Author/s:
Bateman, S;Stone, A

Title:
Precedents and case-based reasoning in the case law of the High Court of Australia

Date:
2022-01-01

Citation:
Bateman, S. & Stone, A. (2022). Precedents and case-based reasoning in the case law of the High Court of Australia. Monika, F-W (Ed.). Constitutional Law and Precedent International Perspectives on Case Based Reasoning, (1st), pp.57-80. Routledge.

Persistent Link:
https://hdl.handle.net/11343/300056

3 Precedents and case-based reasoning in the case law of the High Court of Australia[1]

Selena Bateman and Adrienne Stone

Introduction

The High Court of Australia is at the apex of the Australian court system. Established in 1901 upon the federation of the Australian colonies, the Constitution preserved the pre-existing colonial courts as courts of the new Australian States[2] and established the High Court to serve as a final court of appeal from all other Australian courts.[3] The High Court has jurisdiction to hear appeals from all State, territory and federal courts on matters of State and federal law including the common law. Its constitutional jurisdiction therefore includes both original and appellate jurisdiction.

The Court's decisions are binding on all lower courts, both federal and State, in the hierarchy as part of the doctrine of precedent which is a critical feature of the common law. The Court itself, as a matter of long-established practice, generally follows its previous decisions. While it is not bound to do so, it only overrules its previous authority by reference to considerations that seek to prioritise stability and certainty in the law. The Court's approach to adjudication generally, and constitutional adjudication particularly, is very much shaped by its position in the Australian court hierarchy mandated by the Australian Constitution and by the continuing influence of both the British model of constitutionalism and the Constitution of the United States.[4]

Because of its position, the Court is never required to apply lower court decisions. However, it regularly refers to the decisions of lower courts in the Australian judicial hierarchy. While lower courts also have jurisdiction to determine constitutional issues, in many cases novel constitutional issues will be initiated in the High Court.

While it is impossible to survey comprehensively the Court's constitutional jurisprudence, this chapter will examine the Court's approach to the decisions of international courts and the decisions of other supreme courts through the

1 Work on this chapter has been generously supported by the Australian Research Council pursuant to Adrienne Stone's Australian Laureate Fellowship.

2 *Constitution of the Commonwealth of Australia (1901)* s 106.

3 Ibid s 71.

4 Cheryl Saunders and Adrienne Stone, 'The High Court of Australia' in Andras Jakab et al. (eds.), *Constitutional Reasoning* (Cambridge University Press 2017).

DOI: 10.4324/9781003264262-5

prism of one significant area of Australian constitutional law, the law of Chapter III of the Constitution, which governs the Australian judiciary. The provisions of Chapter III were inspired by, and in many ways closely replicate, the text and structure of Article III of the United States Constitution. Chapter III establishes the federal judiciary, with the High Court at the apex, and defines the Court's power. Critically, Chapter III has been held to entrench a strict separation of judicial power from legislative and executive power at a federal level.

Chapter III jurisprudence has been a very important source of the development of rights protections in Australia. The Australian Constitution is highly unusual for its sparsity of rights protection.[5] In the absence of a federal charter of rights, Chapter III jurisprudence has been pivotal to the development of rights protections in Australian law, including elements of substantive and procedural due process. Legal issues involving fundamental rights that in other jurisdictions are ordinarily litigated by reference to constitutional or legislative rights frameworks are instead often ventilated in Chapter III cases. This case study will survey the variety of ways the Court uses decisions of United States and United Kingdom courts in some key Chapter III cases decided by the Court over the last 30 years.

The role of precedent in the High Court of Australia

The fundamentals of the Australian common law system

To understand the High Court's approach to constitutional adjudication, it is necessary to understand some features of the Australian common law system. A key feature of that system is the doctrine of precedent: the rule that a lower court is required to take account of, and follow, the decisions of all courts higher than it in the hierarchy.[6]

As former Chief Justice of the High Court Sir Anthony Mason has said of the doctrine:[7]

> [m]ore than anything else the doctrine of precedent makes the common law continuous, consistent and predictable. And it gives legal reasoning, that is, common law legal reasoning, its distinctive quality, a quality that differentiates legal reasoning from other forms of reasoning.

In the context of the Australian judiciary, the doctrine of precedent requires all other courts to follow the High Court's decisions on all matters of law, including on all matters of constitutional law.

5 Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27 Sydney Law Review 29.

6 R. Cross, *Precedent in English Law*, 3rd ed. (Clarendon 1977) 6.

7 Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93 at 93.

A closely related common law doctrine is that of *stare decisis* which either requires a superior court to apply its earlier decisions, or less strictly, that it ought not generally depart from them. As will be outlined, the High Court has never regarded itself as unable to depart from its earlier decisions but does so cautiously.

The position of the High Court

The High Court's position at the apex of the Australian judiciary is expressly mandated by Chapter III (sections 71–80) of the Constitution, titled 'The Judicature', which confers the Court with original jurisdiction in defined subject matters, including any matter arising under the Constitution or involving its interpretation.[8] Chapter III also confers appellate jurisdiction on the Court to hear and determine appeals from all 'judgments, decrees, orders and sentences' of any other federal court, or court exercising federal jurisdiction, or the Supreme Court of any State.[9]

From enactment in 1900, the Australian Constitution included a provision (s 74) that allowed for appeals from the High Court to the Judicial Committee of Privy Council ('Privy Council') in the United Kingdom. In addition, the Constitution also allowed for appeal from a State Supreme Court to the Privy Council directly.[10] Historically, the only limitation on this appeal avenue was that no appeal was permitted from the High Court to the Privy Council on what are known as 'inter se' questions, which are any disputes that involved the Commonwealth on the one hand and a State on the other, or a dispute between two or more States. In effect, this made the High Court effectively the final court on all constitutional matters.[11] The Court's reasoning on this issue, only six years after Australia's federation, while the nation was yet to achieve full independence from the United Kingdom, shows its early commitment to shaping uniquely Australian constitutional dynamics. The Court held that the resolution of these disputes required:[12]

> an Australian Court, immediately available, constant in its composition, well versed in Australian history and conditions, Australian in its sympathies, and whose judgments, rendered as the occasion arose, would form a working code for the guidance of the Commonwealth [of Australia].

8 *Australian Constitution* s 75 confers original jurisdiction in relation to enumerated subject matters directly on the Court. Section 76 empowers Parliament to confer additional original jurisdiction on the Court including in constitutional matters (s 76(i)).

9 *Australian Constitution* s 73.

10 Ibid s 74.

11 The Court has only granted a certificate permitting the Privy Council to hear an appeal on an inter se question once in 1913 (*Attorney-General (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644, 645 (PC)).

