that Mr Kirk, the director of the employer, who was himself the subject of charges in that capacity, was called by the prosecution as a witness. This apparently occurred by consent and in accordance with the usual practice in the Industrial Court. This was found to contravene s 17(2) of the *Evidence Act* 1995, which provides that

a defendant is not competent to give evidence as a witness for the prosecution. This was not a provision that could be waived by consent pursuant to s 190 of the *Evidence Act*.⁸²

Mr Kirk could not give evidence with respect to the charge against himself. However, it may be that his evidence could have been adduced against the company, as the prohibition in s 17(3) with respect to evidence from an “associated defendant” applies a not “compellable test” rather than a not “competent” test. This subsection was not discussed in *Kirk*.

The High Court held that:

“[76] ... The Industrial Court misapprehended a limit on its powers by permitting the prosecution to call Mr Kirk at the trial. The Industrial Court’s power to try charges of criminal offences was limited to trying the charges applying the laws of evidence. The laws of evidence permit many forms of departure from the rules that are stated. Many, perhaps most departures from the strict rules of evidence can be seen as agreed to parties at least implicitly. But calling the accused as a witness for the prosecution is not permitted, even if the accused

consents to that course. The joint trial of Mr Kirk and the Kirk Company was not a trial conducted in accordance with the laws of evidence. The Industrial Court thus conducted the trial of Mr Kirk and the Kirk Company in breach of the limits on its power to try charges of a criminal offence.”

It was of significance, as I have indicated above, that s 190 of the *Evidence Act* did not permit an accused to consent to waive s 17(2). As the High Court indicated, most of the rules of evidence are more flexible. Nevertheless, the conclusion that the conduct of a trial in contravention of this particular rule of evidence constituted jurisdictional error, because the Industrial Court had no power to try charges in this manner, may give rise to questions as to whether other rules of evidence or of procedure are of equal significance in the conduct of criminal trials and, perhaps, other trials. It may well be that some of the learning on “inviolable restraints”, developed in the context of the *Hickman* principle, may have a resonance here as a form of jurisdictional error capable of being raised by way of judicial review, notwithstanding the consent of the parties to a particular course of conduct at trial.

Time Bar Clauses

A matter of considerable practice significance that will arise from the *Kirk* judgment is the impact of that case on other forms of statutory restriction on judicial review. I will first consider time bar clauses, ie, clauses which require proceedings to be brought within a certain period. Time bar clauses are frequently found in State legislation and they vary considerably in their strictness.

In *Plaintiff S157* the High Court found that the privative clause inserted into the *Migration Act* 1958 (Cth) in 2001 did not apply to jurisdictional error. However, s 486A of the *Migration Act* required an application to the High Court to be made within 35 days of the notification of the decision under that Act and provided that the High Court could not extend that time. This section did not need to be dealt with by the majority in *Plaintiff S157*. Callinan J expressed the view that the provision may not provide enough time.⁸³ This approach appeared to conflict with earlier decisions that suggested that time bar clauses did not raise jurisdictional issues.⁸⁴

After *Plaintiff S157*, no doubt based on Callinan J's reasons, s 486A of the *Migration Act* was amended to provide for a 28 day

limit, in lieu of the original limit of 35 days, and to permit a 56 day extension if the High Court considered it to be in the interests of justice.

In *Bodruddaza*⁸⁵ the High Court unanimously found that s 486A was invalid. The joint judgment put forward as a general proposition:

“ ... A law with respect to the commencement of proceedings under s 75(v) will be valid if, whether directly or as a matter of practical effect, it does not so curtail or limit the right or ability of applications to seek relief under s 75(v) as to be inconsistent with the place of that provision in the constitutional structure ...”⁸⁶

The High Court went on to deal with the particular structure of the section but warned that for Parliament to itself formulate “a rule precluding what is considered by the legislature to be an untimely application ...” was a “path ... bound to encounter constitutional difficulties”.⁸⁷

By parallel reasoning, time bar provisions contained in State legislation could not validly compromise the capacity of a State

Supreme court to exercise its supervisory jurisdiction given constitutional protection by *Kirk*. The position of State courts may differ, in this respect, from that of federal courts other than the High Court. It has been held that the decision in *Bodruddaza* did not apply to the Federal Court's time limit under s 477 of the *Migration Act*, because the jurisdiction of the Federal Magistrates Court was statutory not constitutional.⁸⁸

The practical significance of time bar clauses is highlighted by the jurisprudence that has developed in this State in the context of environmental planning appeals. The *Environmental Planning and Assessment Act* 1979 (the "EP&A Act") provides in s 101 that the validity of any consent or certificate cannot be questioned except in proceedings commenced before the expiration of three months from the date on which public notice was given. Similarly, s 35 of the EP&A Act provides that the validity of an environmental planning instrument cannot be questioned except in proceedings commenced within three months of the date of publication on the New South Wales website of the instrument. *Kirk* may require further attention to the validity of these sections.⁸⁹

In *Woolworths Limited v Pallas Newco Pty Ltd*⁹⁰ the New South Wales Court of Appeal held that the characterisation of the use in a development application was a jurisdictional fact. This was a matter of considerable practical importance because of the social and commercial disruption that could occur if consents were successfully challenged long after they had been granted or, indeed, implemented.

The judgment limited the practical scope of the inconvenience capable of arising from the finding that characterisation of a development was a jurisdictional fact by holding that, as a matter of interpretation, the time bar in s 101 was intended to protect decisions from jurisdictional error.⁹¹ (Subject, however, to the application of the *Hickman* principle on the basis of this Court's analysis of *Hickman* before *Kirk*.⁹²)

Although I cannot express a concluded view, in the context of the particular statutory framework, I think it likely that the three month limit in both s 33 and s 101 is permissible. However, I expect that, in the light of *Kirk*, this may be tested.

It is, however, clear that the long line of authority which suggests that time bar clauses are effective to protect from jurisdictional error, subject to the application of the *Hickman* principle, must now be regarded as doubtful.⁹³ These cases must be reviewed in the light of the constitutional conception of the Supreme Court and the preservation of its supervisory jurisdiction as determined in *Kirk*.

No Invalidity Clause

A second example of the identification of the line between an impermissible intrusion on the minimum provision for judicial review, at both the Commonwealth and State level, arises from what has been described as a “no invalidity clause”.⁹⁴ Such a clause does not expressly deprive a court of its jurisdiction. It states that some act or decision that may be in breach of a statutory requirement or, perhaps some principle or administrative law, does not have the consequence that the act or decision is invalid. As a matter of substance, clauses of this character deprive the affected citizen of any substantive right to review for jurisdictional error, by removing the basis upon which that course could be undertaken. In effect, this extends the jurisdiction retrospectively to whatever happened.

The issue has arisen in the High Court judgment in *Futuris*.⁹⁵ The case came before the High Court as an appeal from an application for judicial review. The allegation that the decisions had been vitiated by jurisdictional error had to face the provisions of s 175 of the *Income Assessment Act* 1936 (Cth), which provided:

“The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.”

However, the Act expressly allowed a merits review to the Administrative Appeals Tribunal and also appeals to the Federal Court. It is also significant that the taxpayer had in fact instituted an appeal to the Federal Court from the relevant assessment. Although the proposition does not emerge with clarity from the High Court reasoning it is, in my opinion, of critical significance that an appeal on the merits lay, indeed had been instituted, with respect to the substance of the decision, an aspect of which was sought to be challenged by way of judicial review.

In *Futuris* s 175 was found to implement the approach accepted in *Project Blue Sky*.⁹⁶ In many such cases, of course, the issue will be resolved by a process of reading down a “no invalidity” clause.

It was suggested in *Futuris* that the Commissioner had deliberately issued an assessment which he knew to be invalid. This was rejected on the facts. However, the joint judgment in the High Court did indicate that s 175 would not be construed to “encompass deliberate failures to administer the law according to its terms”.⁹⁷ This is equivalent to the reading down of the privative provision in *Plaintiff S157, Batterham and Kirk*.

There remains plenty of scope for disputation. One has only to think of the wide range of possible denials of procedural fairness to recognise that drawing the line between a procedural breach which is validated by a no invalidity clause and a breach which, either as a matter of interpretation or as a matter of constitutional requirement, is of such significance that it cannot be validated, is fraught with difficulty.

Where, as was the case in *Futuris*, the structure of the legislative scheme is such that there is a clear right of appeal capable of correcting error, indeed not just jurisdictional error, it can hardly be suggested that a restriction on judicial review is, as a matter of practical reality, such as to infringe the constitutional protection of a minimum requirement of judicial review for jurisdictional error. This must apply at both a Commonwealth and State level. This distinction is only implicit in the reasoning of the joint judgment in *Futuris*, but appears to me to be an important aspect of the explanation of the result in that case.⁹⁸

The Land and Environment Court has been invested with the supervisory jurisdiction of the Supreme Court by way of judicial review pursuant to s 20(2)(b) of the *Land and Environment Court Act* 1979. Furthermore by s 71(1) of that Act, proceedings of that character “may not be commenced or entertained in the Supreme Court”. *Kirk* could be seen to call in question the validity of s 71(1) of the *Land and Environment Court Act*. However, although again I cannot express a concluded view, the fact that decisions of the Land and Environment Court are subject to appeal to the Court of Appeal would probably save this particular provision.

This issue will, however, become more acute in a legislative context where there is restriction on the ability to institute an appeal or seek review on the merits. The courts will then be required to determine the significance of the matters which would not be able to be agitated in proceedings other than by way of judicial review. Either the interpretation of a “no invalidity clause” or its permissible constitutional scope will then fall for decision.

Conclusion

One salutary effect of *Kirk* is to bring into alignment the principles of administrative law applicable at a State level and those applicable at a Commonwealth level. There has been some divergence between the two due to the development of the concept of constitutional writs. That divergence has now been significantly diminished if not, for all practical purposes, removed. This will facilitate the further development of Australian administrative law.

As I have indicated, I have long believed that the Commonwealth constitutional jurisprudence on this matter would exercise a gravitational pull on State administrative law. That gravitational force has now done its work. Indeed, it may well be

that the appropriate metaphor is not gravity but magnetism. It may even be the case that the High Court has developed a unified field of all forms of force: gravity, electro-magnetism and nuclear. This was a task which eluded even Albert Einstein, but it is possible the High Court has accomplished it.

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- ¹ See, eg, *Bros Bins Systems Pty Ltd v Industrial Relations Commission of NSW* [2008] NSWCA 292; (2008) 178 IR 28 at [30]; J J Spigelman ‘Jurisdiction and Integrity’, The Second Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law (2004) at 26; J J Spigelman ‘The Significance of the Integrity System’ (2008) 4(2) *Original Law Review* 39 at 47, reprinted in Tim D Castle (ed) *Speeches of a Chief Justice: James Spigelman 1998-2008* (2008), CS2N Publishing at 326; J J Spigelman ‘The Equitable Origins of the Improper Purpose Ground’ in Linda Pearson, Carol Harlow and Michael Taggart *Administrative Law in a Changing State: Essays in Honour of Mark Aronson*, (2008) Hart Publishing, Oxford at 149.
- ² See *Kirk v Industrial Relations Commission* [2010] HCA 1 at [48]; (2010) 84 ALJR 154.
- ³ *Kirk* supra at [96].
- ⁴ See *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51 at 141-142.
- ⁵ *Forge v Australian Securities and Investments Commission* [2006] HCA 44; (2006) 228 CLR 45 at [63].
- ⁶ Quoted in Eugene W Hickok Jr (ed) *The Bill of Rights: Original Meaning and Current Understanding* (1991) University of Virginia Press at 21.
- ⁷ See *Brownlee v The Queen* [2001] HCA 36; (2001) 207 CLR 278 at [7], [33]; *Ng v The Queen* [2003] HCA 20; (2003) 217 CLR 521 at [9].
- ⁸ See *Dalton v New South Wales Crime Commission* [2006] HCA 17; (2006) 227 CLR 490 at [34] and [40].
- ⁹ *New South Wales v Commonwealth (Work Choices Case)* [2006] HCA 52; (2006) 229 CLR 1 at [58].
- ¹⁰ *Shaw v Minister for Immigration and Multicultural Affairs* [2003] HCA 72; (2003) 218 CLR 28 at [14] and [20].
- ¹¹ *Wurridjal v Commonwealth* [2009] HCA 2; (2009) 237 CLR 309 at [200] and [266]. See also *Copyright Agency Limited v New South Wales* [2008] HCA 35; (2008) 233 CLR 279.
- ¹² *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322 at [401].
- ¹³ *Singh (an infant) by her next friend Singh v Commonwealth* [2004] HCA 43; (2004) 222 CLR 322 at [151], [158].
- ¹⁴ See *Re McJannet; Ex parte Minister for Employment Training and Industrial Relations* (1995) 184 CLR 620 at 653.
- ¹⁵ *In Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82 at [21].
- ¹⁶ The Honourable W M C Gummow AC, “The Constitution: Ultimate Formulation of Australian Law?” (2005) 79 *Australian Law Journal* 167 at 172.
- ¹⁷ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 141.
- ¹⁸ *Fardon v Attorney General (Qld)* [2004] HCA 46; (2004) 223 CLR 575.

