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LIVING WITH LEGAL HISTORY IN THE COURTS[*]

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I A REVOLUTION?

It is a privilege to be associated with the inauguration of the Alex Castles Lectures in Legal History. Who could be more suitable to give the first lecture than Professor Alex Castles himself, doyen of legal history in Australia?

His chosen theme concerning legal history — 'A Revolution Just Beginning?' bears such an arresting title that I had to look twice to make sure that I had not misread it. To a judge, working at making the tiny building blocks of legal history, Australia's story seems anything but revolutionary. Bruce Kercher has suggested that Australian law has undergone five distinct stages, each one of them merging, in effect, with natural inevitability into the other.[1] He argues that we began with a 'frontier period' when there was a practical opportunity for the rejection of English legal principles. This was followed by a time when the new superior courts of the Australian colonies were established. Their professional judges began cementing the role for English legal principles in the Australian common law which was to last for 150 years. It was during this time that the doctrine of repugnancy was introduced, fortifying the role which English legal precedent was to play in its new antipodean domain. According to Kercher, the third phase began in 1850s when the 'grant of responsible government in five of the six colonies was reinforced by the *Colonial Laws Validity Act* 1865'.[2] The fourth phase began with federation which loosened the ties to the United Kingdom except for appeals to the Privy Council which the British Government demanded should be guaranteed in the text of the document.[3]

The fifth stage is said to have commenced in the 1960s. According to Kercher it has been characterised by a selective willingness to reject English legal doctrine. That willingness was reinforced by the abolition of appeals to the Privy Council. It lead to the passage of the *Australia Acts* of 1986, passed in virtually identical form by the Parliaments of the Commonwealth and the UK, with requests from the Australian States. It is interesting to demand an answer to the question: If Australia was truly a fully independent nation in a process that began with federation in 1901, what business was it of the United Kingdom Parliament in 1986, even at the request of the Australian Commonwealth and State Parliaments, to enact a law that purported to extend any operation whatever to Australia and its sovereign people?[4]

Doubtless other historians might divide Australian legal history into different segments. Some might see it as divided between the colonial and the federal era. If the referendum which proposed the establishment of a republic had been accepted by the electors in November 1999, Australia would have seen a new division — monarchy to republic.[5] The Crown has permeated many of the nooks and

crannies of the law of Australia in ways that we have tended to take for granted. But republic or not, colonies and federation in Australia have marched along the highway of legal history at a steady pace. The highway is unbroken. There are no sudden turns or sharp bends. The way of Australian legal history has been the evolutionary way.[6] One era merges peacefully and naturally into the other. Looking back, the changes may be perceptible. But at the time they are easily absorbed and seem to grow, with a certain inevitability, out of the past. By comparison to nations that have been shattered by war, revolution and genocide, the Australian story may seem a trifle unexciting. We search in its detail for the occasional challenge to authority (such as that at Eureka) or the colourful anti-hero (such as Ned Kelly). Yet striving to provide occasional discordance to our harmonious symphony, with its predictable form, we run the danger of pretending to a history that we did not have.

It is no source of shame, in my view, that Australia's history has been evolutionary and that, at least if we are not indigenes, we have been spared foreign occupation and civil war. Students of legal history, at least, should appreciate the power of the influence of the idea of law, of legitimacy and of evolutionary change. Australia, which began its modern history as a penal settlement, truly grew directly out of the English legal system and its urgent demands. It was only settled because of the loss of the American colonies and the need for a new place, far away, to send the unloved convicts and later to ship the troublesome colonists, disillusioned with the home country. From the outset of the Australian experiment, the Imperial government had learned important lessons from the American Revolution. It wanted no repetition of that humiliation in the far away antipodean dependencies. It quickly yielded to the demands of the settlers to have their own forms of government, juries, an end to transportation and independent courts. In this sense, Australians all are children of the American revolution. Yet we needed no revolution and suffered no civil war to stain our homeland history with blood.

Far from this being a colourless story of mediocre people transplanted to a land on the other side of the world which they sought to fashion in the imagined image of another, ours is a history of legal devolution, early self-government and virtually unbroken legal authority. A country with such a history is much blessed by comparison with those whose story is written in turmoil. The future seems likely to be of more evolutionary, and not revolutionary, change. That appears to be the mode of political, governmental and legal development congenial to the Australian people.