12 *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087, 1117–8 (Griffiths CJ, Barton and O'Connor JJ).

The Privy Council remained the final court of appeal on all non-inter se questions formally until 1986 when the passage of reciprocal legislation by the United Kingdom and Australian Parliaments finally removed the authoritative force of English courts in Australia.[13] This legislation was the last in a long series of judicial and legislative developments over the course of the twentieth century that severed the formal constitutional links between the United Kingdom and Australia.[14] Section 74 remains in the Constitution (it could only be removed in accordance with the referendum mechanism)[15] but it is a 'vestigial remnant' of the former hierarchical connection between Australian courts and the Privy Council and there is no possibility of the Court using the mechanism to permit an appeal to the Privy Council.[16]

Other components of the Australian judicial system—federal, state and territory courts

The High Court is the only federal court established by the Constitution, but the document enables federal Parliament to create lower federal courts by legislation.[17] Currently, the other courts in the federal court hierarchy are the Federal Circuit and Family Court of Australia[18] and the Federal Court of Australia.[19]

The courts of each of the Australian colonies were preserved by the Constitution and became the courts of the State.[20] In an arrangement described as the 'autochthonous expedient' Chapter III of the Australian Constitution enables federal Parliament to confer federal jurisdiction on State courts.[21] In addition, Australia's two self-governing territories have their own court systems.[22]

By virtue of constitutional arrangements and federal legislation, all federal, State and territory courts have original jurisdiction to determine constitutional

13 Appeals from the High Court to the Privy Council were formally abolished in 1975 (*Privy Council (Appeals from the High Court) Act 1975* (Cth); and appeals form all Australian States to the Privy Council were abolished in 1986 (*Australia) Request Act 1985*; *Australia (Request and Consent) Act 1985* (Cth); *Australia Act 1986* (UK)).

14 *Sue v Hill* (1999) 199 CLR 462, 490–3 (Gleeson CJ, Gummow and Hayne JJ). See also Anthony Mason, 'Fullagar Lecture: Future Directions in Australian Law' (1987) Monash University Law Review 150, 150.

15 *Australian Constitution*, s 128.

16 *Kirmani v Captain Cook Cruises Pty Ltd* (1985) 159 CLR 461 (Gibbs CJ, Mason, Wilson Brennan, Deane and Dawson JJ).

17 *Australian Constitution*, s 71.

18 A newly established court that merged the jurisdictions of the Federal Circuit Court and the Family Court of Australia: *Federal Circuit and Family Court of Australia Act* 2021 (Cth) into one court with separate divisions.

19 *Federal Court of Australia Act* 1977 (Cth).

20 *Australian Constitution*, s 106.

21 Ibid s 77(iii).

22 The Australian Capital Territory and the Northern Territory. Australia also has a number of external non-self-governing territories.

issues.[23] That is, constitutional review in Australia is diffuse and not the sole preserve of the High Court. In practice, however, many litigants commence proceedings raising novel constitutional issues in the Court's original jurisdiction rather than litigate in lower courts. Alternatively, the Court has the ability to remove proceedings from a lower court into its docket. In practice, it has meant that many constitutional disputes are heard by the High Court sitting in its original jurisdiction rather than on appeal.[24]

The role of High Court precedents and their binding effect

The High Court is the final arbiter on all issues of law including all constitutional questions within the Australian judiciary. As such, and by virtue of the doctrine of precedent, all other Australian courts are obliged to follow the decisions of the High Court. The 'vertical' binding effect of High Court decisions is therefore complete. Turning to the 'horizontal' binding effect, the position is somewhat more nuanced. While the Court is not strictly bound to follow its earlier decisions, it is very reluctant to depart from earlier authority[25] given the obvious importance of consistency and continuity.[26]

The Court has developed four criteria that govern whether an earlier decision should be re-opened and overruled:[27]

- Firstly, whether the earlier decision rests upon a principle carefully working out in a series of significant cases
- Secondly, whether there were differences in the reasoning in the justices constituting the majority in the earlier decision
- Thirdly, whether the earlier decision has achieved no useful result but has instead led to considerable inconvenience
- Fourthly, the earlier decision has not been independently acted on in a way that militates against reconsideration.

23 Typically, federal legislation confers jurisdiction that mirrors the High Court's original jurisdiction to hear constitutional matters on other Australian courts. For example, the provision that confers federal jurisdiction on State courts within the limits of their jurisdiction: *Judiciary Act* 1903 (Cth), s 39.

24 *Judiciary Act* 1903 *(Cth), ss 40–44(1)*. Both the removal and remittal powers were modelled on United States precedent: *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, [44].

25 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438–439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ); *Plaintiff M76 v Commonwealth* (2013) 251 CLR 322, 382 [192] (Kiefel and Keane JJ); *Wurridjal v The Commonwealth* (2009) 237 CLR 309, 352 [70] (French CJ).

26 *Private R v Cowen* (2020) 94 ALJR 849, [122] (Edelman J).

27 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438–9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ); *Plaintiff M76 v Commonwealth* (2013) 251 CLR 322, 382 [192] (Kiefel and Keane JJ); *Wurridjal v The Commonwealth* (2009) 237 CLR 309, 352 [70] (French CJ).

This list of criteria is not necessarily closed[28] and the criteria have been applied in both constitutional and non-constitutional cases.[29]

However, there have been statements made by individual justices to suggest that in constitutional cases the Court should be more ready to depart from earlier precedents.[30] Unlike the Court's decisions on the common law or interpreting ordinary legislation, Parliament cannot correct errors in constitutional interpretation. Therefore, some justices have taken the view that when the Court considers an earlier *constitutional* precedent to be wrong, the Court's duty and fidelity should be first and foremost to the Constitution. Early in the Court's history, Justice Isaacs put this view succinctly: '[i]t is not, in my opinion, better that the Court be persistently wrong than that it should be ultimately right.'[31] However, this approach does not usually prevail. In most cases, the Court does not treat constitutional precedent differently but applies the general principles set out earlier. This approach reflects the view that:[32]

> [n]o Justice is entitled to ignore the decisions and reasoning of [his or her] predecessors, and to arrive at [his or her] own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court … It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to [his or her] own opinions in preference to an earlier decision of the Court.

The High Court's approach to judgment writing and to national judicial decisions

The High Court's approach to its own judgments

Since its establishment, the High Court's practice has been to produce *seriatim* opinions. In constitutional cases, very often there is no single majority judgment; rather, constitutional principles pronounced by the Court will be developed

28 *Esso Australia Resources Ltd v Commissioner of Taxation (Cth)* (1999) 201 CLR 49, [164] (Callinan J).