19 *Forge* supra at [63].

20 *Fardon* supra at [15], [23], [37], [41], [101]-[102] and *Forge* supra at [65]-[66].

21 See *Kable* supra at [132] as applied in *International Finance Trust Company v New South Wales Crime Commission* [2009] HCA 49; (2009) 84 ALJR 31 at [56], [98] and [140].

22 *Kirk* supra at [96].

23 *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 at [43]. See also *Bodruddaza v MIMA* [2007] HCA 14; (2007) 228 CLR 651 at [46].

24 See *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 375 per O'Connor J.

25 *Cheatle v The Queen* (1993) 177 CLR 541 at 549, 560.

26 See also *Ng v The Queen* supra at [9]; *Brownlee v The Queen* supra at [6]-[7], [21]-[22], [33]-[34] and [52]-[57].

27 See *Ex parte Aala* supra at [24]-[25], [34].

28 *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476 at [103].

29 *Ibid.*

30 See *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 and see *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Act Case)* (1998) 195 CLR 337 at [89].

31 *Solution 6 Holdings Ltd v Industrial Relations Commission (NSW)* [2004] NSWCA 200; (2004) 60 NSWLR 558 at [129]-[134].

32 See *Re Grimshaw; Ex parte Australian Telephone and Phonogram Officers' Association* (1986) 60 ALJR 588 at 594; *Ex parte Aala* supra at [19]-[23].

33 See *Ex parte Aala* supra at [44], [146]-[149].

34 Compare *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 118-119; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 194-195 and 217-218; and *Ex parte Aala* supra at [5], [49]-[56], [145].

35 My attention has since been drawn to an article by the Hon Duncan Kerr MP, 'Privative Clauses and the Courts: why and how Australian courts have resisted attempts to remove the citizen's right to judicial review of unlawful executive action' (2005) 5 (2) *Queensland University of Technology Law and Justice Journal* 195 at 212-215. I am grateful for the reference.

36 See *Clancy v Butcher's Shop Employees Union* (1904) 1 CLR 181; *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114; *Brown v Rezitis* (1970) 127 CLR 157.

37 *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 635.

38 *In Ex parte Hebburn Limited; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420.

39 See, eg, *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 267-268; *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 144.

40 See *Walker v Industrial Court of New South Wales* (1994) 53 IR 121 at 150.

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- 41 See *Mitchforce Pty Ltd v Industrial Relations Commission (NSW)* [2003] NSWCA 151; (2003) 57 NSWLR 212 esp at [61]-[92].
- 42 See *Batterham v QSR Limited* [2006] HCA 23; (2006) 225 CLR 237.
- 43 See *Kirk* supra at [103]-[105] and cf the analysis in *Kirk Group Holdings Ltd v Workcover Authority (NSW)* [2006] NSWCA 172; (2006) 66 NSWLR 151 at [30]-[34].
- 44 See C Beaton-Wells ‘Judicial Review of Migration Decisions: Life After S157’ (2005) 33(1) *Federal Law Review* 141.
- 45 See *Craig v South Australia* (1995) 184 CLR 163.
- 46 See *Anisminic Limited v Foreign Compensation Commission* [1969] 2 AC 147 at 171.
- 47 See *Craig v South Australia* supra at 178-179.
- 48 See *Page v Hull University Visitor* [1993] AC 682; [1993] 1 All ER 97.
- 49 See *Kirk* supra at [95].
- 50 See *Plaintiff S157/2002* supra at [98].
- 51 *United States v L A Tucker Truck Lines* 344 US 33 [1952] at 39.
- 52 *City of Yonkers v United States* 320 US 685 [1944] at 695.
- 53 Commencing in (1929) 45 *Law Quarterly Review* 459 and (1931) 47 *Law Quarterly Review* 386.
- 54 See Mark Aronson ‘The Resurgence of Jurisdictional Facts’ (2001) 12 *Public Law Review* 17 at ft 14.
- 55 See *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22; (2001) 206 CLR 57 at 123; *Re Minister for Immigration and Multicultural Affairs; Ex parte Holland* [2001] HCA 76; (2001) 185 ALR 504 at [22]; *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 at 439; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; (2003) 77 ALJR 1165.
- 56 See, eg, Paul Craig, *Administrative Law* (6th ed, 2008) Sweet & Maxwell, Ch 14.
- 57 A M Gleeson ‘Judicial Legitimacy’ (2000) 20 *Australian Bar Review* 4 at 11.
- 58 See *Ex parte Aala* supra at [163].
- 59 *Attorney General for the State of New South Wales v Quin* (1990) 170 CLR 1 at 35-36.
- 60 See generally J J Spigelman AIAL National Lecture Series supra. I note that the first lecture in the series was published as J J Spigelman ‘The Integrity Branch of Government’ (2004) 78 *Australian Law Journal* 724.
- 61 *Corporation of the City of Enfield* supra.
- 62 Mark Aronson, ‘The Resurgence of Jurisdictional Facts’ supra.
- 63 *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 429-430.

64 *The Queen v The Judges of the Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 125.

65 *Corporation of City of Enfield* supra at 148.

66 *Craig v South Australia* supra at 177.

67 *Ex parte Mullen; Re Hood* (1935) 35 SR (NSW) 289 at 298.

68 *Timbarra Protection Coalition Inc v Ross Mining NL* [1999] NSWCA 8; (1999) 46 NSWLR 55 at [39].

69 *Timbarra* supra at [37]-[39].

70 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93].

71 *Project Blue Sky* supra at [93]; *Tasker v Fullwood* [1978] 1 NSWLR 20 at 23-24.

72 *Project Blue Sky* supra at [91]; See also Louis Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Review* 953 at 961-2; *Ex parte Redgrave; Re Bennett* (1945) 46 SR (NSW) 122 at 125 per Jordan CJ.

73 *Ross Mining NL v Timbarra Protection Coalition Inc* (S 26/1999, 14 May 1999); [1999] HCATrans 145.

74 See, eg, *Timbarra* supra at [42]-[60]; J J Spigelman 'Jurisdiction and Integrity' supra at 32-34.

75 See *Kirk* supra at [28].

76 See *Kirk* supra at [34].

77 *Kirk* supra at [72].

78 *Kirk* supra at [72].

79 *Kirk* supra at [72].

80 See *Kirk* supra at [72]-[73] referring to *Craig v South Australia* supra at 177-178.

81 *Ex parte Lovell; Re Buckley* (1938) 38 SR (NSW) 153 at 173.

82 See *Kirk* supra at [51].

83 *Plaintiff S157/2002* supra at [173]-[176].

84 See, eg, *Parisiennes Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 esp at 385, 388-389; *Bell v Stewart* (1920) 28 CLR 419 at 424; *Smith Kline & French Laboratories (Aust) Ltd v Commonwealth* (1991) 173 CLR 194.

85 *Bodruddaza* supra.

86 *Bodruddaza* supra at [53].

87 *Bodruddaza* supra at [59].

88 See *SZAJB v Minister for Immigration and Citizenship* [2008] FCAFC 75; 168 FCR 410.

89 See also *Maitland City Council v Anambah Homes Pty Ltd* [2005] NSWCA 455; (2005) 64 NSWLR 695.

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- 90 *Woolworths Ltd v Pallas Newco Pty Ltd* [2004] NSWCA 422; (2004) 61 NSWLR 707.
- 91 See *Woolworths v Pallas Newco* supra at [79]-[80].
- 92 See *Woolworths v Pallas Newco* supra at [81]-[85].
- 93 See, eg, *Smith v East Elloe Rural District Council* (1956) AC 736; *R v Secretary of State for the Environment; Ex parte Ostler* [1977] 1 QB 122; *R v Cornwall County Council; Ex parte Cornwall and Isles of Scilly Guardians ad litem and Reporting Officers Panel* [1992] 1 WLR 427 and on appeal (1994) 1 All ER 694; *Vanmeld Pty Ltd v Fairfield City Council* [1999] NSWCA 6; (1999) 46 NSWLR 78 esp at [143], [150]; *Woolworths v Pallas Newco* supra at [82], [84]; *Maitland City Council* supra at [2], [21].
- 94 See Leighton McDonald, 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law' (2010) 21 *Public Law Review* 14.
- 95 *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32; (2008) 237 CLR 146.
- 96 See *Futuris* supra at [23]-[24].
- 97 *Futuris* supra at [55].
- 98 See the analysis by McDonald, 'The Entrenched Minimum Provision' supra at 29-31 and the commentary on the article by Mark Aronson in (2010) 21 *Public Law Review* 35 at 38-39 and by Alan Robertson SC in (2010) 21 *Public Law Review* 40 at 42.

**INSTITUTIONAL SHAREHOLDERS AND CORPORATE
GOVERNANCE
OPENING ADDRESS
BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
SUPERANNUATION CONFERENCE, LAW COUNCIL OF
AUSTRALIA
SYDNEY, 25 FEBRUARY 2010**

The title chosen for this year's Conference for superannuation lawyers – *2010: A Super Odyssey* – was no doubt intended to manifest the sense of an epic voyage. Perhaps that epic quality is meant to refer to the significance for the superannuation industry of the combined effects of the Ripoll Report on Financial Products and Services, the Henry Review of the Taxation System and the further Reports of the Superannuation System Review. It is important, in what appears to be likely to become a year of significance for the industry, to remember that the original *Odyssey* was both a journey home and that it took 10 years.

Those of you who have participated in the process of reform of the superannuation system over many years will appreciate the applicability of the basic structure of the *Odyssey* in which the plot begins in the middle of the story and proceeds with flashbacks interspersed with further development. This is a tale of overcoming obstacles like multi-headed monsters, storms, whirlpools, one-eyed opponents, imprisonment, shipwrecks and other means of preventing arrival at the intended destination. There are, indeed, resonances here for the course of superannuation reform.

As with previous conferences the organisers have identified in the agenda a range of issues of concern to superannuation lawyers. You have in store a number of learned papers and, I am sure, stimulating discussion. No doubt, the central theme of much of this consideration will be based on a recognition of the fundamental role of the superannuation industry in providing retirement benefits for all working Australians and their dependents, based on the prudent management of investments. Nevertheless, the economic and social significance of superannuation funds is such that many other spheres of legal

discourse impinge upon, and often impose constraints upon, the ability to pursue this overriding purpose.

One such field of increasing significance is the role institutional shareholders play in the promotion of good corporate governance of the corporations in which they are, collectively, the most important shareholders. This is much more closely related to the fundamental objectives of superannuation fund investment than most attempts to engage the wealth and power of superannuation funds for other social and economic purposes. It is in this respect that I wish to make some observations this morning in opening this Conference.

Over the last decade or two there has been a discernible increase in shareholder activism on the part of institutional shareholders.¹ This has taken both private and public forms.

With respect to the former, scarcely a week goes by without some major corporation indicating that it has engaged in a process of consultation with its shareholders. From time to time displeasure on the part of significant shareholders about a proposed course of conduct has become manifest and

occasionally, although this is not usually necessary, that displeasure has been expressed in the form of voting on resolutions or in failure to subscribe additional capital.

In public debate there is often advocacy of institutional shareholders taking a more active interest and involvement in corporate decision-making. A recent example of such advocacy, based on corporate governance considerations, is the Report of the Parliamentary Joint Committee on Corporations and Financial Services of June 2008 entitled *Better Shareholders – Better Company* and subtitled *Shareholder Engagement and Participation in Australia*. The very title and subtitle indicate the thrust of the Report, which focuses on the significance of mechanisms of accountability for boards of directors.

