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COMMENT

JURISDICTIONAL AND PROCEDURAL CONSTRAINTS ON THE EVOLUTION OF AUSTRALIAN LAW

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The political controversy and the publicity which surround constitutional cases decided by the High Court has deflected attention from its role as the ultimate court of appeal in Australia. The forthcoming abolition of the residual appeal to the Privy Council from the State Supreme Courts points up the need to remove existing impediments to the progressive evolution of Australian law.

Jurisdictional Obstacles

My impression is that the High Court's contribution in the last decade to the development of the general law, especially private law, has not been as significant as its contribution to public law. One important reason is the volume of the Court's existing spread of work. The upsurge in lengthy constitutional cases, and the large proportion of appeals as of right, involving either issues of fact or issues of law having no general importance, make it impossible for the Court to grant special leave to appeal in all the applications in which there is a point of general importance. Leave is sometimes refused because the Court feels that the appeal is unlikely to succeed or because it may well go off on another point. The problem will be aggravated when appeals which presently go to the Privy Council come to

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us and if the advisory opinion jurisdiction is thrust upon us by an amendment to the Constitution in accordance with the recommendation of the recent Constitutional Convention.

The accession of the work now going to the Privy Council will remedy a deficiency by bringing to the Court some of the commercial work which figures prominently in the appeals taken to the Privy Council. Commercial cases have been an insignificant part of our work. However, the addition of this work strengthens the need to restructure the Court's appellate jurisdiction by making the grant of special leave a condition of all appeals, except appeals which involve the interpretation of the Constitution (see s. 35 of the Judiciary Act 1903 (Cth), as amended). This would enable the Court to give its time to those questions of law which are of general importance. Such an amendment to the Judiciary Act would have virtually no effect on appeals coming to us from the Federal Court because, subject to minor qualifications, appeals from the Federal Court lie by special leave only. The same comment, without any qualification, applies to the Family Court.

It is surprising that appeals from the Supreme Courts have not already been placed on the same footing. The result has been that the Federal Court and the Family Court have been free to interpret and elaborate the new areas of substantive law which they administer, subject only to High Court intervention in cases worthy of the grant of special leave. The Supreme Courts enjoy no such freedom because the litigant who can show that the judgment is a final judgment which satisfies the pecuniary limit of $20,000 can bring an appeal as of right to the High Court, except on any ground relating to the quantum of damages for death or personal injury in which special leave is required. The position of the Supreme Courts is all the more surprising when we bear in mind that they, unlike the Federal Court and Family Court, in the absence of innovative State legislation are for the most part administering substantive law which is neither novel nor in need of special elucidation.

The contribution that can be made to the development of Australian law by courts other than the High Court is best illustrated by the achievement of the Federal Court in trade practices law. The method of drafting employed in the Trade Practices Act 1974 (Cth), as amended, has allowed that Court scope to shape the application of the operative provisions. Relatively few cases have gone on appeal to the High Court; indeed, applications for special leave to appeal have not been common. Our recent experience in taxation law, where the principles are well established, has been similar. Up to July 1983 we have not heard an appeal against an assessment to income tax since *Federal Commissioner of Taxation* v. *Whitfords Beach Pty. Ltd.*[1] was decided in March 1982. In refusing special leave applications in taxation matters we have made it clear that, except for important questions of principle, the process of appeal ends with the Federal Court.

[1] (1982) 39 A.L.R. 521.

The jurisdictional problems caused by s. 86 of the Trade Practices Act which makes the grant of jurisdiction to the Federal Court in trade practices matters exclusive to that Court present an unnecessary hazard to litigants. It leads to tactical manoeuvring and the expenditure of time and money in pursuing jurisdictional questions. The problems could be diminished by making the Federal Court's original jurisdiction in relation to consumer protection matters concurrent with that of State courts. This solution to the problem has also been advocated by Gibbs, CJ. Wilson and Dawson, JJ. since this comment was initially written — see *Stack* v. *Coast Securities (No 9) Pty. Ltd.*[2] There is much to be said for retaining in the Federal Court an exclusive jurisdiction in relation to matters involving restrictive trade practices — it is a specialist court and will pursue a uniform approach. But there is less to be said for giving the Federal Court an exclusive original jurisdiction in relation to all consumer protection matters. They are often more appropriate to the status of a District Court than to that of a superior court and the issues they tend to generate — misleading representations and unfair conduct — do not call for the special skills of the Federal Court. There is no strong reason for hiving off these issues from related issues which are dealt with by State courts, viz. fraudulent misrepresentation and breach of warranty.