29 Some examples of the Court applying the criteria in constitutional cases are: *Wurridjal v The Commonwealth* (2009) 237 CLR 309, 352 [70] (French CJ)*; Minogue v Victoria* (2019) 93 ALJR 1031, [24] (Edelman J).

30 For example, *Australian Agricultural Co v Federated Engine-Drivers and Firemans Association of Australasia* (1913) 17 CLR 261, 278 (Isaacs J); *Damajanovic & Sons Pty Ltd v Commonwealth* (1968) 117 CLR 390, 396 (Barwick CJ); *Buck v Bavone* (1976) 135 CLR 110, 137 (Murphy J); *Queensland v Commonwealth* (1977) 139 CLR 585, 593 (Barwick CJ), 610 (Murphy J); *Stevens v Head* (1992) 176 CLR 433, 464–65 (Gaudron J).

31 *Australian Agricultural Co. v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261, 278.

32 *Queensland v The Commonwealth* (1977) 139 CLR 585, 599 (Gibbs J).

across several judgments within the one decision. This convention has inevitably led to a wide variety of judgment styles and approaches to constitutional adjudication over the Court's history, making it practically impossible, and well beyond the scope of this chapter, to map precisely the Court's approach to judgment writing.[33] This feature of the High Court's jurisprudence also often makes it more challenging to ascertain the *ratio decidendi* for which a case stands.

Consistent with the common law method of adjudication, the Court has a wide discretion as to how to refer to its earlier decisions and a review of any of the Court's constitutional decisions will demonstrate the variety of ways the Court draws upon earlier authority to decide the case before it. It is common to see references to a single past case as authority for a proposition and references to lines of precedent that establish a proposition overtime. Equally, reasoning may focus on the general rules and principles of previous cases, or it may focus on the particularities of a previous cases. The justices often refer to precise passages (which may be quoted) but also frequently provide their own exposition of the case law. Judicial reasoning will encompass discussion of majority decisions, concurrences and dissents, as is appropriate to the argument being developed. The justices have such a wide degree of freedom accorded to judges on these matters that it is impossible to identify a general practice and much depends on the precise argument being put by the parties in the proceeding and how the individual justice, or group of justices if writing jointly, choose to resolve the case.

Consistently with the common law method, the purpose to which the references to past cases may be put are equally diverse. They include reconstructing principles of law, identifying principles or practices of interpretation, demonstrating that a challenged law is problematic or, alternatively demonstrating that a legal issue has already been decided in a previous case, and consequently, that a law is valid. In the common law tradition, all these methods are available and which method is employed will depend on context and individual judicial preference.

Noting these important caveats, the High Court's legal reasoning is typical of other apex courts in common law countries: there is a heavy reliance on showing consistency with past decisions of the Court and demonstrating the coherence of the law overall. In doing so, there is prominent use of analogy to develop and apply legal principles to the facts of the case.[34]

33 Then Chief Justice Sir Anthony Mason commented that this aspect of the Anglo-Australian judicial tradition has led to greater fragmentation of opinion than in other constitutional courts in the common law world: Mason (n 7) *93, 102*. But for an analysis of judicial reasoning in 40 major constitutional decisions, see Cheryl Saunders and Adrienne Stone, 'Australia' in Andras Jakab et al. (eds.), *Constitutional Reasoning* (Cambridge University Press 2017).

34 Mason (n 7) 93 at 93. See also *The Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424 at 481 (Brennan J); Cheryl Saunders and Adrienne Stone, 'Australia' in Andras Jakab et al. (eds.), *Constitutional Reasoning* (Cambridge University Press 2017); Adrienne Stone, 'Judicial Reasoning' in *The Oxford Handbook of the Australian Constitution* (Oxford University Press 2018) 479.

The High Court's references to decisions of inferior Australian courts

As explained above, the Court is at the apex of the court hierarchy; it hears and determines appeals from lower federal, State and territory courts. This feature of the Australian legal system means that the Court regularly refers to lower courts' decisions in the process of determining the cases before it.

In terms of raw numbers, a statistical analysis conducted in 2001 using five randomly selected sample years of the citation practice of the High Court (1920, 1940, 1960, 1980 and 1996) showed that the Court regularly referenced (cited) lower federal and state courts.[35] This kind of statistical analysis is a relatively blunt instrument. As the study noted, these statistics do not reveal whether decisions of these lower courts were cited because the Court considered them to be persuasive, or only to distinguish or reject them.[36] Nor does this analysis show whether there is a distinctive pattern of citation of lower courts in constitutional cases. But, consistent with the Court's apex position and the common law method, the Court will consider and apply its own decisions and give much greater persuasive weight to its previous statements on matters of constitutional principle rather than to the reasoning of lower courts. References to prior decisions of the High Court are therefore certain to be more frequent, at least when the Court is analysing precedent to establish the content of the law.

However, another key task of the High Court is to ensure the uniformity of Australian law.[37] That means that the Constitution must be given a single consistent interpretation in Australian law and if there are inconsistencies as between decisions of inferior courts (for instance, if courts of different states have given inconsistent interpretations), the High Court must resolve them. Indeed, there is no appeal to the High Court as of right; rather the High Court must agree to hear an appeal.[38] Resolution of an inconsistency between lower courts' decisions is one ground on which the High Court may do so.[39] An important reason that the High Court may refer to the decisions of lower courts, therefore, is to identify and resolve divergent approaches.

35 Russell Smyth, 'Citations by Court' in *The Oxford Companion to the High Court of Australia* (Oxford University Press), www.oxfordreference.com/view/10.1093/acref/9780195540222.001.0001/acref-9780195540222-e-59 accessed on 28 June 2021.

36 Ibid.

37 In contradistinction to the United States, where the common law may vary from state to state, the High Court has held that in Australia, there is a single, uniform common law. Compare *Erie Railroad Co v Tompkins* 304 U.S. 64 (1938) and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563 (the Court); *Lipohar v The Queen* (1999) 200 CLR 485, 505–508 [43]–[53] (Gaudron, Gummow and Hayne JJ).

38 Through the 'special leave' procedure in accordance with criteria specified under federal law: *Judiciary Act* 1903 (Cth), s 35A.

39 *Judiciary Act* 1903 (Cth), s 35A(ii).

The High Court's use of the decisions of foreign and international courts

Introduction

Unlike many constitutional or apex courts, there is no supra-national court that the High Court is bound by, or required to have regard to, in determining the law. Additionally, Australian law remains 'dualist' in its reception of international law. That is, the principles of international law are not automatically absorbed into domestic law; they must be transformed as legal norms applicable to domestic legal rights and interests through the enactment of legislation.[40]

These principles do not mean, however, that the law developed by foreign courts has no effect on the High Court's constitutional jurisprudence. On the contrary, the Court regularly looks to the decisions of other jurisdictions when determining constitutional cases and draws no principled distinction between them.