Perhaps the principal focal point of recent concern, manifest throughout the developed world, is shareholder influence on executive remuneration. There is a wide range of proposals under consideration. In Australia the debate has focused on the recommendations of the Productivity Commission. Its Report is replete with references to the importance of the involvement of

institutional shareholders in corporate governance and to the significance of what is described as “shareholder engagement”.²

The undoubted expansion of institutional shareholder activism has occurred in the context of a longstanding debate about the separation of ownership and control within corporations. There is no single correct balance between the conflicting requirements.

On the one hand, there are too many examples of the principal/agent problem manifesting itself in inappropriate conduct, where management pursues its own objectives at the expense of the interests of shareholders. On the other hand, shareholder involvement can go beyond ensuring proper accountability and constitute an interference with the ability of management to effectively discharge its functions.

A good example of the effect of this development is the guidelines promulgated by the Investment and Financial Services Association on best practice for corporate governance, known as the “Blue Book”. The guidelines state:

“Fund managers should vote on all Australian company resolutions where they have the voting authority and responsibility to do so. An aggregate summary of fund managers Australian proxy voting record must be published at least annually and within two months of the end of the financial year.

Voting rights are a valuable shareholder right that should be managed with the same care and diligence as any other asset. Ultimately, shareholders ability to influence management depends on shareholders willingness to exercise those rights.”³

The question I pose is whether this approach reflects the legal obligations of institutional investors or whether it is principally a concern about good corporate governance. Generally, I am of the view that it is the latter. Institutional shareholders have a very real interest in good corporate governance. However, save in the case of corporations in which a specific fund has a substantial interest, this is a collective interest which, by reason of transaction costs and free rider problems, is difficult to pursue.

The mechanisms available for shareholder activism are varied. Corporations law and stock exchange listing rules often require or permit shareholder ratification or approval of executive decisions. Most significant is, however, the need for directors to be re-elected. This is, perhaps, the most frequently available and most critical form of accountability of the board to shareholders. These elections occur in a context where directors, particularly non-executive directors, have a collective responsibility for controlling the principal/agent problems that arise from the separation of ownership and control.

All of this may be a little trite, but it is important background for understanding what, if any, are the legal obligations upon superannuation funds to become involved in corporate governance. I am not concerned with commercial motivations for involvement by institutional shareholders in corporate decision-making. The concern for lawyers is the source and nature of the legal obligation, if any, on the part of institutional shareholders to get involved in such matters by exercising, or threatening to exercise, the voting rights attached to shares.

There is a large international and Australian literature on the obligations of institutional shareholders with respect to corporate governance.⁴ The focus of much of this attention is on the fiduciary duties of trustees.

A further source of legal obligation is to be found in the provisions of the *Superannuation Industry (Supervision) Act 1993* (Cth) (“SIS”), and in particular in the statutory covenants imposed on every superannuation entity by s 52 of that Act, being covenants which, I suspect, everyone in this room knows off by heart. To some extent, albeit with varying degrees of comprehensiveness, these covenants were intended to reflect what was understood to constitute equitable obligations. However, some clearly do less but, as time passes, may be found to do more.

The right to vote attached to a share is a valuable incident of the property right in the share. The principles developed in the context of trustees with a substantial, and often a controlling, interest in an asset are not necessarily applicable to the usual superannuation fund trustee context of proportionally small holdings in a large number of publicly listed corporations.

The principles are particularly difficult to apply to the context of contemporary portfolio management practices, especially that part of a portfolio managed to reflect an index. Nonetheless, there have been suggestions that there is a fiduciary duty to vote.

The law of trusts does not often impose a duty to exercise a power, although there are powers coupled with a duty. It is clear that trustee shareholders must use their voting power in the interests of beneficiaries.⁵ However, that does not determine when such a right ought be exercised.

This is a difficult area of fiduciary law. I commend to practitioners in the field a recent book just published in the United Kingdom entitled *Fiduciary Loyalty* which contains an analysis of the relationship between fiduciary duties, and non-fiduciary duties which may be of assistance.⁶

Australian fiduciary law, unlike that of Canada and the United States, continues to focus on fiduciary duties as proscriptive not prescriptive.⁷ Australian courts are much less likely to review the exercise of a discretionary power by a trustee.⁸

The extent of the divergence between Australian and United States fiduciary law is manifest in a recent contribution which suggests that activist institutional shareholders have fiduciary duties to other shareholders.⁹ This is an inconceivable development in Australia.

The well-established duty to invest trust funds does encompass a duty to preserve the trust property. However what may be required to be done in this latter respect is by no means clearly defined.

The same is true of the proposition that positive obligations may arise by reason of the duty of loyalty, which encompasses a duty to act in the best interests of the beneficiary. It has always been more difficult to establish breach of duty when the alleged default is of omission, rather than commission.

Perhaps the best established duty, of a prescriptive character, is the obligation of a trustee to turn his or her or its mind to whether or not to exercise a discretionary power.¹⁰ As a practical matter it cannot possibly be the case in a contemporary superannuation environment for a trustee to be obliged to give

detailed or, what is sometimes referred to as “real and genuine consideration”,¹¹ to every single vote of every corporation in which interests are held. The difficulty is to know where to draw the line between what is required and what is not.

I find it inconceivable that any such duty would attach to a holding by a trustee shareholder of an index portfolio where, almost *ex hypothesi*, the shareholder is indifferent to the outcome of a particular resolution, extending even to the election of directors. On the other hand there will be resolutions, including those required by the Corporations law or by listing rules, which are capable of having a significant influence on the value of the shareholding. In such circumstances consideration as to whether or not to exercise the right to vote could well be obligatory.

The paucity of the case law in these respects is a reflection of the difficulty individual beneficiaries have of proving a default by omission. In the superannuation field there is the additional constraint arising from widely dispersed beneficiary interests. Bringing together persons with comparatively small individual, but substantial collective, losses is a real barrier. The emergence of

litigation funders may change the dynamic in this respect, as it has elsewhere.

I have already referred to the statutory overlay on the fiduciary duties in the form of the covenants implied by the *Superannuation Industry (Supervision) Act 1993* (Cth). With respect to the exercise of the right to vote, the relevant covenants are the duty of skill and diligence and the duty to act in the best interests of beneficiaries, imposed respectively by pars (b) and (c) of s 52(2). To some degree, as is well known, these covenants are meant to reflect fiduciary duties, but they do not do so precisely.

It is unlikely that a requirement for institutional activism will be found in the statutory skill and diligence duty, confined as it is to a standard of the “ordinary prudent person”. As has been pointed out,¹² this is less demanding than the standard in equity of an “ordinary prudent *business* person”,¹³ let alone the possible, I would have thought probable, standard of an “ordinary prudent *professional* trustee”.¹⁴ The lowest standard was, I believe, chosen deliberately.

The alternative covenant under par (c), imposing a duty to act in the best interests of the beneficiaries, reflects the principle identified, not without subsequent controversy, in the well-known judgment of Sir Robert Megarry VC in *Cowan v Scargill*.¹⁵

It is not easy to know what Megarry VC intended by extending the duty he identified beyond performance of duties to the exercise of powers.¹⁶ Not all trustee powers are fiduciary powers. It is also difficult to know precisely what the implications are of Megarry VC's characterisation of the "best interests" duty as "paramount", particularly in the context of the well-established Australian position that fiduciary obligations are proscriptive rather than prescriptive. Nor is it apparent why a statutory duty derived from an equitable principle, in purported application of *Cowan v Scargill*, should be expressed in terms of a duty to "pursue to the utmost" the interests of beneficiaries.¹⁷

Once frozen in a statutory formulation, as distinct from a judgment in narrative form, it is much easier to wax lyrical about the use of a superlative such as "best" and to conclude that the obligation extends to "best efforts" and even to "best outcomes".¹⁸ Frankly, I deplore the proclivity of Parliamentary drafters to

transform the language, often in dicta, of a single judgment into a statute, a process which rips the reasoning from its context and deprives it of nuance. Perhaps the most egregious recent example is found in the criminal responsibility provisions of the Commonwealth Criminal Code. Reducing judicial reasoning to statutory formulations is a form of structured over-simplification, like a Power Point presentation.

It is important to appreciate the degree to which the law loses its capacity to expand and adapt when a flexible common law or equitable principle is encased in a rigid verbal formula. As seen most clearly in the entire area of Corporations law, the contemporary political necessity to be “seen to be doing something” has made this process irresistible for legislatures. We seem to be stuck with a never ending increase in the volume of regulatory texts, in which an understanding of legal principle is overborne by the deployment of dictionary definitions in an elusive quest for certainty.

The legal requirements for institutional shareholders to be active are few. However, the principal defect of the law in this respect is the risks which might attend drawing the line in what, in

hindsight, proves to be the wrong place. Of course, prudent trustees will err on the side of caution in such respects. So will trustee directors who are deemed to give the SIS covenants by s 52(8) of that Act. For this reason active steps, including seeking advice or relying on others to act, becomes advisable, even where not necessary. Frequently, the task is performed by fund managers, but even that may require a level of scrutiny which varies with the significance of the issue, because of the delegation of duty which is involved.¹⁹

One manifestation of the increase in shareholder activism on the part of institutional investors is the use of proxy advisers who provide, on a commercial basis, analyses of the conduct of corporations and advice on how to vote on resolutions, including the election of directors. This is an area fraught with difficulty, not least because of the absence of effective quality controls on the advisers or on the advice provided. There is a discernible element of mechanical compliance with what is perceived to be an obligation on the part of institutional shareholders to seek advice on such matters. The “tick a box” approach often appears to be tokenistic and, if the issue is ever tested, will not necessarily provide any protection.

There are people in this room who have lived through the process by which an increase of activism emerged and will know the detail better than me. However, as far as I can discern, it began because of the extension of American practices, through American institutional shareholdings in Australian corporations.

From about 1988 the Department of Labor in the United States which administers the *Employee Retirement Income Security Act* 1974 (“ERISA”), has interpreted fiduciary duties imposed upon funds to include a fiduciary responsibly to exercise the right to vote.

The Department has expressed the obligation in the following way:

“The fiduciary obligations of prudence and loyalty to plan participants and beneficiaries require the responsible fiduciary to vote proxies on issues that may affect the value of the plan’s investment.”²⁰

Of particular significance with respect to this regulation is that it applied to shares owned by American entities in foreign corporations.

The Securities and Exchange Commission of the United States has, since 2003-2004, expanded the obligations recognised by the Department of Labor beyond firms regulated by ERISA to all mutual funds, requiring them to disclose their policies on voting proxies and to file and make available to shareholders their proxy voting records.

These obligations have created a significant industry of proxy voting advisory firms in the United States. By reason of the extension to foreign shareholdings, American funds required similar advice about Australian corporations. It was, as I understand the position, this United States requirement that led to the establishment of the first of the proxy advisory firms here. They have expanded since that time, with frequent criticism from corporations about whom they have given adverse advice.

In the absence of any clearly established legal obligation to become active, the justification for greater participation on the part

of institutional investors in the affairs of corporations must be commercial. As the broad thrust of the arguments in favour of shifting the balance between the power of directors and the power of shareholders in corporate life appears to suggest, the purpose is to improve the performance of the corporate sector as a whole. There are different views about whether shifting that balance will have that effect, but the contemporary direction of practice and, probably, regulation, is towards shareholder involvement.

On this basis, superannuation funds have a collective interest which goes beyond the interest each fund may have as a shareholder of a particular corporation. Serving the overriding purpose of ensuring reasonable retirement income for members of funds will be enhanced by an across-the-board improvement in Australian corporate performance.

There are legal difficulties that may arise when institutions become more active as shareholders, which have been discussed in the literature, including the possibility of conflicts of interests, the risk of becoming a shadow director or of falling foul of insider trading provisions. Most significantly, from the point of view of any kind of collective action, are the substantial corporate law

implications if different institutional shareholders become “associates” of each other.²¹

In recognition of the fact that such corporate law restraints would prevent institutions from actively participating in corporate governance, ASIC has formulated an exemption from the takeover provisions by a class order entitled *Collective Action by Institutional Investors*. It is a limited exemption which does not, in my opinion, fully overcome the inhibitions to collective action. However, I recognise that there is a difficult balance between conflicting public policies involved.