II HISTORY IN THE HIGH COURT OF AUSTRALIA

To be a lawyer in Australia is, in a sense, to be a legal historian. It is an inescapable feature of the common law that we live our lives in the presence of the great legal spirits of the past and their cases. On our bookshelves, and now in electronic systems, are captured the tales of ancient conflicts and the attempts, mostly by rational people, to come to principled and just solutions to the causes of conflict.

Increasingly, in recent times, legal solutions have been offered in the form of legislation. But for nearly seven centuries, little cases have been brought to the courts of our tradition. Their facts have been written down. The solutions to the problems which they presented have been expounded by judges. Those expositions have been recorded. They have been shared with colleagues at the time and sent into the future for its instruction. The power of the judicial reasoning has been passed to new generations. The principles emerging from a multitude of cases have gone together to make up the great body of the common law. To be a judge in our legal tradition, is thus to be a privileged participant in the making of this form of legal history. The contribution of no one, however brilliant and distinguished, is very great. Occasionally a towering figure of the common law stands out, only to see the reputation wither when history catches up and replaces that reputation with something new.

The establishment of the High Court of Australia in October 1903 was a critical moment for Australia's legal history. From that event sprang a court which, by steady achievement and a happy mix of creativity and continuity, won the respect of Australians and of lawyers far away. Of necessity, in the early years, the Justices of the Court looked to the principles that had been fashioned in the courts of England in the previous centuries. To some extent, as they developed

their notions of the Australian federal constitution, they looked to decisions of the courts of the United States of America. The idea of federalism was, at that time and seemingly still is, alien to the English courts. But gradually, the High Court of Australia developed its own jurisprudence and came to use the principles expounded by its own Justices. After some initial proud hesitations, the State courts throughout Australia dutifully followed the principles laid down by the High Court, deferring occasionally to the decisions of the Privy Council which reversed its rulings in questions outside those constitutional matters which were, from the start, reserved to the High Court's final decision.[7]

In the beginning the High Court was somewhat cautious about the use of Australian legal history, at least so far as it concerned the debates at the Constitutional Conventions which, in the 1890s, had fashioned and finally settled the text of the Australian Constitution. In the earliest decisions of the Court, it rejected the idea that the Justices could seek enlightenment as to the meaning of the constitutional text from the contributions made in the debates at the conventions in which all of the original Justices had themselves taken part.[8]

In part, this rejection derived from the then current view that language always had an objectively discoverable meaning; that such meaning was to be found by careful study of the text and context; and that external materials would only be likely to confuse interpretation. But in part, the attitude may have derived from the sure conviction of the original Justices that they knew exactly what the Constitution meant from their own participation in the conventions. They remembered. They did not need to be reminded, least of all of the words of other delegates, some of whom they may have held in low regard. It is difficult, as we look back on the generally high standard of the debates of the Australasian and Australian Constitutional Conventions of the 1890s, to remember that the participants were human beings, much as ourselves: with foibles and vanities and weaknesses only too well known by their contemporaries.

The rejection of access to the constitutional debates lasted many generations. As recently as the time of Chief Justice Barwick, the self-denying ordinance was reiterated in a decision of the High Court.[9] But then in *Cole v Whitfield,*[10] in an unanimous opinion of the entire Court in 1988, the bicentenary of British settlement in Australia was effectively celebrated by a reversal of the old rule.

To explain the true purposes of the guarantee in s 92 of the Australian Constitution, that trade, commerce and intercourse amongst the States would be 'absolutely free', the Justices, led by Chief Justice Mason, plunged deep and unrestrainedly into the record of the constitutional debates and into the essays on Australian legal history by which earlier scholars, such as Professor J A LaNauze, had analysed the debates.[11] The embargo was broken. Henceforth the High Court would readily agree to look to the convention debates to help in the ascertainment of the meaning of the Australian Constitution. An important change in doctrine was achieved by a new device of legal argumentation previously rejected. Legal history came to the rescue of constitutional interpretation. Study of its materials cast new light. It permitted a new construction of the constitutional text to be adopted. Things would never be the same. The pretence that constitutional interpretation required nothing but a close and prolonged study of the sparse language of the Constitution was abandoned. But what is to take its place?

III ORIGINAL INTENT OF A TEXT SET FREE?