In terms of the raw figures, the High Court regularly cites cases from the superior courts of other common law countries, most usually the UK, the US, Canada and New Zealand.[41] Less frequently the Court cites cases from civil law countries.[42] It also cites cases from international courts, like the European Court of Justice and the European Court of Human Rights.[43]

A quantitative study of the number of times the Court cites foreign and international courts in its constitutional jurisprudence, however, would not be illuminating without careful qualitative evaluation.[44] The nature of the

40 *Koowarta v Bjelke-Petersen* (1983) 153 CLR 168, 224–25 (Mason J).

41 B. Topperwien, *Foreign Precedents. In the Oxford Companion to the High Court of Australia* (Oxford University Press 2001), www.oxfordreference.com/view/10.1093/acref/9780195540222.001.0001/acref-9780195540222-e-160 accessed on 29 June 2021; Paul E. von Nessen, 'The Use of American Precedents by The High Court of Australia 1901–1987' (1992) 14 Adelaide Law Review 181.

42 Topperwien (n 41). In recent years, in cases concerning the constitutional implied freedom of political communication, the High Court has frequently discussed the development of principles of proportionality drawn from German constitutional law developed by the German Federal Constitutional Court. A majority of the Court applies a similar structured proportionality test as a tool of analysis to test the validity of Australian laws that are said to infringe this constitutional limitation: e.g., *McCloy v New South Wales* (2015) 257 CLR 178, [67]–[77] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328, [104] (Kiefel CJ, Bell and Keane JJ), [157]–[160] (Gageler J); *Clubb v Edwards* (2019) 267 CLR 171, [391]–[392] (Gordon J), [494], [502] (Edelman J).

43 For example, *Al-Kateb v Godwin* (2004) 219 CLR 562, [72] (Kirby J); *Leask v The Commonwealth* (1996) 187 CLR 579, 594–95 (Brennan J), 600–601 (Dawson J), 615 (Toohey J); *Nationwide News* (1992) 177 CLR 1, 47 (Brennan J), *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 130 (Mason CJ, Toohey and Gaudron JJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 141 (Kiefel J); *Clubb v Edwards* (2019) 267 CLR 171, [205] (Gageler J).

44 One quantitative study over the period 2000–2008 identified 193 constitutional cases in 99 of which, representing 51.30%, foreign precedents were cited. Cheryl Saunders and

common law method, the large variation in judicial writing approaches and constitutional methods in High Court justices over the last 121 years and the Court's practice of writing long *seriatim* judgments would, in any event, make it a Herculean task.

Therefore, this chapter will focus on a small set of cases and key principles arising from one aspect of the Court's constitutional jurisprudence—the law of Chapter III of the Constitution—in order to make some necessarily general observations as to how and when the Court uses comparative sources of law in this area of Australian constitutional law.

The Chapter III case law has been selected for three reasons. Firstly, it is a vibrant and critical area of Australian constitutional law. The provisions of Chapter III are the foundations of the Australian judiciary, and in the absence of a federal rights framework, Chapter III has provided the Court with a platform for the cautious development of principles that protect certain rights.[45] Secondly, the text and structure of Chapter III are heavily influenced by Article III of the United States Constitution, and so it is an area of Australian constitutional law that has long been ripe for comparative analysis. Thirdly, over the last 30 years, Chapter III cases have required the Court to grapple with human rights issues that have been the subject of cases in comparative jurisdictions, including jurisdictions influenced by international courts and human rights law. Consequently, it is instructive to examine some of the ways the Court has dealt with the law pronounced by foreign legal systems when addressing these issues in the Australian constitutional context.

The fundamentals of Chapter III

The drafting of the Australian Constitution was heavily influenced by the constitutional models of the United Kingdom and the United States. From the United Kingdom, and the Australian colonies, the framers imported the principle of responsible government and model of parliamentary supremacy. From the United States, as well as other countries with written constitutions like Canada and Switzerland, they imported an entrenched written Constitution as well as federalism and the principle of the separation of powers.[46]

Adrienne Stone, 'Reference to Foreign Precedents by the Australian High Court: A Matter of Method' (with Cheryl Saunders) in Tania Groppi and Marie-Claire Ponthereau (eds.), *The Use of Foreign Precedents by Constitutional Judges* (Hart 2013).

45 Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27 Sydney Law Review 29, 33–34.

46 See S. Gageler and W. Bateman, 'Comparative Constitutional Law' in C. Saunders and A. Stone (eds.), *The Oxford Handbook of the Australian Constitution* (Oxford University Press 2020), *quoting the Preamble to the Australian Constitution, 265. See generally John Quick and Robert Randolph Garran, The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths 2002) 667; Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press 1987) 4.

Thus, since its establishment, the High Court has often had regard to foreign jurisdictions in developing its constitutional principles, expressly cognisant of the fact that the Australian Constitution represents a deliberate fusion of ideas from several jurisdictions—most prominently the United Kingdom and the United States. The following section will focus on some key Chapter III cases decided over the last 30 years and, in particular, the way the Court has used the case law of the United States and the United Kingdom.

The High Court's use of United States precedents: a case study of the use of Mistretta v United States

Chapter III of the Constitution was very closely modelled on Article III of the United States Constitution in both its text and structure.[47] Like Article III, Chapter III establishes the judicial branch of government, separate from the Legislature and the Executive (governed by Chapters I and II respectively); it creates a federal supreme court (the High Court of Australia) and delineates the exercise of judicial power in federal courts. It also borrows many of the heads of federal jurisdiction from Article III. There are two significant points of divergence: firstly, Chapter III allows the federal Parliament to invest State courts with federal jurisdiction, and secondly, it confers on the High Court a general appellate jurisdiction from state as well as federal courts.[48]

Given the influence of Article III on the drafting of Chapter III, the High Court has frequently drawn on United States judicial decisions and constitutional law principles.[49] A clear, and somewhat controversial, instance is the repeated use of a decision of the United States Supreme Court—*Mistretta v United States*[50] (*Mistretta)*—in the development of two related lines of authority spanning almost three decades.[51] In *Mistretta*, the Supreme Court had to determine whether the Sentencing Commission—an independent body created by Congress partly composed of federal judges to promulgate strict sentencing guidelines for federal criminal offences—was invalid because it violated Article III. Relevantly, the Supreme Court held that the separation of powers doctrine did not prohibit federal judges from engaging in all extrajudicial activities, and that the specific functions conferred on federal judges on the Commission did not undermine

47 For a detailed analysis of the similarities and differences between the two and the drafting history of Chapter III see James Stellios, *The Federal Judicature: Chapter III of the Constitution*, 2nd ed. (Lexis Nexus 2020), Chapter 3. See also, *The Queen v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254 at 297.