Perhaps the most important collective interest that institutional shareholders have is in the quality of the pool of persons prepared to act as non-executive company directors, notwithstanding the very onerous responsibilities that attach to the role. There are a number of organisations that represent institutional investors which are, through collective action, capable of improving the pool of non-executive directors, upon whom so much reliance is now placed with respect to corporate governance.

Some years ago two American scholars made an innovative suggestion for achieving this objective which may prove more feasible in the Australian environment than it has in the United States.²² The proposal was for institutional investors to combine to identify a cadre of professional directors, being persons who are prepared to work on a fulltime basis as non-executive directors of no more than, say, five or six corporations. What the authors described as a “focussed mandate”, with the possibility of flexibility and specialisation, would enable non-executive directors to perform more active and better informed roles as directors of a limited number of corporations.

It is understandable that, in the wake of the Global Financial Crisis and the necessity for the United States government to appoint directors to major corporations, which the government now controls, this proposal for a professional cadre of directors has been revived, particularly in a detailed proposal from Harvard Business School for a Corporate Governance College.²³

In the original proposal, it was not suggested that institutional shareholders would be bound to vote for any such person. However, as a practical matter, before such an idea could

be pursued in Australia, it may be necessary to revisit the existing ASIC Class Order to ensure that no difficulties arise in this respect.

One or more of the various organisations that represent institutional shareholders in Australia, alone or in combination, could effectively undertake the task of recruiting such a pool of directors. Such a group of professional non-executive directors could develop a sense of collegiality and enhanced independence that would serve as a counterweight to the institutional dynamic created by the traditional practice of selection solely by the chairman and senior management of a corporation. This is also a mechanism by which other objectives of improving overall corporate governance, such as gender balance on boards of directors, could be pursued. It is, in my opinion, an idea worthy of consideration.

I formally declare this Conference open and, in doing so, revert to my introductory theme. As you contemplate the challenges ahead, you may find comfort in the haiku version of *The Odyssey*:

Aegean forecast –

storms, chance of one-eyed giants,
delays expected.

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- ¹ See, eg, Ian Ramsay, G P Stapledon and K Fong “Corporate Guidance: The Perspective of Australian Institutional Shareholders” (2000) 18 *C&S LJ* 110; Julian Sher, “The Changing Role of Institutional Investors in Australia – A Paradigm Shift?” (2002) 21 *Aust J of Corporate Law* 81.
- ² Productivity Commission “Executive Remuneration in Australia” Inquiry Report No 49, 19 December 2009, Ch 9.
- ³ Investment and Financial Services Association “Corporate Governance: A Guide for Fund Managers & Corporations” IFSA Guidance Note No 2.00, June 2009, p 13.
- ⁴ See generally G P Stapledon *Institutional Shareholders and Corporate Governance* Clarendon Press, Oxford, (1996); Paul U Ali, G P Stapledon and Martin Gold *Corporate Governance and Investment Fiduciaries* Law Book Co, Sydney (2003).
- ⁵ See, eg, J D Heydon & M J Leeming *Jacobs Law of Trust in Australia* (2006) 7th ed at [2051].
- ⁶ Matthew Conaglen *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* Hart Publishing, London, (2010).
- ⁷ See, eg, *Breen v Williams* (1995) 186 CLR 71 esp at 113; *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 105 esp at 198.
- ⁸ See generally J C Campbell “Exercise by Superannuation Trustees of Discretionary Powers” (2009) 83 *ALJ* 159.
- ⁹ See Iman Anabtawi and Lynn Stout “Fiduciary Duties for Activist Shareholders” (2008) 60 *Stanford Law Review* 1255.
- ¹⁰ *Re Gulbenkians Settlements Trust* [1970] AC 508 at 518; *McPhail v Doulton* [1971] AC 424 at 449, 456.
- ¹¹ See *Karger v Paul* [1984] VR 161 at 163-164.
- ¹² See Lisa M Butler “The Super Standard of Care – How High Should Superannuation Trustees Jump?” (2008) 2 *Journal of Equity* 225.
- ¹³ *Speight v Gaunt* (1883) 22 Ch D 727 at 739.
- ¹⁴ *Bartlett v Barclays Trust Co (No 1)* [1980] 1 Ch 515 at 535.
- ¹⁵ See *Cowan v Scargill* [1985] Ch 270; see also Sir Robert Megarry “Investing Pension Funds: The Mine Workers’ Case in T G Youdan (ed) *Equity, Fiduciaries and Trusts* Carswell, Toronto (1989); Justice Margaret Stone “Superannuation Trustees: Are Fiduciary Obligations and Standards Appropriate?” (2007) 1 *Journal of Equity* 167; N Scott Donald “Best Interests?” (2008) 2 *Journal of Equity* 245.
- ¹⁶ However, that has not overcome the proscriptive than prescriptive perspective.
- ¹⁷ See *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd* (2006) 15 VR 87 at [107].
- ¹⁸ See, eg, M Scott McDonald, *supra*, at 255-257; Geraint Thomas “The Duty of Trustees to Act in the ‘Best Interests’ of the Beneficiaries” (2008) 2 *Journal of Equity* 177 esp at 179-184, 202-203.

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- ¹⁹ See J R F Lehane “Delegation of Trustees Powers and Current Developments in Investment Funds Management” (1995) 7 *Bond L Rev* 1.
- ²⁰ US Department of Labor “Interpretive Bulletin relating to written statements of investment policy, including proxy voting policy or guidelines” 29 CFR 2509.94-2, 29 July 1994.
- ²¹ See generally G P Stapledon “Disincentives to Activism by Institutional Investors in Listed Australian Companies” (1996) 18 *Sydney LRev* 152.
- ²² See Ronald J Gilson and Reinier Kraakman “Reinventing the Outside Director: An Agenda for Institutional Investors” (1991) 43 *Stan.L.Rev.* 863.
- ²³ See Gilson and Kraakman “The Directors Guild” *The New York Times* 8 June 2009; Surowiecki “Bored Stiff” *The New Yorker* 1 June 2009; Lars Nielson, *A Public Policy Proposal for the Corporate Governance College* April 1 2009 available at www.ssrn.com/abstract=1413286.

TOWARDS A NATIONAL JUDICIARY AND PROFESSION
OPENING OF LAW TERM DINNER, 2010
LAW SOCIETY OF NEW SOUTH WALES
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
SYDNEY, 1 FEBRUARY 2010

Last year was the bicentenary of the birth of Charles Darwin and the sesquicentenary of the publication of his great work *The Origin of Species*. These significant anniversaries were marked in Australia, with understandable emphasis on the significance for his theories of Australian flora and fauna. However, the Australian commemoration glossed over the fact that when he actually visited Sydney, Darwin was singularly unimpressed.

In his diary, now known as *The Beagle Diary*, Darwin wrote, as he was leaving Sydney on 14 March 1836:

“Farewell Australia, you are a rising infant and doubtless some day will reign a great princess in the South; but you are too great and ambitious for affection, yet not great enough for respect. I leave your shores without sorrow or regret.”

When I read this passage in the Darwin Exhibition at the National Museum of Australia in Canberra last year, I found it an insightful summary of the present dilemmas faced by a middle ranking power as Australia has become. There is, however, one significant change in values since the early Victorian era when Darwin wrote. Today, 'greatness' is not the only basis on which the people of one nation hold the people and institutions of another in respect. Australia's success in various fields of endeavour is acknowledged and is the basis for respect. For example, notwithstanding the last Ashes tour, there is no doubt that our national cricket team receives respect, but not affection, wherever it goes.

In May this year I will have been Chief Justice for twelve years. During that period I have had numerous occasions to interact with judges and legal practitioners from many different nations and to initiate significant contact between our legal institutions and the institutions of other nations. In my experience, our legal system is widely admired. We produce lawyers and judges of the highest calibre. "Respect" is an appropriate word to

describe the attitude of most international commentary about our legal system. Indeed, there are even indications of affection.

As many of you in this audience have heard me say, probably more than a dozen times, the longevity of our legal institutions is one of the key determinants of our success in this field. However, that long history has been punctuated with, occasionally significant, changes to the legal system. This process of renewal has been essential to our success. However, it is necessary to emphasise that such renewal has always been based on an understanding of the value of the institutional traditions of the system.

The year 2010 may well become a significant year in terms of the development of the profession and of the judiciary, by reason of the currency of proposals to adopt a national framework for the profession and, to a lesser extent, for the judiciary. I wish to make some observations about some aspects of the proposals currently under consideration with respect to, first, the judiciary and, secondly, the profession.

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We have a unified system of law in Australia which is complicated by the multiplicity of jurisdictions. This is a manifestation of our federal system. Jurisdictional diversity is reflected throughout the legal system: from the structure of the courts to the structure of the profession. In these and other such matters I am and always have been more of a centralist than a federalist, although my career path has not recently afforded opportunities to manifest this predisposition.

Nevertheless, I recognise that government structures are path dependent. What works depends on institutional history. Institutional change must always be informed by both principle and experience.

King Arthur asserted the legitimacy of his authority on the basis of receiving Excalibur from the Lady of the Lake. However, as the Michael Palin character put it in *Monty Python and the Holy Grail*:

“Strange women lying in ponds distributing swords is no basis for a system of government.”

This may remind you of some of the deficiencies of our federal system.

In order to achieve the objective of reinforcing the national character of our legal system, one has to start with the court structure. Regrettably our unified legal system has never led to the establishment of a unified system of courts. The best proposal for doing that remains that of Sir Owen Dixon, who advocated such a system in a submission to the Royal Commission on the Constitution in 1927.

As Sir Owen put it in a subsequent address:

“Our conception of the unity of the law might naturally have led us to regard the courts of law as established to administer justice, not as agents either of State or of Commonwealth, but simply as the Kings Courts having jurisdiction in Australia and administering the law of the land independently of its source ... In other words we might have established a judicial system which was neither state nor federal but simply Australian.”¹

This remains as good a statement of a worthy aspiration for the future development of our judicial system: to repeat – “neither state nor federal but simply Australian”.

Our present system does not ensure that we make full use of our most talented judges, particularly those with highly specialised knowledge. Nor does it ensure that there is an optimal allocation of resources to the separate institutions which administer the single body of Australian law. Nor does it ensure that the inevitable institutional tensions and intermittent turf battles are a creative form of competition. We can do better with a national judiciary.

Increasingly over recent years, a sense of national collegiality has emerged throughout the judiciary in Australia. The ease and frequency of interaction amongst judges from different jurisdictions has been transformed. We meet each other often in a variety of contexts, both educational and institutional, to a degree that did not exist even a decade or two ago. Of course it is important to acknowledge the inevitability of different practices in a nation as geographically large as Australia. Nevertheless, the personal foundation of a national judiciary is well established.

The difficulties of amending our Commonwealth Constitution are well known. However, in my opinion, if there is a political will to create a national judiciary, this can be done by political arrangements not requiring Constitutional amendment. Such a judiciary could emerge if two steps are taken: First, judicial appointments to each Supreme Court and to the Federal and Family Courts in each State, are made as joint appointments of both the Commonwealth and the relevant State government. Secondly, each such Court is jointly funded by the two levels of government. I put this model forward for debate.

It is not a necessary concomitant of a federal system that judges of courts, particularly courts at the level of the Supreme Court, must be appointed by the provincial or state government. The Indian and Canadian federations both operate on the basis that it is the centre that makes the appointments to the state Supreme Courts. Nevertheless, our system was and is different and the objective stated by Sir Owen Dixon requires a process of co-operative federalism.

It is entirely appropriate that each level of government should have some influence on the judicial system of the other. A significant part of the work of State courts involves the exercise of federal jurisdiction. A significant part of the work of federal courts involves co-operative legislation based on the reference of State powers or the exercise of accrued or ancillary State jurisdiction.

My views as to the desirable mechanisms for the appointment of judges are, perhaps, determined by the close collaboration I have had with respect to the selection of judges for the Supreme Court with each of three Attorneys who have served during my period of office. I have no complaints in this respect.

There is no single correct model for a judicial appointment procedure. Requirements vary from one jurisdiction to another. I have previously expressed my scepticism that the task of balancing and assessing the wide range of attainments required for judicial office is a task capable of being performed by a committee. I am not a fan of a so-called "independent" judicial appointments process.