It is because claims based on the consumer protection provisions are commonly coupled with non-federal claims of the kind already mentioned and passing off, breach of contract, confidence or fiduciary obligation or opposed to claims for specific performance that questions have arisen as to (a) the existence of jurisdiction in the Federal Court to determine the entire controversy and (b) the continued existence in a State Supreme Court of a jurisdiction to determine those elements in the controversy which do not owe their origin to State law. The grant of concurrent jurisdiction in the way suggested would do much to solve the problems. The problems appear to have given the Federal Court an advantage over the Supreme Courts. Because the Federal Court has an exclusive jurisdiction and it possesses a non-exclusive accrued jurisdiction which extends to the related non-federal elements of a single justiciable controversy, the Federal Court can adjudicate the entire controversy, so long as it involves a substantial federal element, something that State Supreme Courts cannot do — *Stack* v. *Coast Securities (No. 9) Pty. Ltd.*[3]

Similar difficulties which beset Family Law and which have generated a series of arid jurisdictional conflicts for decision by the High Court cry even more loudly for remedy. Here the solution must lie in a constitutional amendment or an agreement between the Commonwealth and the States providing for a reference of powers or for co-operative Commonwealth and State legislation. It is a sorry commentary on our system of government

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[2] (1983) 49 A.L.R.
[3] *Ibid.*

that petty parochial political considerations have for so long overshadowed an urgent need for reform.

The Attitude to Precedent and the Use of Authority in Argument

So long as the Privy Council remains an ultimate court of appeal Australian judges naturally look to English decisions, especially those of the House of Lords, as indicative of the Privy Council's likely response to a question of law. With the elimination of the appeal, Australian courts will have greater freedom to pursue an approach which is less dependent on analysis of English case law and more suited to our own circumstances. Examination of Australian authority is understandably not a common feature of English judgments. Moreover, it is to be expected that the development of English law will be steadily influenced by United Kingdom membership of the European Economic Community. Our statute law, which was largely moulded on the model of United Kingdom statutes which amend the common law, no longer follows United Kingdom models. Although those who fashion our new statutes, in the Law Reform Commissions and in the Government Law Departments, take into account English statutory developments they now frame statutes which differ, sometimes radically, from English statutes on similar topics. For all these reasons we will be less likely to find assistance in English case law, although, to the extent to which it elaborates the doctrines of English common law and equity — our basic legal heritage — it will remain a valuable guide.

According to the American tradition counsel in the United States have been more influential in the development of the law than counsel in the United Kingdom and Australia. The legend of Louis Brandeis and his introduction of "the Brandeis brief" has no counterpart in this country. It may be that in Australia precedent is as much an attitude of mind as a legal doctrine and that there is altogether too much deference to authority and to the *obiter dictum*.

One perverse example of unnecessary deference to authority is the citation of English decisions instead of Australian decisions. This practice was justified when there was a dearth of Australian textbooks. But it is no longer acceptable now that the profession has access to so many Australian textbooks on a wide variety of topics. Indeed, the availability of Australian textbooks and the upsurge in the number of Australian University law reviews, specialist law journals and law services has given a remarkable impetus in recent years to the development of Australian law. In the halcyon days when I was a law student the *Australian Law Journal*, the *Melbourne University Law Review* and desultory issues of *Blackacre* were the only journals available to the profession.