48 Australian Constitution, sections 73 and 77(iii).

49 Another instance, not covered in this chapter, is the reliance on United States constitutional law in the seminal Ch III case of *The Queen v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254.

50 488 US 361 (1989).

51 *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Vella v Commissioner of Police* (2019) 90 ALJR 89.

the integrity of the judiciary, nor were they incompatible with their judicial functions.[52] Despite concluding that the extrajudicial service of the Commission's federal judges was constitutionally valid, the Supreme Court said:[53]

> This is not to suggest, of course, that every kind of extrajudicial service under every circumstance necessarily accords with the Constitution. That the Constitution does not absolutely prohibit a federal judge from assuming extrajudicial duties does not mean that every extrajudicial service would be compatible with, or appropriate to, continuing service on the bench; nor does it mean that Congress may require a federal judge to assume extrajudicial duties as long as the judge is assigned those duties in an individual, not judicial, capacity. The ultimate inquiry remains whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch.

One justification the Supreme Court gave for this constitutional principle was that:[54]

> [t]he legitimacy of the Judicial Branch ultimately depends upon its reputation for impartiality and non-partisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colors of judicial action.

Five years after the Supreme Court decided *Mistretta*, four Justices of the High Court picked up these passages from *Mistretta* and referred to them by way of analogy in the decision of *Grollo v Palmer*.[55] Their Honours observed that the Supreme Court's reasoning in *Mistretta* was consistent with the constitutional restriction in Chapter III preventing federal judges from performing functions that were incompatible with their role. But their Honours held that the legislation (which empowered a federal judge to issue a particular kind of warrant) did not infringe the incompatibility principle and was therefore valid.[56]

A year later this reasoning was again endorsed and applied by a majority of the Court in two significant Chapter III cases delivered on the same day to invalidate a federal law and a State law: *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs*[57] (*Wilson*) and *Kable v Director of Public Prosecution (NSW)*[58] (*Kable*).

52 *Mistretta,* 488 US 361 (1989), 381, 390–394, 397, 404. *Mistretta* is one case in a long line of Supreme Court authority considering the extent to which extrajudicial activities may be incompatible with their Article III judicial functions. See for example *Commodity Futures Trading Commission v Schor* (1986) 478 US 478 U.S. 833.

53 *Mistretta*, 488 US 361 (1989), 381.

54 Ibid 407 (emphasis added).

55 (1995) 184 CLR 348, 365–66 (Brennan CJ, Deane, Dawson and Toohey JJ).

56 (1995) 184 CLR 348, 369.

57 (1996) 189 CLR 1.

58 Ibid 51.

The issue for the Court in *Wilson* was whether a federal judge could be conferred with a non-judicial power to exercise in his or her personal (not judicial) capacity to conduct an inquiry giving rise to a report to a federal Minister. The plurality's reasons quoted the passages extracted earlier from *Mistretta* and declared that 'the passages from *Mistretta* are equally relevant to the interpretation of Ch III of the Constitution of this country.'[59] The plurality went on to say that the strict separation of judicial power from the other functions of government advances two constitutional objectives 'the guarantee of liberty' and 'the independence of Ch III judges.'[60] While the Court expressly drew on the reasoning in *Mistretta* to articulate why the incompatibility doctrine limited the conferral of extrajudicial functions on federal judges in *Wilson*, the Court was also building on its own earlier decisions, including *Grollo v Palmer*, that had established there were limits on the types of functions that the *Commonwealth* Parliament could confer on *federal* judges consistent with the Constitution.[61] The argument advanced in *Kable*, on the other hand, was entirely novel. In that case, a majority of the Court held for the first time that a *State* Parliament could not confer a power on a *State* court[62] that undermined the institutional integrity of that court because of Chapter III of the Constitution.[63] The appellant successfully argued that conferring such a power was contrary to the integrated judicial system under Chapter III of the Constitution and was therefore invalid. In advancing this argument the applicant expressly relied on the reasoning in *Mistretta* by way of analogy.[64]

All justices in the majority in *Kable* either applied the reasoning,[65] or more specifically the 'cloaking' metaphor, from *Mistretta* in their judgments.[66] Two of the justices, Justices Gaudron and McHugh, did this quite obliquely by referencing key passages from *Wilson* and the earlier decision in *Grollo* that imported the *Mistretta* reasoning.[67] By contrast, Justice Gummow's judgment contained several references to United States authority (both Supreme Court and lower federal courts) and expressly applied the incompatibility doctrine developed in American constitutional law to the Australian context.[68] From a comparative perspective, a remarkable feature of this reasoning is that it takes an American constitutional

59 (1996) 189 CLR 1, 9 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
60 (1996) 189 CLR 1, 11.
61 See also *Hinton v Wells* (1985) 157 CLR 57.
62 Strictly, in the case of *Kable*, a state court exercising federal jurisdiction: (1996) 189 CLR 51, 94.
63 *Kable* (1996) 189 CLR 51, 94 (Toohey J), 104 (Gaudron J), 114 (McHugh J), 127–8 (Gummow J).
64 *Kable* (1996) 189 CLR 51 at 133.
65 *Kable* (1996) 189 CLR 51 at 107–8 (Gaudron J); 116, 122 (McHugh J); 133–34 (Gummow J). See also Toohey J. at 96 although note his Honour's reasoning differed from the other majority justices since he found the State legislation was invalid on the ground that the court was exercising federal, not State, jurisdiction.
66 *Kable* (1996) 189 CLR 51 at 133–34 (Gummow J).
67 *Kable* (1996) 189 CLR 51, 103–4, 116.
68 *Kable* (1996) 189 CLR 51 at 132–34 (Gummow). See especially fns 260–265.

doctrine rooted in the text and structure of Article III applicable to *federal* judges performing functions under *federal* law and applies it to develop an Australian constitutional doctrine sourced in Chapter III that applies to Australian *State* judges performing functions under *State* law.