My own experience emphasises both the validity and the utility of a democratic input into judicial selection. I realise that the experience of other chief justices has not been as benign as mine, leading some to prefer some kind of formal appointments procedure to ensure that inappropriate appointments are not made.

Human institutions are necessarily imperfect. There is no reason to believe that the occasions on which a political decision-making process goes wrong is likely to be more frequent than a committee process, with its tendency to compromise, proclivity for timidity and, in the long term, the inevitability of institutional sclerosis.

Requiring the concurrence of both the State and Commonwealth governments would establish an appropriate check on any particular Attorney acting in an inappropriate manner. However, from the point of view of the national judiciary, each judge appointed in this manner would take office with an understanding that s/he held office on a collaborative national basis, irrespective of the particular institutional structure of the jurisdiction in which s/he serves.

In my opinion, the risks of such a process, such as a stalemate by the exercise of a veto power, appear to me to be less than the risks of aberrant appointments by a single Attorney under the current arrangements.

The second step in the creation of a national judiciary would be an arrangement by which all courts at the Supreme Court level are jointly funded by Commonwealth and State governments. This entails difficulties with which our federation has had to cope in many areas of governance, primarily because of the fiscal imbalance which pervades all aspects of Commonwealth/State relations. I do not under-estimate the complexity of such negotiations. Nevertheless, acceptable arrangements can be made.

The establishment of such a system would, in my opinion, lead to the creation of a national judiciary, in which Sir Owen Dixon's objective can be attained, to repeat again: a judiciary which is neither federal nor state, but simply Australian.

Some tentative steps in this general direction were taken last year. The Standing Committee of Attorneys General adopted a judicial exchange scheme, to which all States, except Queensland, have committed. Enabling legislation for the judicial exchange between Australian courts was enacted in New South Wales last year. Furthermore, the Attorneys of the Commonwealth and of New South Wales and Victoria have raised the possibility of joint commissions.

Over 15 years ago Chief Justice Gleeson, when Chief Justice of New South Wales, convinced the Council of Chief Justices to adopt an exchange system. However, the only exchanges actually carried into effect were between the Supreme Court of New South Wales and the Supreme Court of the Northern Territory.

The revival of interest in exchanges was in part prompted by Chief Justice Robert French, when a judge of the Federal Court. His Honour put forward a detailed proposal for judicial exchange outlining the numerous advantages that would accrue from a systematic programme of exchanges between the courts. He said, and I agree, that such a system could lead to:

- “Improvement of individual judicial performance in terms of the efficiency and quality of the judicial officer’s work;
- Improvement of the overall functioning of courts procedurally and by reference to the efficiency and quality of the work of their members;
- Improvement of the morale of judicial officers and associated retention of experienced officers for longer periods;
- Improvement in the attractiveness of courts for prospective appointees;
- Effective allocation of judicial resources between courts;
- Enhancement of the standing of the courts within the legal profession and the wider community;
- Improved awareness between courts of the development of the law in areas of common jurisdiction;
- A more consistent body of national decision-making in areas of common jurisdiction;
- Mutual awareness and acceptance of the respective functions of trial judges and intermediate appellate judges; and
- Improved quality of decision-making and efficiency of appellate judges.”²

The New South Wales Court has continued to encourage such interchange. Tony Fitzgerald from Queensland and David Ipp from Western Australia became Judges of Appeal. Other judges from Queensland, Victoria, South Australia and Western Australia have served as acting judges of the Supreme Court of New South Wales. I have particularly sought to promote such exchange in criminal appeals for Commonwealth offences. Last year two Victorian judges sat on our Court of Criminal Appeal.

I look forward to further exchanges under the new uniform system. Any process of judicial exchange can only work on the basis of reciprocity between the respective courts, so that the courts deal with each other on the basis of equality. I have no doubt that this can exist between State Courts.

There are constitutional restraints on exchanges between the Federal Court and a State Supreme Court. The view has been taken in the Federal Court that there is no restriction on a Federal judge accepting an appointment to a State Supreme Court, in much the same manner as the judges have served in Territory

courts. It is by no means clear to me that this is permissible and there is a substantial risk involved in proceeding on this basis.

The same may be true of the proposal that was raised last year for judges to hold dual commissions in State and Federal courts, a proposal which I support. However, this process can also only work on the basis of reciprocity, reflecting equality between the courts. If constitutional restrictions are of a kind which prevent such equality, then the scheme will not work. This cannot be a one way street.

The final matter raised last year relevant to a national judiciary are the consultations, proceeding under the auspices of SCAG, with respect to the possibility of a national scheme for judicial complaints. This is a case of the tail wagging the dog. If one wishes to promote a national judiciary this is the last thing one would turn one's mind to. It is not clear to me why it has become the first.

Attorney General Hatzistergos has made it quite clear that this State will not be part of the process, because we have a well-established system of dealing with judicial complaints which has

been operating successfully for over two decades. One of the reasons why other States and the federal system have not developed an equivalent mechanism is because of longstanding judicial resistance. That resistance has, so far as I can see, quickly evaporated, at least at a leadership level.

In my twelve years as President of the Judicial Commission of New South Wales I have had occasion to closely examine many hundreds of complaints. Although some of them arose in the course of the courts of New South Wales exercising federal jurisdiction, I do not recall one having anything remotely like a national element.

Complaints are essentially local. The complainants are all concerned with a local manifestation of the judicial process. Furthermore, assessment of the conduct of a particular judicial officer also involves, and usually only involves, local information. It is possible to envisage complaints which would give rise to cross-jurisdictional considerations but, on the basis of the experience of the Judicial Commission, these would be few and far between.

Desirable as I think a national judiciary would be, I am strongly of the view that the handling and determination of complaints needs to be decentralised. I suspect this would also be true if, as seems to be the most likely end result of the current process, an equivalent of the Judicial Commission's procedures is established for Federal judges.

From time to time constitutional questions have been raised about such a mechanism. Save in one respect I am not convinced that there is any constitutional barrier to adopting the New South Wales system at a federal level. The respect in which there may be such a difference is that in New South Wales the Parliament is not entitled to take steps to remove a judge from office unless it has received a report from the legislatively created Conduct Division of the Commission. I doubt that the Commonwealth Parliament could be so restrained.

I realise that the High Court has adopted a strict approach to Chapter III of the *Constitution* – much more rigid and inflexible than the approach of the United States Supreme Court with respect to the equivalent Article III of the *United States Constitution*.

Nevertheless, I can see no reason why legislation could not make provision for an investigation of complaints against Federal judges.

If my proposal for Commonwealth/State joint appointment and financing were adopted, then it would be appropriate to adopt a joint mechanism for dealing with judicial complaints. The core of the Judicial Commission consists of the heads of jurisdiction of each of the State courts. There would be no difficulty in adding to this body the heads of jurisdiction, or the most senior member in New South Wales, of each of the three Federal courts. I have no doubt such a joint body could work effectively in the context of a national judiciary established in the manner which I have put forward for consideration.

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The national project of particular interest to members of the Law Society of New South Wales is the National Legal Profession Reform Project. This has involved a series of draft papers and extensive consultations, intended to culminate in a formal proposal in a few months. This is an ambitious project which, I wish to make clear, I wholeheartedly support. The ability to practice nationally in a seamless manner is an important objective.

Nevertheless, it must also be recognised that the overwhelming majority of legal practitioners operate only locally and, accordingly, the overwhelming majority of practitioner/client interactions are local. This is a perspective that must not be lost when longstanding institutional arrangements are to be fundamentally changed. The legal profession cannot be organised exclusively for the commercial benefit of the large national firms and the senior barristers who practice nationally.

As this audience is well aware, after many years of negotiation, a uniform legal profession statute was, more or less, adopted by all States save, for local political reasons, South Australia. Nevertheless, the range of differences, many of a quite minor character, that appeared in the respective statutes was such

that uniformity was not in fact achieved. The cumulation of, often irritatingly small, variations was such as to make national, seamless practice impossible.

This is the kind of problem that has long bedevilled attempts at uniform legislation in our federation. The new Project is designed to overcome these difficulties by ensuring uniformity, not only of the statutory text, but also of institutional structures.

There is a comparison with the various permutations of our national corporations law. I, together with other commercial lawyers of my vintage, originally cut my teeth on the Uniform Acts of 1961, which were in fact uniform. What was not uniform was the process of administration and of implementation. State Corporate Affairs Commissions still existed. There were three successive regimes designed to establish a new uniform scheme extending to regulatory institutions: first with the 1981 co-operative scheme, in the form of the Companies Codes, creating the National Companies and Securities Commission; then the 1991 co-operative scheme of the *Corporations Law*, creating the Australian Securities Commission and, finally, the *Corporations Act*

2001, based on a referral of powers, creating the Australian Securities and Investments Commission.

What has happened with the legal profession is that we have attempted a scheme equivalent to the Uniform Companies Legislation of 1961, which has failed. The issue now is what kind of national institutional structure can be created, along the lines of one of the 1981, 1991 or 2001 corporations schemes.

The general thrust of the proposals by the National Taskforce is commendable: uniform legislation and regulation with national standards and practices permitting national practice. However, I was particularly concerned when the original discussion draft of the Taskforce proposed that the new National Legal Services Board should be appointed by the Standing Committee of Attorneys General. I was even more concerned when the Law Council of Australia proposed, in its response to this discussion draft, that the Board should be appointed by the Commonwealth Attorney General after consultation with other state Attorneys and professional associations.

In various deliberations, I expressed the view that a vocation structured in this manner had no right to call itself a profession. The regulation of a profession cannot be conducted by a body appointed by the executive arm of government. There has never been such a structure in any common law system of which I am aware. The National Legal Services Board should consist of a majority of members appointed by professional associations and a chair appointed by the Chief Justices Council. Any other kind of structure would, in my mind, disentitle legal practitioners from describing themselves as professionals.

The Law Council of Australia modified its original proposal and recommended that the majority of the National Legal Services Board be members of the legal profession appointed independently of government. Importantly, as I understand the position, there will be a modification of the proposal by the Taskforce, but there is not yet a written identification of an alternative appointment structure. I understand that a Draft Bill will be available soon and I look forward to its contents.

The Chief Justices Council adopted my proposal that that Council should appoint the Chair of the National Legal Services

Board. Chief Justice French conveyed the views of the Council to the Taskforce. He emphasised that the independence of the legal profession is a corollary of independence of the judiciary. Accordingly, the majority of the members of the Board should be members of the legal profession appointed independently of executive government. The issue of professional independence, he noted, was particularly acute with respect to the setting of ethical standards.

My principal concern in this matter has been the institutional integrity of the legal profession. Legal practice is a profession. It is not simply the provision of services to the consumers. The consumer/service provider model of economic activity has become a feral metaphor. Its unthinking application to the legal profession could have serious consequences for the rule of law in this country, unless the centrality of independence of the profession is kept firmly in mind throughout the process.

I realise that some people believe that claims to professional status amount to no more than rent seeking. As I have emphasised on many occasions, that kind of approach is fundamentally corrosive of the rule of law and threatens to

undermine the basic institutional arrangements of our society. The approach is based on an inadequate understanding of the role the legal profession plays in the preservation and operation of the legal system. The legal profession is not and cannot be treated as if it is merely an economic activity which requires a centralised licensing regime.

In our common law adversary system the profession and the judiciary have a symbiotic relationship. Judges rely on the integrity and competence of practitioners. As a result, many of the tasks performed by judges in civil law countries are performed by the profession in our system. Furthermore, the principal training for the judiciary occurs when judges were practitioners: I refer not only to knowledge and experience of substantive and procedural law, but also to the inculcation of the capacity for detachment and of the habit of independence of mind.

These are reasons why Germany has about ten times the number of judges per 100,000 of population than the United Kingdom. Anything which could undermine the traditional professional status or the independence of lawyers would threaten the efficient operation of our legal system. In the long term it

would impose significant additional burdens on taxpayers. Furthermore, in my opinion, it would also prove corrosive of the rule of law.

From the outset the Taskforce has accepted that the respective Supreme Courts will retain the right to admit legal practitioners, irrespective of the creation of the new national mechanism. This reflects the existing position in the States, including with regard to the Legal Profession Admission Board in New South Wales. Existing State legislation, including the national uniform legislation now proposed, creates an institution for admission but reserves the powers of the Supreme Court in this regard.