Whether counsel make sufficient use of law journal articles, overseas and Australian, in the preparation of argument is open to question. There have been occasions, by no means isolated, when counsel failed to mention illuminating articles in law journals. Obviously articles should not be treated as if they were judgments. In general, it is enough to refer to the ar-

ticle and summarize the strand of thought, leaving the judge to read the article himself if he is so minded. And the reading of long passages from judgments should be discouraged. Cases and judgments should be used merely to document and authenticate steps taken in elaboration of the argument. The argument needs to be presented in a form which will enable it to have an impact while the judge remains open to persuasion, that is before his mind has begun to move towards a contrary conclusion. The argument must be so structured that it advances quickly to the debatable middle ground where the case or the issue will be won or lost.

Recent judgments, especially in the High Court, take more account of Canadian and United States authority, as well as English and New Zealand authority. Indeed, there is no reason why the Court should not take into account authority in any courts overseas, especially courts in common law countries if the authority provides persuasive reasons for reaching a particular conclusion and the reasons are appropriate to our conditions and legal conceptions. In the early days of the High Court close attention was given to decisions of the Supreme Court of the United States on the Constitution. This fascination with American cases faded as they came to deal more with the constitutional guarantees and less with questions of power and as the Anglo-Australian approaches to interpretation diverged, a divergence which deserves closer study. Recently there has been a return to American authority, not quite so much in constitutional cases as in common law cases generally. However, the time available for argument does not permit counsel to make a thorough examination of American cases.

This is just as well in view of the volume of the material, the difficulty of establishing that it is up to date and that it is not the product of some circumstance or development peculiar to America, and the fact that different principles are sometimes applied in different American jurisdictions. In general, reference to United States authority is not instructive unless it answers the question in hand in a persuasive way or it demonstrates general acceptance of a particular principle or answer. None the less it is likely that our law will be increasingly influenced by United States Law.

Canadian and especially New Zealand authority does not present the same degree of difficulty. Even so it needs to be used with discretion. After all we are not setting out to establish what is the common law for the common law world. The High Court is not the Supreme Court of Canada, though in one recent case counsel's argument was so beguiling that I imagined, as if in a dream, that we were sitting in Ottawa.

One problem confronting counsel is the ever-expanding amount of material potentially relevant to the case in hand. This problem is accentuated, rather than solved, by the computer. Perhaps the time has come when professional organizations should develop a research and reference capability to be made available to their members for an appropriate charge. In the preparation of cases greater use now seems to be made of research undertaken by academic lawyers, but it is difficult to ascertain the extent to which this takes place.

Oral Argument or Written Submissions

And there is the question whether courts, especially courts of appeal, can afford to allow unlimited time for argument. There is a growing tendency on the part of counsel to use, and for courts to require, written submissions in order to reduce the time taken in oral argument. It is too early to say whether this development will ultimately ripen into an adoption of American procedures requiring delivery of written briefs. But there is no doubt that unlimited oral argument makes heavy demands on time and that it is not an efficient method of introducing the issue to a court. The delivery of a written case or submission is a more effective and helpful means of putting a court in possession of the issue and of the basic contentions, even if it is to be followed by oral elaboration.

Unfortunately the art of presenting an argument in writing which will persuade the reader has not been highly developed in this country. Written submissions as we know them are little more than a statement of the particular propositions relied upon. When expanded they tend to become so voluminous as to lose sight of the focal point of the controversy. No doubt this is because, being schooled in the traditions of oral argument, we regard written argument as an inferior substitute. We overlook the fundamental advantage which is offered by the well-prepared written case. The written case induces the reader to suspend the process of evaluation because it quickly presents to the mind a neat sketch of the party's total argument in which the interlocking propositions are seen in an appropriate setting, so that the consequences of acceptance, short-term for the resolution of the case, and long-term for the development of the law, may be readily perceived. On the other hand, the slow development of oral argument tends to focus hostile attention, even at an early stage, on the correctness of particular propositions, because the mind of the judge has not then been alerted to the possibility that the setting in which the proposition is to be considered differs from what he imagines it to be. And delivery of written cases in advance of oral argument enables the court to consider in some detail the conflicting contentions and consequently derive more benefit from the subsequent oral argument.