Kable was a watershed in Australian constitutional law, establishing that Chapter III of the Constitution prohibits State Parliaments from conferring a power on a State court that is incompatible with their essential characteristics. The principle has been further developed, refined and applied by the Court in a long line of cases.[69] Justice Gummow, in the next *Kable* principle case that came before the High Court, *Fardon v Attorney-General (Qld)* further embedded the *Mistretta* metaphor in Australian constitutional law by outlining the relevance of *Mistretta* to the majority's reasoning in *Kable*.[70] More recently, in *Vella v Commissioner of Police (NSW)* (*Vella*), Justice Gageler described the Court's reasoning in *Wilson* and *Kable* as an 'appropriation and application' of the *Mistretta* metaphor.[71]

However, despite the willingness evident by some members of the Court in *Fardon* and *Vella* to appropriate and apply the Supreme Court's decision in *Mistretta*, other members of the Court have expressed discontent at the continued reliance on the *Mistretta* metaphor. In *Pollentine v Bleijie*,[72] six justices said that the use of the cloaking metaphor in that case 'was wholly inapplicable' and that 'even if the metaphor could be applied… (and it cannot), its use could be no substitute for consideration of the principles of repugnancy and incompatibility.'[73] In *Kuczborski v Queensland*, Justice Hayne, writing separately, set out the *Kable* principle and noted that:[74]

> In *Fardon*, Gummow J referred to a metaphor adopted by the Supreme Court of the United States in *Mistretta v United States*: that the reputation of the judicial branch of government may not be borrowed by the legislative and executive branches "to cloak their work in the neutral colors of judicial action. As the plurality recently said in *Pollentine v Bleijie*, the use of that metaphor can "be no substitute for consideration of the principles of repugnancy and incompatibility". Conclusions cannot and must not be formed by reference only to particular verbal formulae.

69 Interestingly, as Gageler and Bateman note, the *Kable* principle has been developed in more recent cases by drawing on Canadian and European cases that focus on maintaining the 'essential characteristics' of a 'court': *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 152 [3] (Gleeson CJ), 172 [65] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Wainohu v New South Wales* (2011) 243 CLR 181, 208 [44] (French CJ and Kiefel J). See Gageler and Bateman (n 46), Chapter 11, 11.

70 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 615.

71 *Vella* (2019) 93 ALJR 1236, [144] noting his Honour was in dissent in the outcome.

72 (2013) 253 CLR 629.

73 *Pollentine v Bleijie* (2013) 253 CLR 629, 651 [49] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

74 (2014) 254 CLR 51, 89 [105] (citations omitted).

These contrasting views likely reflect different attitudes among the judges to the use of foreign law in this area of constitutional law. However, the trend in cases decided by the High Court concerning the *Kable* principle appears to be moving away from express reliance on *Mistretta*. The statements in the more recent cases, which have emphasised the 'essential' principles and doctrines of Chapter III as developed in a line of High Court decisions, demonstrate a desire to develop a uniquely *Australian* concept of Chapter III.

The Court's use of United Kingdom decisions

The Court's use of United Kingdom decisions in several Chapter III cases provides an additional and interesting case study. Although the strong historical connection between the constitutional frameworks of Australia and the United Kingdom has always by recognised by the Court, these textual and structural connections are much weaker in the context of Chapter III. In addition, the United Kingdom and Australian have diverged over more recent decades in light of the role of the European Court of Human Rights and the enactment of the *Human Rights Act* 1998 (UK) (HRA).[75] These differences have given rise to some interesting exchanges between Australian and United Kingdom courts that aptly demonstrate a range of approaches to the use of foreign decisions in Australian constitutional law.

A case study of Momcilovic v The Queen

One such instance arises from the adoption in the Australian State of Victoria of the *Charter of Human Rights and Responsibility* 2006 (Vic) (the *Charter*), which, like the *Human Rights Act* (UK) on which it was partly modelled, imposed a non-binding human rights framework premised on a 'weak form' model of human rights protection.[76] Under both the HRA and the *Charter*, courts are given the power to make non-binding 'declarations' that a law was inconsistent with human rights (the declaration power).[77] In addition, both Acts impose a requirement that other laws be interpreted to be compatible with human rights (the interpretive mandate).[78] Under these regimes, courts are not, however, given the power to disapply or rule invalid a law contravening human rights.

75 Adrienne Stone, 'Review Essay: Constitutional Orthodoxy in Australia and the United Kingdom: The Deepening Divide' (2015) 38 Melbourne University Law Review 836.

76 Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 American Journal of Comparative Law 707, 736–737.

77 *Human Rights Act 1998* (UK), s 4; *Charter of Human Rights and Responsibility 2006* (Vic), s 36(2).

78 Section 3(1) of the *HRA* provides that: 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.' Section 32(1) of the *Charter* provides that: 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a

In *Momcilovic v The Queen* (*Momcilovic*),[79] the High Court considered several constitutional law issues raised by the Victorian *Charter*. For our purposes it is useful to focus on two questions: firstly, whether the declaration power contravened the *Kable* principle because a 'non-binding' declaration power was incompatible with the 'institutional integrity' of the State court;[80] and secondly, the question of whether the interpretive mandate authorised 'remedial interpretation' of the kind that the House of Lords had held were authorised by the equivalent provision in the HRA.[81] Pursuant to remedial interpretations, statutes can be read as consistent with human rights even when there is no ambiguity in meaning.

The *Kable* challenge to the declarations power was narrowly rejected by the High Court.[82] But the Court's treatment of the question nonetheless reveals a very distinct approach to the interpretation of the declaration power. Specifically, the Court found that such powers were 'non-judicial' and, therefore, although such a power could be exercised by a *State* court, an equivalent power could not be conferred on an Australian federal court because there is a strict separation of judicial from non-judicial powers at the federal level mandated by Chapter III. This distinctive position makes it impossible for the Australian Parliament validly to enact an Australian equivalent of the HRA.

The Court's approach to the interpretive mandate is also somewhat distinctive. On the precise question at issue, the Court held that, as a matter of statutory construction, the interpretive mandate did not authorise 'remedial' interpretation.[83] There is a distinct possibility, moreover, that had the Court found that if remedial interpretations were permitted, it would also have found the mandate to be constitutionally invalid.[84] The distinctiveness of the Court's approach to the *Charter* is, at first glance, somewhat surprising. The High Court's reasoning is driven by a conception of what is intrinsic to the nature of a court and the exercise of judicial power. But the concept of judicial power draws in part on traditional

---

way that is compatible with human rights' (noting the slightly different wording of the two provisions).

79 (2011) 245 CLR 1.

80 The Court had to determine whether the declaration had been validly made by the Victorian Court of Appeal and in that context considered whether the non-binding declaration was, in effect, 'advice' to the Attorney-General and that courts could not, consistent with their institutional integrity, perform this advisory role: (2011) 245 CLR 1, 93 [174], 241 [661].

81 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 577 [50].

82 (2011) 245 CLR 1,67 [91]–[92] (French CJ (with Bell J agreeing at 241 [661]), 229 [605] (Crennan and Kiefel JJ). A majority of the Court found that a court exercising federal jurisdiction could not make a declaration of incompatibility consistent with Chapter III, making it constitutionally impossible for the federal Parliament to enact a similar model.