There are some who contend that the true business of a constitutional court in seeking to give meaning to a text of the fundamental law, is to confine itself to a search for the intention or purposes of those who originally framed the document. At least this could theoretically be discovered objectively. By going back to the historical materials, the meaning could be ascertained with a fair degree of certainty. This would afford the court a definite starting point. Any changes would then be left not to the court of unelected judges but to the sovereign people to whom the Constitution belongs. The doctrine of original intent has distinguished supporters in the United States of America and some in Australia.[12]

To a superficial student of Australian legal history, it might seem that the abandonment of the prohibition on the use of the debates in the constitutional convention amounted to the acceptance by the Australian High Court of techniques apt to the discovery of the original intentions of the drafters of the Australian Constitution understood in this sense. Certainly, the study of their words in the debates of the 1890s would tend to show what they thought the text which they were adopting, amending or rejecting was supposed to mean. Is this what *Cole v Whitfield* intended? Does it embrace original intent as the pre-eminent criterion for interpretation of the Constitution? Does it have implications for the construction of other lawmaking documents, such as statutes and subordinate legislation? Is this what the judicial search is supposed to find when an ambiguity arises in a legal text?

I do not consider that this was the purpose in the use of the constitutional debates which *Cole v Whitfield* mandates.[13] At the dawn of federation in Australia, Andrew Inglis Clark was one of the most influential writers on Australian constitutional law. His text[14] is particularly important because of Clark's leading part in the committee which prepared the first draft of the Constitution. Clark was familiar with United States legal authority. This gave him an edge of advantage in the conventions as the issues of federalism had to be addressed.[15] It was Clark who wrote a chapter on interpretation of written constitutions — to be a new and vital task for Australian lawyers in the new federation. He outlined a theory of constitutional construction which has had an influence from the beginning. It is one which, I believe, is gradually emerging as the one proper to the construction of the Australian Constitution:[16]

... The social conditions and the political exigencies of the succeeding generations of every civilised and progressive community will inevitably produce new governmental problems to which the language of the Constitution must be applied, and hence it must be read and construed, not as containing a declaration of the will and intentions of men long since dead ... but as declaring the will and intentions of the present inheritors and possessors of sovereign power, who maintain the Constitution and have the power to alter it, and who are in the immediate presence of the problems to be solved. It is they who enforce the provisions of the Constitution and make a *living force* of that which would otherwise be a silent and lifeless document.

This doctrine of the Constitution as a 'living force' is one which has proved influential over the years with particular Justices of the High Court of Australia.[17] When an old line of authority is overturned, this may sometimes be explained not by reference to an error in the perception of the Justices who propounded that authority at the time of its invention and first application. But rather a recognition that the eyes of new generations of Australians will see the same unchanged language in a different light. The words remain the same. The meaning and content of the words inevitably takes colour from the social circumstances to which the words must be understood and applied.[18]

In a number of decisions, I have tried to explain my view of how, once adopted, the Australian Constitution was set free from the intentions of the original drafters. In *Re Wakim; Ex parte McNally*[19] the High Court struck down, as unconstitutional, the beneficial cross-vesting legislation which was supported by all of the governments of the Commonwealth, the States and the Territories of Australia. Much of the debate before the Court concerned the meaning and operation of Ch III of the Constitution dealing with the Judicature. In the course of my reasons[20] I attempted to state why I took a view of the construction of the Constitution different from my colleagues:

In my respectful view the point which distinguishes the competing opinions expressed in *Gould*[21] (now reflected in these proceedings) concerns a conception of the Constitution and of its capacity to adapt to changing times, with needs vastly different from those which existed when the text was written. I differ from the view that the function of the Court in constitutional interpretation is to 'give effect to the intention of the makers of the Constitution as evinced by the terms in which they settled that intention.[22] Once the makers' draft was settled it was submitted to the vote of the electors of Australia. Approved and enacted it took upon itself its own existence and character as a constitutional charter. As Holmes J remarked in *Missouri v Holland*:[23]

[The Constitution] called into life a being, the development of which could not have been foreseen

completely by the most gifted of its begetters.

The makers did not intend, nor did they have the power to require, that their wishes and expectations should control us who now live under its protection. The Constitution is read by today's Australians to meet, so far as its text allows, their contemporary governmental needs.[24]

Although this view did not carry the day in *Wakim,* it is interesting to compare it with the opinion of the majority who, in *Sue v Hill,*[25] felt free to express a conclusion about the meaning of 'subject or citizen of foreign power' in s 44(i) of the Constitution. There, it was concluded by the Court that the United Kingdom was, in its relationship to Australia, for the purposes of this phrase, a 'foreign power'. Such a view of the United Kingdom, for the purposes of the Constitution, would plainly *not* have been taken in 1901 when the Constitution was adopted. Certainly, such an idea would *not* have been in the minds and intentions of the drafters of the clause and the delegates to the constitutional conventions. Even at the time of the *Engineers'* case [26] in 1920, the High Court declared that one of the 'cardinal' features of the Constitution was the 'common sovereignty in all parts of the British Empire'. Yet, a new look, with today's eyes, at the phrase in s 44(i) of the Australian Constitution has resulted in a construction which is almost certainly the opposite of that which would have been perceived in the early decades of the century. The text remains the same. The perception of its meaning has changed.