This does not constitute a concession. Chapter III of the Commonwealth *Constitution* would prevent any Parliament establishing a scheme that wholly replaces the courts in this respect. A national scheme cannot take away the right of the courts to control admissions if they chose to do so. That is quite clear in terms of appearances in court and is also true, albeit somewhat less clearly, with respect to the full range of legal practice.

In New South Wales there has never been a proposal for the courts to establish any kind of parallel system. There has been no call to do so in this state because of the influence the court retains in the Legal Profession Admission Board, albeit not majority representation. The Court's powers have, however, often been invoked to strike practitioners off the roll, as an alternative to the statutory system.

Suffice it to say that the worst possible outcome of any national reform would be if there were two parallel regimes for admission and discipline. If called upon to do so, the Supreme Courts, acting through the Chief Justices Council, could establish a parallel regime, but of course it is no one's interest for that to happen. It is necessary for those involved to ensure that the new structure maintains both the reality and the appearance of an independent legal profession.

Let me conclude with some observations from Confucius. When asked about politics, the Sage said:

“Do not try to hurry things. Ignore petty advantages. If you hurry things, you will not reach your goal. If you

pursue petty advantages, larger enterprises will not come to fruition.”³

There is much wisdom in these words.

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- ¹ Sir Owen Dixon, “Sources of Legal Authority” in Severin Woinarski (ed) *Jesting Pilate: and other papers and addresses by Sir Owen Dixon* (1965) Law Book Company, Melbourne at p 201.
- ² R S French “Judicial Exchange: Debalkinising the Courts” (2006) 15 *Journal of Judicial Administration* 142 at 153.
- ³ Simon Leys (trans), *The Analects of Confucius* (1997) Norton, New York, p 63 at [13.17].

CROSS BORDER ISSUES FOR COMMERCIAL COURTS:

AN OVERVIEW

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SECOND JUDICIAL SEMINAR ON COMMERCIAL LITIGATION

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The enhancement of mutual understanding amongst commercial judges of their respective laws and legal systems is necessary to reduce the barriers to mutually advantageous trade, commerce and investment amongst nations.¹ It was such considerations that led me to recommend, in an address to the LawAsia Conference in Hong Kong in June 2007, the convening of a conference of commercial judges.² The first seminar was held in Sydney in April 2008 as a joint venture of the Supreme Court of New South Wales and the High Court of the Hong Kong Special Administrative Region. The success of that seminar has resulted in this second such gathering.

One of the objects of the seminar is to enhance the understanding of the judiciary of one nation about the practices of other nations, in order to enable judges to make decisions on cases

involving cross border disputes with a higher level of understanding of what is likely to happen if the court declines jurisdiction in favour of another. Another object is to strengthen the prospect of cooperation between courts which is often required when cross border issues arise.

The significance of such judicial understanding and cooperation was recognised in the 1999 *Seoul Statement on Mutual Judicial Assistance in the Asian Pacific Region* signed by or on behalf of the Chief Justices of Australia, Bangladesh, Brunei, China, Fiji, Hong Kong SAR, India, Indonesia, Japan, Kazakhstan, Republic of Korea, Marshall Islands, Micronesia, Mongolia, Myanmar, Nepal, New Caledonia, New Zealand, Solomon Islands, Sri Lanka, Northern Mariana Islands, Papua New Guinea, The Philippines, Russia and Samoa.

That statement was:

1. Increasing numbers of individuals, corporations and other forms of business associations are doing business internationally.
2. Forms of judicial administration and civil procedure differ widely among countries in the Asia-Pacific region.

3. The increasing number of commercial transactions between individuals, corporations and other forms of business associations resident, incorporated or registered in different countries within the Asia-Pacific region creates the potential for conflict over the most appropriate forum in which to determine commercial disputes.
4. International commercial transactions may also involve capital, goods or services in any number of countries throughout the region.
5. The prompt and fair resolution of civil and commercial disputes between residents of different countries in the Asia-Pacific region requires the establishment of procedures for the efficient and effective service of process, taking of evidence and enforcement of judgments by a resident of one state in the territory of another.
6. This Conference adopts as its objective, the establishment of such procedures.
7. In order to achieve this objective, this Conference recommends the formulations of a strong network of arrangements on the service of process, taking of evidence and enforcement of judgments between countries in the Asia-Pacific.

8. The Conference noted the provisions of the proposed Treaty on Judicial Assistance in Civil and Commercial Matters between Australia and the Republic of Korea, a copy of which forms Annexure 'A' to this Statement, and encourages the adoption of similar or other appropriate arrangements between countries within the Asia-Pacific Region.

This statement and the annexed treaty were, in large measure, the initiative of the then Chief Justice of the Republic of Korea. The policy momentum was not to continue. In the decades since the Seoul Statement of 1999 the scope and intensity of international exchange by way of trade and investment has significantly expanded and many traditional institutional arrangements are subject to unprecedented challenges, including technological challenges.

Even in 1999 the expansion of trade through the internet could not have been anticipated. I agree with the following observation by one legal academic that the internet is as significant as the old Silk Road. He said:

“The Silk Road linking the ancient world’s civilisations wound through deserts and mountain passes, traversed by caravans laden with the world’s treasures. The modern Silk Road winds its way through undersea fiber optic cables and satellite links, ferrying electrons brimming with information. This electronic Silk Road makes possible trade in services heretofore impossible in human history. Radiologists, accountants, engineers, lawyers, musicians, filmmakers, and reporters now offer their services to the world, without boarding a plane (or passing a customs checkpoint). Like the ancient Silk Road, which transformed the lands that it connected, this new trade route promises to remake the world.”³

Such developments make it even more important for business lawyers and judges to enhance mechanisms for the resolution of the disputes which inevitably attends all forms of commerce. The purpose of this paper is to provide a general overview of the kinds of issues that require cooperation between courts.

One of the barriers to trade and investment, as significant as many of the tariff and non-tariff barriers that have been modified over recent decades, arises from the way the legal system impedes transnational trade and investment, by imposing additional and distinctive burdens including:

- uncertainty about the ability to enforce legal rights;
- additional layers of complexity;
- additional costs of enforcement;
- risks arising from unfamiliarity with foreign legal process;
- risks arising from unknown and unpredictable legal exposure;
- risks arising from lower levels of professional competence, including judicial competence;
- risks arising from inefficiencies in the administration of justice, and in some cases, of corruption.

These additional transactions costs of international trade and investment are of a character which do not operate, or operate to a lesser degree, with respect to intra-national trade and investment.

These increased transaction costs impede mutually beneficial exchange by means of trade and investment.

Judicial Assistance

There are long standing arrangements for judicial assistance with service of process and for the collection of evidence. However, these arrangements are not comprehensive. The *Hague Service Convention* of 1965 and the *Hague Evidence Convention* of 1970 are amongst the most successful of the Hague conventions. However, many nations in the Asia-Pacific region have not ratified these conventions. Indeed, the Australian process of ratifying the *Service Convention* was only revived after I gave my first address on this matter in 2006.⁴

These Conventions are directed to all forms of civil proceedings. They do not take into account the particular requirements for speed and certainty in commercial litigation. It may well be that steps directed to enhancing such cooperation in commercial matters would be acceptable to those nations who have not ratified the *Service Convention* eg Malaysia, New Zealand, Singapore and Thailand or the *Evidence Convention* eg Thailand, Japan, the Philippines, as well as the nations which are

not members of the Hague Conference eg Indonesia, Bangladesh, Vietnam, Cambodia.

Each Convention involves what is in my view an excessively bureaucratic regime by creating Central Authorities for the receipt of requests from courts. This is a manifestation of the traditional attitude to courts as a manifestation of the sovereignty of the state. It does not take into account the changes in the degree of interaction that now occurs between courts, which is of a different order than it was when these Hague convention structures were brought into existence.

The *Apostille Convention* is in the course of amendment to permit electronic communication.

Some nations, such as the People's Republic of China, continue to object to all methods of service except by that of the Chinese Central Authority. However, other nations have now accepted that these functions do not require political supervision in every case. Accordingly in the United Kingdom, the High Court of England and Wales has been nominated as the Central Authority and, in Australia, the Supreme Courts of each State and the

Federal Court have been or are to be identified as Additional Authorities pursuant to each of the Service Convention and Evidence Convention.

Provision can be made so that the central government is informed of any application, without necessarily constituting the approving authority. This approach enables the central government to intervene if, in some manner, a request impinges upon an issue of national sovereignty, whilst allowing the more efficient processing of requests. In my opinion a system based on the presumption that *every* such request impinges upon national sovereignty is antiquated in an era of globalisation, at least in a commercial context.

Civil Procedure

The differences in legal traditions of the nations of the Asia-Pacific region – particularly between those from the common law tradition and those from a civil law tradition – are a source of uncertainty with respect to international commercial litigation. It is important that the commercial community, its legal advisors and judges develop a sense of familiarity with the civil procedure for commercial cases in foreign jurisdictions.

Notwithstanding the differences between these two traditions, a considerable degree of harmonisation is possible because the demands of the conduct of commercial litigation are similar in all jurisdictions. I have emphasised on prior occasions⁵ that the *Model Principles of Transnational Civil Procedure*, promulgated jointly by the American Law Institute (“ALI”) and UNIDROIT, combine features of both the civil and common law legal traditions.

The *Model Principles* make provision with respect to joinder of parties, service of process, pleadings, the composition and impartiality of a court, default judgments and dismissals, negotiation for settlement, coercive interlocutory orders, case management, discovery, exchange of evidence, admissibility, privilege, burden of proof, cross examination of witnesses, cross appeals and enforcement provisions. This is a serious attempt to develop a hybrid model which is understandable to lawyers from both civil and common law traditions.

The *Principles* represent a checklist which it is appropriate for any jurisdiction to use as a reference for purposes of assessing its own procedures. An increase in the degree of similarity or of

harmonisation in procedures for commercial litigation between jurisdictions would reduce the sense of unfamiliarity, even of bewilderment, which can sometimes be held by parties and their legal advisors about becoming embroiled in litigation in a foreign jurisdiction.

Venue Disputation

The scope and intensity of disputes about venue for commercial dispute resolution have considerably expanded over the last few decades. It is quite clear that parties to international commercial arrangements believe that venue matters in terms of resolving a dispute. Frequently these disputes have arisen in a commercial context where there is an express choice of law and choice of jurisdiction provision in the relevant contractual documentation. The possibility of time consuming and costly ancillary litigation remains a significant impediment to international trade and investment.

In all nations provision is made for long arm jurisdiction for their national courts. There is a variety of tests and procedures for determining when it is appropriate for a court, which has such jurisdiction, to decline to exercise it. In the civil law tradition these

are matters which require statutory provision which, I am sure, varies from case to case. The ALI-UNIDROIT *Model Principles of Transnational Civil Procedure* promulgate a “substantial connection” test which is the test developed for Europe under the Brussels Convention. It is a rational test and is not dissimilar to the “more appropriate forum” test that is adopted in the overwhelming majority of common law jurisdictions. I regret to say Australia adopts the most parochial of any such test. An Australian court will assume jurisdiction unless it determines it is a “clearly inappropriate forum”.

The civil law tradition favours the court in which the first proceedings were commenced. This is a simple test. It reflects the unease that such legal systems have, when compared with common law systems about conferring discretions on judges. However, it is open to abuse eg in Europe a prospective party to litigation who does not want the case heard commences proceedings in Italy. This tactic is known as the “Italian torpedo”. The European Court of Justice has virtually destroyed the ability of the English Courts to control such abuse by anti-suit injunctions.

When a court assumes jurisdiction in cross border disputes, it is often the case that the relationship in dispute will be governed by the law of a foreign jurisdiction. All nations have developed their own mechanisms for determining what that law is. In the common law tradition that is matter for expert evidence, which is a costly process and leads to significant “lost in translation” problems, with a real prospect that an incorrect understanding of the foreign law will be adopted and applied.

This may be an area, in the future, in which direct communication between courts could lead to an authoritative statement of foreign law rather than one based on fact finding derived from expert evidence. This is a matter that would require multilateral or bilateral arrangements to permit a court to refer a legal issue for determination by the court of another nation. I realised that this could involve excessive delay. I put this forward as a general idea for discussion.