83 (2011) 245 CLR 1, 47–8 [46], 55 [62] (French CJ), 83–87 [146], [170]–[171] (Gummow J), 123 [280] (Hayne J), 210 [544]–[545] (Crennan and Kiefel JJ), 250 [684] (Bell J).

84 Indeed, the only judge who found that s 32 authorised a remedial interpretation—Heydon J.—also found that s 32 was invalid for contravening the requirements of Chapter III. *Momcilovic* (2012) 245 CLR 1, 183–4 [454] and concerns along these lines may underlie other judges' reasons as well.

understandings of the role of courts[85] and on such questions the Australian and United Kingdom courts might be expected, by virtue of their common heritage, to hold similar views.[86]

There is revealing commentary on other aspects of the 'interpretive' mandate that gives some insight to the judicial mindset. The relevant provision of the *Charter*—s 32—included a requirement that 'International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.'[87] The Court gave this provision a cautious reading. Chief Justice French's observations are illustrative in this regard; his Honour noted that this provision[88]

> does not authorise a court to do anything which it cannot already do. The use of comparative materials in judicial decision-making in Australia is not novel. Courts may, without express statutory authority, refer to the judgments of international and foreign domestic courts which have logical or analogical relevance to the interpretation of a statutory provision. If such a judgment concerns a term identical to or substantially the same as that in the statutory provision being interpreted, then its potential logical or analogical relevance is apparent.

His Honour went on to say:[89]

> Nevertheless, international and foreign domestic judgments should be consulted with discrimination and care. Such judgments are made in a variety of legal systems and constitutional settings which have to be taken into account when reading them. What McHugh J said in *Theophanous v Herald & Weekly Times Ltd* is applicable in this context:
>
> > The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscience advertence, by reason of their common language or culture.
>
> Despite our common legal heritage, that general proposition is relevant today in reading decisions of the courts of the United Kingdom, especially in

85 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 307.

86 The relevance of the historical functions of courts is relevant to the determination of the nature of judicial power. See, e.g., *Pasini v United Mexican States* (2002) 209 CLR 246 (on the 'chameleon power'); *Thomas v Mowbray* (2007) 233 CLR 307, 357 [120]–[121] (on the use of historical analogy to characterise a novel statutory power as judicial). See also Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia*, 4th ed. (LexisNexis Butterworths 2018) 551.

87 Section 32(2).

88 (2011) 245 CLR 1, 36–7 [18] (citation omitted).

89 (2011) 245 CLR 1, 37–8 [19] (French CJ) (citations omitted).

> relation to the *Human Rights Act 1998* (UK) ("the HRA"). It is appropriate to take heed not only of Lord Bingham of Cornhill's remark about the need for caution "in considering different enactments decided under different constitutional arrangements", but also his observation that "the United Kingdom courts must take their lead from Strasbourg."

The High Court, in *Momcilovic*, clearly regarded the HRA, together with the supra-national structures provided for by the European Convention on Human Rights and its enforcement by the European Court of Human Rights, as a critical point of divergence between the two systems. The Court did not hesitate to forge its own path with respect to human rights protection. Justice Gummow explained his view of the divergence:[90]

> The system of federal government in Australia is constructed upon the recognition that there rests upon the judicature 'the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised' Judicial review of both the validity of legislation and the lawfulness of administrative action is thus an accepted part of the Australian legal landscape. By contrast, in the United Kingdom, ... Diceyan notions of parliamentary sovereignty remain influential. Those notions appear to be treated as compatible with the existence of European structures of law-making and adjudication and with the application of the [Human Rights Act 1998 (UK)] as some superior form of law alongside the application of the European Convention by the European Court of Human Rights. In *Jackson v Attorney-General* [[2006] 1 AC 262 at 318], Baroness Hale of Richmond, whilst acknowledging that 'Scotland may have taken a different view', observed that '[t]he concept of parliamentary sovereignty', which since the seventeenth century 'has been fundamental to the constitution of England and Wales', means that 'Parliament can do anything'.

Comparing the reception of *Mistretta* with the reception of the case law surrounding the HRA might give rise to an impression of inconsistency. Or it might suggest that in the realm of Chapter III, because of the constitutional text and structure, the Court is more receptive to United States authority than to authority from the United Kingdom. However, the picture is considerably more nuanced. What is interesting to observe from these Chapter III case studies is the High Court's desire to develop and strengthen the Australian judicial system, and it appears to be very often through that lens that the Court makes use of foreign judgments. Thus, in cases in which the institutional role of the High Court specifically, or the powers of Australian courts generally, are under scrutiny, the Court may be more likely to tread cautiously when asked to embrace the approach of a foreign court. In *Momcilovic*, the Court was very reluctant to

90 (2011) 245 CLR 1 at 89–90 [156]–[157] (footnote omitted).

develop Australian interpretative principles in accordance with the UK courts, partly because this appears to have been perceived by the Court as a marked departure from traditional understandings of judicial power and the proper role of a court in Australia's constitutional system.[91] By contrast, the central purpose of the *Kable* principle, consistent with the Supreme Court's articulation of the incompatibility doctrine in *Mistretta*, is to protect and further entrench the institutional integrity of Australian courts from impermissible intrusion from the other branches of government. And the general trend in the early development of that principle was to draw upon the Supreme Court's decision to bolster the Australian approach.

A contrasting case study of Vella v Commissioner of Police (NSW)

At the risk of further muddying the waters, however, absent the special circumstances of the HRA, the Court does not always take such a cautious approach to the use of United Kingdom decisions in Chapter III cases. The recent case of *Vella* presents a contrasting case study.

In *Vella*, the Court had to determine the validity of a State legislative scheme that empowered a State court to make 'prevention orders' to restrain the liberty of a person without proof of the commission of a crime.[92] In other jurisdictions such a law may be challenged on the basis that it infringes fundamental rights to liberty, freedom of movement and association. In the High Court, absent a legislative or constitutional rights protection instrument, Mr. Vella argued that the law infringed the *Kable* principle because the power to make the preventative orders was not judicial. Critical to the constitutional challenge was an anterior question of statutory construction: whether or not the statute required the relevant court to make preventative orders that were proportionate to the nature of the potential offending. To determine this question, a majority of the Court considered and applied the Court of Appeal of England and Wales' interpretation of statutory language under a United Kingdom statute with similar wording in *R v Hancox*.[93]

In doing so, the majority relied upon a presumption of statutory interpretation according to which, once a form of words is given an authoritative interpretation, later uses of those words in subsequent statutes are given the same meaning.[94] This presumption had previously been applied, albeit infrequently, in Australia in much earlier High Court cases to assist in construing statutory language by reference to decisions of United Kingdom courts, long before the cleavage of

91 Sir Anthony Mason, 'Statutory Interpretive Techniques Under the Charter—Section 32' (2014) Judicial College of Victoria Online Journal 69 at 76.