A study of the debates of the constitutional conventions could not alter this conclusion. That study would be helpful to stimulate the minds of those who have the responsibility of construing the text. It would be helpful to isolate and present the problem for decision. But the conclusion of the High Court in *Sue v Hill* is a vivid illustration of the way in which Australian constitutional jurisprudence has freed itself from the doctrine of original intent. What is needed is a consistent theory for the approach of the Court to the resolution of problems of this kind. The embrace in one case of a criterion of 'the intention of the makers ... as evinced by the terms in which they expressed that intention' and the adoption in another case of A I Clark's 'living force' doctrine may suggest ambivalence about the approach to constitutional interpretation[27] which future cases will need to resolve.

IV AN AUSTRALIAN COMMON LAW

Another controversy connected with legal history is displayed in a further unanimous opinion of the Court in 1997. In *Lange v Australian Broadcasting Corporation*[28] the Court clarified the extent to which the Australian Constitution protects freedom of communication between people concerning political or governmental matters which enable the people, as electors, to exercise a free and informed choice in the government of the Commonwealth. One of the issues which arose in that case concerned the effect upon common law rights of this construction of the Constitution. Was there a single common law in Australia? Or did it differ from one State jurisdiction to another in accordance with the particular ways in which the courts of the colonies and of the States had severally developed legal doctrine during the 175 years of their development? On this subject, the High Court spoke with one voice:[29]

It makes little sense in Australia to adopt the United States doctrine so as to identify litigation between private parties over their common law rights and liabilities as involving 'State law rights'. Here, '[w]e act every day on the unexpressed assumption that the one common law surrounds us and applies where it has not been superseded by statute'.[30] Moreover, that one common law operates in the federal system established by the Constitution. The Constitution displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature. It placed upon the federal judicature the responsibility of deciding the limits of the respective functions of State and Commonwealth Government.[31] The Constitution, the federal, State and Territorial laws, and the common law in Australia together constitute the law of this country and form 'one system of jurisprudence'.[32] Covering cl 5 of the Constitution renders the Constitution 'binding on the courts, judges and people of every State and every part of the Commonwealth, notwithstanding anything in the laws of any State'. Within that single system of jurisprudence, the basic law of the Constitution provides the authority for the enactment of valid

statute law and may have effect on the content of the common law.

This notion is to some a novel one given the mentality that accompanied the colonial origins and early State experience in the law. When appeals still ran to the Judicial Committee of the Privy Council in London, there was always a chance that different lines of lawmaking would create diversity in the common law in Australia as between that of an Australian jurisdiction and England and as between the several Australian jurisdictions.[33] But with the abolition of appeals to the Privy Council, the primacy of the High Court of Australia is incontestably established. There is now but one voice which speaks of fundamental common law principle in Australia. That voice is the High Court of Australia. Appeals from all Australian federal and State courts, as provided by the Constitution, come together in the apex court of the Judicature of Australia.[34] This is a point which distinguishes our federation from that of the United States.

Some writers have questioned how this result can follow, given the differing dates upon which the common law was received into the several Australian colonial jurisdictions. Certainly, in ascertaining local law, it is commonplace for the High Court to examine the applicable statutes and court decisions of the particular jurisdiction of Australia concerned. There may be significant differences. These may influence the outcome of the case.[35] But the common law is judge made. Judges in Australia must be obedient to authoritative pronouncements on common law principle made by Australia's Federal Supreme Court.[36] Judges know this. They obey its requirements. That is why the early doubts about a common law of Australia have now given way to a general acceptance that it exists.[37] In case of doubt, it can be discovered in the authoritative holdings of the High Court or in the decisions of other Australian courts conforming to such authority.