Freezing and Search Orders

The ability to prevent a person from dissipating assets or destroying evidence is an essential function for courts to perform in the context of commercial litigation. Such conduct can frustrate a

future judgment or otherwise permit a person to fraudulently conceal assets, including those obtained by criminal or corrupt practices. Commercial courts must be able to provide assistance to each other in such matters, including in contexts not covered by, or not yet covered by, international treaty obligations.

The critical question is whether a court is authorised to act in support of foreign proceedings and not only in support of proceedings within the court's own jurisdiction. Australian courts have developed principles, based on the common law's support of comity between courts, so that orders which freeze assets pending the outcome of foreign proceedings will be made. Australian courts will also make search orders to prevent a party destroying evidence. The principles on which these kinds of orders are made have now been made uniform in all Australian jurisdictions as a result of the recommendations of a Harmonisation Committee that operates under the auspices of the Australian Council of Chief Justices.

In this, as in all spheres of international interaction, the existence of reciprocity is significant. This is reflected in Principle 31 of the ALI-UNIDROIT *Model Principles* which provides:

“The courts of a state that has adopted these principles should provide assistance to the courts of any other state that is conducting a proceeding under these Principles, including the granting of protective or provisional relief and assistance in the identification, presentation and production of evidence.”

This Principle applies to freezing orders and extends to the making of search orders designed to prevent a party destroying evidence in order to frustrate a potential judgment.

By reason of the contemporary ease with which funds, assets and electronic records can be transferred from one jurisdiction to another, international fraud and corruption is significantly facilitated and the capacity of any court to do justice can be frustrated. In commercial litigation these issues are the same everywhere. Wherever genuine and enforceable reciprocity is proffered, it is in the self interest of every jurisdiction to offer such assistance upon request. The most efficacious mode of determining such matters, which will minimise delay and the possibility of leaks, will be to establish a mechanism for direct communication between courts.

In an international context this may require treaty and/or legislative support. However, any jurisdiction can expressly adopt legislation or rules of court which proffer such assistance to any other jurisdiction which will reciprocate.

Cross Border Insolvency

The significance of cooperation between courts in cross border insolvency situations is the subject of a paper by Justice Reg Barrett. It is a matter receiving a considerable degree of attention both by those nations that have adopted the UNCITRAL Model Law on Cross Border Insolvency of 1997 and more generally. I have expressed my views on this matter on a number of occasions.⁶

As Justice Barrett points out, the harmonised Australian practice on cross border insolvency has adopted the guidelines prepared by the American Law Institute with the International Insolvency Institute. This involves the determination of protocols for the creation of cooperative regimes between courts involved in cross border insolvency situations. An ad hoc case-specific protocol, adopting and applying the guidelines to particular situations, appears to be most effective in this regard.

The possibility of direct communication between courts in this context remains controversial. Subject to the obligation to ensure a fair trial and to obey the principles of natural justice applicable in any jurisdiction, such communication should not, in this day and age, be regarded as unusual. There is a complete disconnect between the willingness and ability of commercial corporations to operate and interact across borders in a seamless manner, on the one hand, and the restrictions that are still imposed upon public authorities, both regulatory and judicial, from acting in a similar manner. The freedom of commercial communications stands in marked contrast with the distrust of, and inhibitions upon, communications between public authorities.

Anything that can be interpreted as impacting upon the sovereignty of a jurisdiction, by reason of the intrusion of any manifestation of the sovereign power of another jurisdiction, is subject to restrictions that have been abolished with respect to private actors, including state owned commercial actors. Direct court to court communication in the context of cross border insolvency is a particular manifestation of the new sense of international collegiality that has emerged amongst judges of

different nations, who now meet in many different multilateral, regional and bilateral contexts.

A good example, in the context of the HIH litigation conducted in New South Wales by Justice Barrett, was the request for an examination of witnesses resident in Hong Kong by the New South Wales Supreme Court to the Hong Kong High Court. This request was made pursuant to Hong Kong legislation that authorises such assistance to an overseas court. Hong Kong has not adopted the UNCITRAL Model Law, nor any other form of general insolvency cooperation. Nevertheless effective cooperation was possible by reason of the Hong Kong legislation.⁷

There are significant policy differences about matters arising in insolvency eg what kinds of creditors should receive preference. This was the very issue involved in the House of Lords decision which Justice Barrett discusses in his paper. In the result, the House of Lords adopted a universalist approach and accepted that the funds of the corporate group that were held in the UK subsidiary could be distributed to the Australian liquidator, even though that would mean that the funds would be distributed in accordance with the scheme of preferences under Australian law, which differs from

preferences under English law and, as a result, some English creditors would receive less than they would otherwise receive.

I have no doubt that this approach would be reciprocated so that, in the case of an Australian subsidiary of a corporate group headquartered in the UK, a similar approach would apply. Again, what is involved here, is a recognition of mutual self interest in resolving cross border issues.

Enforcement of Judgments

There is a considerable diversity within the Asia-Pacific region with respect to the recognition of foreign judgments.⁸ The diversity of procedural and substantive laws and legal cultures is such that a global multilateral, or even a regional, approach to the recognition of foreign judgments has never proven to be feasible. This is unlikely to change. It may be that bilateral treaties and regional arrangements with respect to specific kinds of commercial cases will prove possible.

There is one possible step with respect to commercial litigation that could reduce the extent of disputation in this regard. I refer to the Hague Conference's *Convention on Choice of Court*

Agreements 2005, which has not yet come into force. This Convention has the same core justification as the highly successful *New York Convention for Recognition and Enforcement of Arbitral Awards*. Under the *Choice of Court Convention*, a court chosen in a commercial arrangement will have jurisdiction unless the agreement is null and void under the law of the designated state. A court not chosen in such a commercial agreement does not have jurisdiction and must decline to hear the case.

Accordingly this convention operates on the same principle as the New York Convention. Parties to a commercial contract have chosen a jurisdiction. The autonomy of the parties should be respected for the same reasons as it is accepted by all those nations that have adopted the New York Convention.⁹ Nevertheless, there may be some reluctance to similarly defer to a court because it is the manifestation of another nation's sovereignty.

There is an understandable apprehension in matters of this character about whether a corporation of a particular nation will receive a "home town" advantage in its national court. The degree to which this may arise will vary from one nation to another. Where

there is a robust independent judiciary, which has a global perspective and which understands the significance of commercial expectations, a home town advantage is unlikely to exist. Unfortunately, the nations of whom this is least true of are most likely to project their failings on others and reject the self proclaimed independence of other judiciaries.

Where two arms length commercial parties of more or less equal bargaining power, in which I do not include government controlled corporations, do agree on an exclusive choice of court clause, it can reasonably be assumed that they are satisfied that neither party will obtain any such advantage. Indeed, as in the case of international commercial arbitration, commercial parties may choose the courts of a third nation, precisely to avoid the possibility of such an advantage.

However, the definitions within the Convention would, unless accession is qualified, extend beyond commercial parties of equal bargaining power including internet “click wrap” and physical “shrink wrap” agreements.

Governments should respect such a choice, at least when made between equal parties.

The issue is ultimately one of enlightened self interest. Even nations which suspect their courts are unlikely to be chosen – because of issues of corruption, confidence or delay – should understand that it is to their economic advantage, even if not to that of their legal professions, to remove such barriers to trade with, or investment in, their own commercial corporations who are prepared to agree to submit to the jurisdiction of another court. The refusal to do so is, in economic terms, a form of protection of the state's domestic legal system, which has the same kind of adverse effect on other parts of the economy as such protection usually has.

International Commercial Arbitration

Over recent years I have often expressed my support for the process of international commercial arbitration, including when giving the opening address at the Inaugural Conference of the Asia-Pacific Arbitration Group (“APRAG”) which brings together arbitral institutions from throughout the region.¹⁰

The complexities of international litigation stand in invidious comparison to the well established regime for international commercial arbitration. To some degree these are alternatives. The advantages of arbitration are substantial, particularly in the area of enforcement. There is simply no equivalent of the New York Convention for the enforcement of arbitral awards that is in prospect with respect to the enforcement of judgments of courts. The *Choice of Court Convention* is only a partial alternative.

The international treaties underpinning the commercial arbitration system for both commercial and investment disputes, have been developed on the basis that the system serves the interest of each nation that participates in it. Reciprocity is at the heart of this international deal. Each ratifying nation has accepted that it is in its interests to behave in this manner, in order to receive for its citizens and corporations the benefits of other nations behaving in the same manner. There is no law of nature which says that this form of enlightened self interest will continue.

In the world before World War One, when international communications had been revolutionised by wireless telegraphy over international cable connections and there had been a

substantial decline in transportation costs, the benefits of globalisation were as obvious as we believe them to be today. That globalised world changed very quickly into war and national autarky, at great cost. No one should assume a similar regression is impossible today.

In order to preserve this system, from which all nations benefit, it is important for those who are involved, such as commercial judges, to ensure that the public and political decision makers are aware of the benefits of the system. But, more importantly, judges have a vital role to ensure that the system actually delivers the benefits of which it is capable.

One of the problems that has emerged over recent decades is the tendency of international commercial arbitration to mimic some of the worst features of commercial litigation in courts. The possibility of a more efficient and speedy resolution of commercial disputes has often not been realised. This has occurred in a context where commercial judges, through development of case management techniques, have become substantially more efficient. In part, for that reason, mediation has come to be a preferred form of ADR.

Of particular significance is the role that judges play in ensuring the integrity of the system of commercial arbitration. In the jurisdictions with which I am most familiar, the longstanding tension between judges and arbitrators has gone. Judges no longer consider arbitration as some kind of trade rival. Courts now exercise their statutory powers with respect to commercial arbitration by a light touch supervisory jurisdiction directed to maintaining the integrity of the system.

Arbitrations do go wrong, sometimes fundamentally so. Arbitrators can manifest bias. Arbitrators have been known to commit errors of so fundamental a kind, as, on any view, to justify intervention by a court. The fundamental commercial concept underlying arbitration agreements is respect for the autonomy of the parties. The parties' choice was not, however, to select arbitration per se. It was to select arbitration by persons and by procedures that manifest a high degree of integrity. Knowledge that the integrity of arbitration can be assured by a light handed but effective supervisory jurisdiction enhances the confidence of the commercial community with respect to the arbitration process.

Such supervisory intervention should be welcomed by arbitrators, rather than treated, as it often is, with suspicion.

The confidence of the commercial community in arbitration depends, in large measure, on the belief that the process will work as intended. That can only occur if both the personal integrity of the individuals conducting arbitrations and the institutional integrity of the processes is assured. Sometimes that requires the exercise of the supervisory jurisdiction by a court. Indeed, the very existence of a supervisory jurisdiction assists in maintaining confidence in the system.

Where international commercial arbitration gives rise to cross border issues, it is important that commercial judges who exercise a supervisory jurisdiction do so in a manner that reflects the fundamental requirement for maintaining the integrity of the system, whilst accepting the autonomy of the parties reflected in an arbitral award. A similarity, or at least some kind of a harmony, of approach by judges exercising the supervisory jurisdiction would enhance this system at an international level.

It may be that in well established fields, there is scope for a more formal regional or bilateral arrangement. Justice James Allsop's paper on maritime law raises some interesting ideas in this respect. The international character of maritime law has been discussed by his Honour in greater detail in his lecture at Tulane University.¹¹ When, as Justice Allsop notes, a Federal Court in the United States and the Supreme Peoples Court of China adopt the same philosophical approach to maritime issues, the international character of maritime law is brought to the fore.

One of the significant long term effects of the internationally accepted system for commercial arbitration may be to harmonise commercial law, particularly contract law. Although this process of harmonisation has not reached the status of international accepted principles, as reflected in maritime law and in closely related fields such as negotiable instruments and insurance, nevertheless globalisation of commerce is pushing us all in the same direction.

The law of contract – both substantive law and the approach to contractual interpretation – is being affected by the cross fertilisation amongst legal practitioners and international arbitrators,

whose practices are increasingly cross jurisdictional. This process will also affect decision making by courts in contract cases.

This development is already reflected in international arrangements based on model laws and treaties. I refer, for example, to UNCITRAL's *United Nations Convention on the International Sale of Goods*, 1980 to which 73 nations have acceded. There are also a number of model laws which have had an influence on national laws.