V LEGAL HISTORY AND ITS FUTURE

If the reader doubts the power of legal history in the decisions of the High Court of Australia, he or she should open the pages of the *Commonwealth Law Reports.* There, in every branch of the law, will be found an exploration of the history of the applicable legislation and common law doctrine which went before the case in hand. Take *Commercial Bank of Australia v Armadio.*[38] There, the decisions in the Court are replete with opinions of judges of the nineteenth and twentieth centuries concerning the traditional boundaries of a contract of guarantee and the grounds upon which equity would set aside contracts and transactions in times long past.[39] Take *Muschinski v Dodds,*[40] another case concerning equitable relief. The reasons of Brennan J in that case examine case law from the eighteenth century as it treated the legal enforceability of conditions attached to gifts.[41] Take *Pavey and Matthews Pty Ltd v Paul*[42] in which the Court ventured into the law of restitution. The reasons of the Court refer in detail to the legal action of *indebitatus assumpsit* and its development in the seventeenth, eighteenth and nineteenth centuries.[43] Or take *Waltons Stores (Interstate) Ltd v Maher,*[44] a case on promissory estoppel. Mason CJ and Wilson J begin their opinion by referring to the 'long line of authority'[45] of common law and equitable principles of estoppel. In all of these cases, legal history provides the foothold for the Court's decision. So it does in *Trident General Insurance Co Ltd v McNiece Bros*[46] where the doctrine of privity of contract was re-examined by the Court.

It is impossible to consider the development and extension of common law doctrine in any case without a full appreciation of what that doctrine is, why it exists, where it came from and how other jurisdictions have applied and developed it. The most vivid illustrations of the impact and power of legal history may be found in *Mabo v Queensland [No 2]*[47] and *Wik Peoples v State of Queensland.*[48] Those decisions could not have occurred without a searching review by all of the Justices of Australia's legal history. It was that review that caused the Court to challenge assumptions previously made both in law and in history as to the applicability of the English doctrines of land law in the very different conditions of continental Australia. It was that review and a reflection on the contemporary requirements of international law relating to fundamental human rights, that occasioned the revision of earlier judicial decisions that had assumed, or held, that native title rights had been extinguished the moment the Union Jack was raised on the soil of this land.

Most cases that come before the appellate courts of Australia, daily teach the importance of legal

history to the life of the Australian lawyer and judge. That is why it is right that we should honour our legal historians. It is especially timely to honour Professor Alex Castles. At a time when, for most lawyers, legal history was confined to the study of the Plantagenet kings of England, Alex Castles taught and wrote of the authentic legal history of Australia. He discerned its special features. He celebrated its achievements and its true heroes. He castigated its wrong turnings.

It was my privilege between 1975 and 1981 to work with Alex Castles in the Australian Law Reform Commission. He and I were inaugural Commissioners. Great was his contribution to its early reports. It is a tribute to the high esteem that he enjoys that he is honoured both by the University of Adelaide and by Flinders University, in the latter of which he is a Visiting Professorial Fellow. I applaud the initiative of Flinders University in inaugurating the Alex Castles Lectures in Legal History. It is fitting that the first lecture should be given by Professor Castles himself. It may be hoped that future lectures will stimulate the attention of Australia's lawyers and other citizens to the fascinating story of the law and its institutions in Australia. Alex Castles, a much loved teacher and respected scholar, is the inspiration for the lecture series. As a Justice of the High Court of Australia, as a former colleague in law reform and as a citizen, I am proud to be associated with this initiative of Flinders University.

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[*] Based on an address for the Flinders University of South Australia, School of Law, given in Adelaide on 12 August 1999.

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[1] B Kercher, *An Unruly Child. A History of Law in Australia* (1995) 202-203.

[2] Ibid 203.

[3] Australian Constitution, s 74. cf W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910, reprinted 1997) 236.

[4] Note the reliance placed upon the *Australia Act* 1986 (Cth) by the majority in *Sue v Hill* (1999) 199 CLR 468, 490. No reference is there made to the United Kingdom Act. Yet an Act of the Federal Parliament is made under, and subject to, the Australian Constitution and cannot enlarge or alter the meaning of the Constitution.

[5] The referendum failed to pass when put to the electors of Australia on 9 November 1999. The proportion of the national vote in favour of the republic proposal was 44.74%, with 54.40% against. The referendum was not carried nationally or in any State, T Blackshield and G Williams, *Australian Constitutional Law and Theory* (3rd ed, 2002) 138.

[6] cf *Southern Centre for Theosophy Inc v South Australia* (1979) 145 CLR 246, 261; *Sue v Hill* (1999) 199 CLR 462, 503.

[7] Australian Constitution, s 74.

[8] *Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208, 213.