There remain important differences between civil law and common law systems eg on the recognition of an obligation of good faith and the contrast between an objective theory of contract and the search for the subjective intention of the parties. These differences may raise important issues of procedure. For example, the adoption of a subjective theory by common law nations may not be practically compatible with the system of discovery – a procedure which is already under challenge because of its cost.

It is in the context of considering cross border issues, that these developments will progress. The debate about the emergence of a new *lex mercatoria* is a debate of substance.

Conclusion

The further development of cooperation between courts will generally require statutory support, perhaps by way of implementing international arrangements which authorise communication and cooperation between courts. Such matters are capable of being included in regional or bilateral treaties, as they have been in the treaties that Australia has entered into on judicial cooperation with South Korea and Thailand.¹²

The arrangements between Australia and New Zealand, soon to be significantly strengthened pursuant to the *Closer Economic Relations Trade Agreement* involve an even closer degree of coordination and cooperation. This is of course possible between jurisdictions which are so closely related in terms of proximity, culture and history as Australia and New Zealand are. Although similar levels of cooperation have been enacted in the European Union, it is unlikely that other regional or even bilateral arrangements in the Asia-Pacific region could go quite so far. I would have thought, however, that some degree of harmonisation should be possible in the ASEAN context, perhaps expanding to

the ASEAN plus Three or the East Asian Summit level if the focus is restricted to commercial litigation.

The Australia and New Zealand example of detailed integration between two legal systems can serve as a checklist of what could be the subject of negotiation in a bilateral or regional arrangement of this character eg the new amendments will mean that Australia will surrender its parochial “clearly inappropriate forum” test in conflict of laws situations with New Zealand.

I regret to say that my own efforts to convince the Australian Government to incorporate negotiation on such issues in the range of bilateral free trade treaty negotiations, that have been or are being conducted between Australia and a number other nations, have not proven successful. I suspect that the real reason is that there are different branches of the public service involved in legal matters.

The inhibiting effects of the complexities of the international commercial dispute resolution upon international trade and investment are inadequately appreciated in such negotiations. Perhaps a process focussed on commercial law may be more

practical. The challenge facing business lawyers and commercial judges is to convince the relevant Ministries – of Justice and Foreign Affairs – that the time and effort involved will justify the resources that such processes require. I welcome the views of other participants in this seminar about whether this effort is worthwhile.

¹ See J J Spigelman “Transaction Costs and International Litigation” (2006) 80 ALJ 435 especially at 439, 453.

² See J J Spigelman “International Commercial Litigation: An Asian Perspective” (2007) 37 Hong Kong Law Journal 859 at 866-867; (2007) Australian Business Law Review 318 at 323.

³ Anupam Chander “Trade 2.0” (2009) 34 Yale Journal of International Law 281 at 281.

⁴ See “Transaction Costs” supra.

⁵ See “Transaction Costs” supra at pp444-445; “An Asian Perspective” supra at pp321-322.

⁶ See “Transaction Costs” supra at 447-448; “An Asian Perspective” supra at 326-331; J J Spigelman “Cross Border Insolvency: Cooperation or Conflict” (2009) 83 Australian Law Journal 44.

⁷ See Re McGrath [2008] NSWSC 780.

⁸ See “Transaction Costs” supra 449-451.

⁹ See generally “An Asian Perspective” at 325-326; J J Spigelman “The Hague Choice of Court Convention and International Commercial Litigation” (2009) 83 ALJ 386.

¹⁰ The APRAG speech was unscripted but see eg “Address to International Commercial Arbitration Conference 2007” accessible at [Hwww.lawlink.nsw.gov.au/scH](http://www.lawlink.nsw.gov.au/scH) under “speeches”. Also reprinted in Tim Castle (ed) *Speeches of a Chief Justice: James Spigelman 1998-2008* Sydney 2008.

¹¹ J Allsop “Maritime Law – the Nature and Importance of its International Character” The 2009 William Tetley Lecture, Tulane University, 15 April 2009, accessible at [Hwww.lawlink.nsw.gov.au/scH](http://www.lawlink.nsw.gov.au/scH) under “speeches”.

¹² See *Treaty on Judicial Assistance on Civil and Commercial Matters Between the Government of Australia and the Government of the Republic of Korea* [2000] ATS5; *Agreement Between the Government of Australia and the Government of the Kingdom of Thailand on Judicial Assistance on Civil and Commercial Matters in Arbitration* [1998] ATS18.

**L Nottage and R Garnett (eds), *International Arbitration in Australia*,
Annandale, The Federation Press, 2010**

PREFACE

**BY THE HONOURABLE J J SPIGELMAN AC
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The widespread adoption of the interlocked provisions of the UNCITRAL Model Law, the New York Convention for Enforcement of Arbitral Awards and the Washington Convention for Investment Disputes represents the most coherent and successful regime in history for applying the rule of law to the resolution of disputes arising in international trade, commerce and investment. By comparison, the patchwork quilt of rules and practices of private international law with respect to the application of foreign law and the recognition and enforcement of court proceedings is, and will remain, an impenetrable jungle.

Originating in Europe, but now widely adopted throughout the world, the arbitral regime is an honourable and preferable successor to the previous practice of European states dispatching one of their regiment or gunboats to assert the contractual rights, and to protect the property, of its citizens. This was how it used to be done in every sphere of international economic activity, ranging from cotton products, through spices to opium.

The international treaties underpinning the modern arbitration regime developed on the basis that commercial arbitration serves

the interests of each nation that participates in it. Reciprocity is at heart of this international deal. Each ratifying nation has accepted that it is in its interests to behave in this manner, in order to receive for its citizens and corporations the benefits of other nations behaving in the same manner.

There is no law of nature which says that this form of enlightened self interest will continue. In the world before WWI, when international communications had been revolutionised by wireless telegraphy and the speed and cost efficiency of transportation had been substantially increased, the benefits of globalisation were as obvious as we believe them to be today. That globalised world changed very quickly into war and national autarky at great cost. No one should assume that similar regression is impossible today.

One of the barriers to international trade, commerce and investment, as significant as many of the tariff and non-tariff barriers that have been modified over recent decades, arises from the way the legal system impedes transnational trade, commerce and investment by imposing additional and distinctive burdens. These include:

- uncertainty about the ability to enforce legal rights;
- additional layers of complexity;
- additional costs of enforcement;
- risks arising from unfamiliarity with foreign legal process;
- risks arising from unknown and unpredictable legal exposure;

- risks arising from lower levels of professional competence, including judicial competence;
- risks arising from inefficiencies in the administration of justice and, in some cases, of corruption.

These additional transactions costs of international trade, commerce and investment are of a character which do not operate, or operate to a lesser degree, with respect to intra-national trade and investment. Such transaction costs impede mutually beneficial exchange. That is why business lawyers have been described as “transaction costs engineers” who add value to commercial transactions by, relevantly, facilitating the resolution of disputes that inevitably arise in commercial relationships.

One of the singular achievements of the international commercial arbitration system is the reduction of these transaction costs. By this means, the economic welfare of all who benefit from the reduction of such costs and risks has been enhanced.

In order to preserve this system, all participants in and beneficiaries of its operation should do whatever they can to ensure that the benefits continue to be provided. The legal resolution of disputes must deliver a high level of predictability, so that economic actors can proceed with confidence that their reasonable expectations will be met. The global system for dispute resolution by international commercial arbitration constitutes a legal infrastructure which is as sophisticated, and as necessary, as the physical infrastructure required for the successful operation of the global market economy.

This book, with the depth of learning displayed by the authors in their analysis of a wide range of issues that arise in this context, will enhance the ability of Australian lawyers to continue to make a contribution to the success of the system. It is a welcome addition to the small library of texts in the field.

As the content of many essays in this book attests, the effective operation of the system requires continual attention and amendment. The timing of this book is of particular significance because of the recent amendments to the *International Arbitration Act* 1974 and the adoption of the UNCITRAL Model Law as the Australian domestic arbitration statute.

I strongly support the latter development. I became aware of the project undertaken by the New South Wales Attorney General's Department, on behalf of the Standing Committees of Attorney's General, to review the uniform *Commercial Arbitration Acts* which had become embarrassingly outdated. The Department gave me access to the files revealing what had gone on during the relevant consultations. It became clear to me that the process had bogged down and was unlikely to produce any satisfactory result in the medium, let alone in the short, term. This was because the basic approach was to draft amendments to the existing scheme. Which could only result in consensus on a lowest common denominator basis.

I proposed to the State Attorney that the way to achieve a breakthrough was to ignore the existing legislative scheme and

adopt the UNCITRAL Model Law as the new Australian scheme. The Attorney raised the proposal with his colleagues and I discussed it with a number of other persons involved in commercial arbitration. I put forward the suggestion publicly in my annual address to the Law Society's Opening of Law Term dinner on 2 February 2009. I am very pleased with how this initiative has developed.

The creation of a seamless regime between domestic and international commercial arbitration will, I am sure, enhance the Australian contribution to both. I am well aware that many young Australian lawyers find this international dimension of legal practice particularly appealing. I noticed the global significance of such involvement at first hand at the International Investment Treaty Law and Arbitration Conference held at the University of Sydney in February 2010.

International arbitration involves lawyers in cross border disputes which have major commercial significance. The field of investment treaty arbitration gives rise to a fascinating interplay between private rights and public international law. I have no doubt that this book will encourage many more young Australian lawyers to pursue a career in this exciting field of legal practice.

As a serving judge, it is appropriate that I refer to the criticism that is often directed to the judiciary to the effect that judges are too prone to interfere with the arbitral process and thereby fail to respect the autonomy of the parties reflected in the contract. Sometimes, but not always, those criticisms are valid.

The confidence of the commercial community in arbitration depends, in large measure, on the belief that the process will work as intended. That can only occur if both the personal integrity of the individuals conducting arbitrations and the institutional integrity of the process are assured. Sometimes that requires the exercise of a supervisory jurisdiction by a court. Indeed, the very existence of a supervisory jurisdiction assists in maintaining confidence in the system.

Arbitrations do go wrong, sometimes fundamentally so. Arbitrators can manifest bias. Arbitrators have been known to commit errors of so fundamental a kind, as, on any view, to justify intervention by a court. The fundamental commercial concept underlying arbitration agreements is respect for the autonomy of the parties. The parties' choice was not, however, to select arbitration per se. It was to select arbitration by persons and by procedures that manifest a high degree of integrity.

So long as they restrict intervention to matters of integrity, judges serve the fundamental objectives of the system. The primary role in this respect is served by the process of selecting arbitrators and agreeing upon the rules. However, recognition that any system is fallible and may need to be corrected in retrospect is not an insight unique to arbitration.

In the jurisdictions with which I am most familiar, the longstanding tension between judges and arbitrators has disappeared. Most judges no longer consider arbitration as some

kind of trade rival. Courts now generally exercise their statutory powers with respect to commercial arbitration by a light touch supervisory jurisdiction directed to maintaining the integrity of the system. A number of the recent amendments to the Australian legislative regime, set out in these essays, are directed to ensuring that judicial intervention is limited in this way.

In so far as arbitrators sometimes express dissatisfaction in such respects, such commentary is, or at least should be, diminishing in frequency. This book will play a significant role in ensuring that this development in judicial attitudes is reinforced.

R P Austin and A J Black, *Austin and Black's Annotation to the Corporations Act*, Chatswood, LexisNexis, 2010

FOREWORD

BY THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

This publication requires no recommendation from a person who has made no contribution to its content. Nevertheless, I do not wish to miss the opportunity given to me to do so.

The practical utility of a work such as this is found in the structure which it bears on its face. As a practitioner and as a judge it is often the case that the quickest way into a legal issue is through the section of the Act which falls to be considered. In Corporations Law I cut my forensic teeth on *Wallace & Young* and the somberly dark brown volumes of the *Patterson & Ednie* loose leaf service. The identification, section by section, of the principal cases on the section together with a pithy but accurate summary of the propositions established in the case law was, and is, an invaluable tool.

The second reason why this work requires no commendation is the reputation of the authors. They will forgive me for pointing out that, between them, for a period of about seven decades they have focused a considerable portion of their intellectual energy on every dimension of Corporations Law: teaching, advising, drafting, publishing and adjudicating, not to mention reading and rereading hundreds of thousands of pages of cases, texts and articles in the field. This considerable body of erudition, manifest in the authors' other publications, is now available in a format which will be welcomed by other practitioners for the purpose of elucidating the complexities of this area of the law.