[9] *Attorney-General (Victoria); Ex rel Black v The Commonwealth* (1981) 146 CLR 559, 577-578. Cf D Solomon, *The Political High Court* (1999) 224, 225.

[10] (1988) 165 CLR 360, 385.

[11] Ibid 387: by reference to 'A Little Bit of Lawyers' Language: The History of "Absolutely Free" 1890-1900' in D Martin (ed), *Essays: Australian Federation* (1969) 57.

[12] G Craven, 'Original Intent and the Australian Constitution — Coming Soon to a Court Near You?' (1990) 1 *Public Law Review* 166; J Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Rev* 1; H Patapan, 'The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia' (1997) 25 *Federal Law Review* 211; D Lyons, 'Original Intention and Legal Interpretation' (1999) 24 *Australian J Legal Philosophy* 1; and G Craven, 'Heresy as Orthodoxy: Were the Founders Progressivists?' (2003) 31 *Federal Law Review* 87.

[13] M D Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship' (2000) 24 *Melbourne University Law Review* 1.

[14] A I Clark, *Studies in Australian Constitutional Law* (1st ed, 1901, reprint 1997). See generally, R Ely, M Howard and J Warden (eds), *A Living Force: Andrew Inglis Clark and the Idea of Commonwealth* (2001).

[15] F Wheeler, 'Framing an Australian Constitutional Law: Andrew Inglis Clark and William Harrison Moore' (1997) 3 *Aust J Leg Hist* 237, 242.

[16] Clark, above n 14, 21. Emphasis added. Noted Wheeler, ibid 248.

[17] For example *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 171-173 per Deane J.

[18] *Victoria v The Commonwealth* (the *Payroll Tax* case) (1971) 122 CLR 353, 396-397 per Windeyer J; cf J Goldsworth, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal L Rev* 1, 16.

[19] (1999) 198 CLR 511.

[20] Ibid 599-600. See also *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479, 522-525.

[21] *Gould v Brown* (1998) 193 CLR 346. In *Gould* the High Court was evenly divided so that the challenge to the cross-vesting legislation failed on that occasion; but it was quickly renewed and in *Re Wakim* it succeeded.

[22] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 549 per McHugh J.

[23] 252 US 416, 433 (1920) cited in *Spratt v Hermes* (1965) 114 CLR 226, 272 per Windeyer J.

[24] See *Spratt v Hermes* (1965) 114 CLR 226, 272 per Windeyer J.

[25] (1999) 199 CLR 462, 503.

[26] (1920) 28 CLR 129, 146.

[27] P Schoff, 'The High Court and History: It Still Hasn't Found[ed] What It's Looking For' (1994) 5 PLR 253; cf Wheeler above n 15, 239.

[28] (1997) 189 CLR 520. See also *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 102, 112, 137 and *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

[29] Ibid 563.

[30] O Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 ALJ 240, 241. See also *Western Australia v The Commonwealth* (*Native Title Act* case) (1995) 183 CLR 373, 487.

[31] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 267-268.

[32] *McArthur v Williams* (1936) 55 CLR 324, 347; cf *Thompson v The Queen* (1989) 169 CLR 1, 34-35.

[33] F C Hutley, 'The Legal Traditions of Australia as Contrasted With Those of the United States' (1981) 55 *ALJ* 63, 68-69.

[34] Constitution, s 73. As to the position of Territories the position is different, see *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322.

[35] See discussion M Bhuta, '*Mabo, Wik* and the Art of Paradigm Management' (1998) 22 *MULR* 24; A R Buck, 'Property Law and the Origins of Australian Egalitarianism' (1995) 1 *Aust J Leg Hist* 145; P Pether, 'Principles or Skeletons? *Mabo* and the Discursive Constitution of the Australian Nation' (1998) 4 *Law Text Culture* 115.

[36] Australian Constitution, s 71.

[37] J Toohey, 'Towards an Australian Common Law' (1990) 6 *Aust Bar Rev* 185; A F Mason, 'An Australian Common Law?' [1996] *Law in Context* 81.

[38] (1983) 151 CLR 447.

[39] Ibid 454, 461.

[40] (1985) 160 CLR 583.

[41] Ibid 604-605.

[42] (1987) 162 CLR 221.

[43] Ibid 231-233 per Brennan J.

[44] (1988) 164 CLR 387.

[45] Ibid 398.

[46] (1988) 165 CLR 107.

[47] (1992) 175 CLR 1.

[48] (1996) 187 CLR 1.