92 *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW), ss 5 and 6.

93 *R v Hancox* [2010] 1 WLR 1434.

94 *Vella* (2019) 93 ALJR 1236, [19]–[20] (Kiefel CJ), [44], [52] (Bell, Keane, Nettle and Edelman JJ). *Townsville Harbour Board v Scottish Shire Line Ltd* (1914) 18 CLR 306, 315; *Re Carl Zeiss Pty Ltd's Application* (1969) 122 CLR 1, 6 (Kitto J).

Australian and English political and constitutional links. In those cases in which courts in the United Kingdom had given words a particular construction, later Australian laws using the same words were taken to have the same meaning.[95]

Relying on this presumption, a majority of the High Court in *Vella* adopted an interpretation given by the Court of Appeal of England and Wales even though that interpretation was influenced by the European Convention on Human Rights, which has no Australian equivalent.[96] For the majority, this was not an obstacle for applying the presumption and the Court of Appeal's reasoning.[97]

The effect of the majority's reasoning in *Vella* was that the law survived the constitutional challenge.

Conclusion

This chapter has told a rather complex story regarding the decisions of foreign and international courts in the High Court of Australia. The task of identifying a principled basis for this apparently divergent practice is made somewhat more difficult by the High Court's own silence on the issue. While the High Court regularly uses comparative law in constitutional adjudication as others have noted, close analyses of its use are relatively rare,[98] and generally speaking, the topic does not provoke robust debates of the kind seen in other jurisdictions.[99] The High Court's relative lack of reflection on the question may

95 *National Photograph Co of Australia Ltd v Mench* (1908) 7 CLR 481, 529 (O'Connor J); *Townsville Harbour Board v Scottish Shire Line Ltd* (1914) 18 CLR 306 at 315 (Griffith CJ), 321 (Isaacs J).

96 *R v Hancox* [2010] 1 WLR 1434, 1437 [10].

97 *Vella* (2019) 269 CLR 219, 233–234 [19] (Kiefel CJ), 244–245 [52] (Bell, Keane, Nettle and Edelman JJ).

98 Nicholas Aroney, 'Comparative Law in Australian Constitutional Jurisprudence' (2007) 26 *The University of Queensland Law Journal* 318 at 318. Although, as Aroney notes, a number of general comparisons have been undertaken between the constitutions and constitutional law of Australia and other countries have been undertaken. See, for example, Owen Dixon, 'Two Constitutions Compared' in *Jesting Pilate and Other Papers and Addresses* (Law Book Co of Australasia 1965); P. H. Lane, *The Australian Federal System with United States Analogues* (The Law Book Company Ltd. 1972); Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 Federal Law Review 1; Christopher Gilbert, *Australian and Canadian Federalism 1867–1984: A Study of Judicial Techniques* (Melbourne University Press 1986); William Rich, 'Converging Constitutions: A Comparative Analysis of Constitutional Law in the United States and Australia' (1993) 21 Federal Law Review 202; Adrienne Stone, 'Comparativism in Constitutional Interpretation (2009) New Zealand Law Review 45.

99 That is not to say that over the Court's history there have been no debates about comparative constitutional adjudication. Certain comparative methods have provoked robust debate amongst the justices of the Court and within Australian constitutional law scholarship. See the reasons of Justice McHugh and Justice Kirby in *Al-Kateb v Godwin* (2004) 219 CLR 562. See also Adrienne Stone, 'Comparativism in Constitutional Interpretation' (2009) New Zealand Law Review 45, 49–52.

simply be a habit of the common law mind. Applying the Australian common law method of adjudication, the Court has always made use of various sources, including foreign sources, as part of the ordinary way it goes about its work.[100] In a similar vein, writing extra-curially while Chief Justice of the High Court, Sir Anthony Mason has written that the nature of the Australian common law system and the non-binding nature of all foreign courts gives the High Court a 'freedom of choice' to consider *how* a particular problem should be resolved.[101] This freedom allows each individual justice to consider, cite, apply and reject the decisions of foreign and international courts when crafting Australian constitutional law.

Such an individualised practice makes it very difficult to reach any generally applicable conclusions about the way the Court uses foreign sources of law. The overview of a handful of prominent Chapter III cases demonstrates some cross-cutting currents. Where there is a close alignment between the Australian Constitution and another constitution (as in the connection between Chapter III and Article III), the Court has generally been more willing to embrace the law developed by foreign courts. But equally in some areas of Australian constitutional law, courts have focused on the development of an Australian constitutional law that conforms with Australia's unique constitutional context.

The use of any foreign source by the High Court will necessarily depend upon the issues raised in the case and, to a degree, the methodological preferences of the justices deciding it. It is also important to recall that when the High Court can have regard to its own precedents, it will do so. The Court's judgments heavily rely on and apply the holding of the Court's previous decisions and give persuasive weigh to its dicta. The resort to foreign law in constitutional adjudication is largely at the margins and the Court, most especially in the context of Chapter III, has developed a uniquely Australian constitutional law.

Bibliography

Aroney Nicholas, 'Comparative Law in Australian Constitutional Jurisprudence' (2007) 26 The University of Queensland Law Journal 318.

Cross Rubert, *Precedent in English Law* (Clarendon Press 1977, 3rd ed).

Dixon Owen, 'Two Constitutions Compared' in Owen Dixon (ed.), *Jesting Pilate and Other Papers and Addresses* (Law Book Co of Australasia 1965).

Finn Paul, *Law and Government in Colonial Australia* (Oxford University Press 1987).

100 Gageler and Bateman (n 46), Chapter 11. See also C. Saunders, 'Judicial Engagement with Comparative Law' in T. Ginsburg and R. Dixon (eds.), *Comparative Constitutional Law* (Edward Elgar Publishing 2011) 571.

Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law' (2006) Indiana Journal of Global Legal Studies 37, 42.

101 Mason (n 7) 93, 110.

Gageler Stephen and Bateman Will, 'Comparative Constitutional Law' in Cheryl Saunders and Adrienne Stone (eds.), *The Oxford Handbook of the Australian Constitution* (Oxford University Press 2020).

Gilbert Christopher, *Australian and Canadian Federalism 1867–1984: A Study of Judicial Techniques* (Melbourne University Press 1986).

Hanks Peter, Gordon Frances and Hill Graeme, *Constitutional Law in Australia* (LexisNexis Butterworths 2018, 4th ed).

Lane P.H., *The Australian Federal System with United States Analogues* (The Law Book Company Ltd. 1972).

Mason Anthony, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 Federal Law Review 1.

Mason Anthony, 'Fullagar Lecture: Future Directions in Australian Law' (1987) Monash University Law Review 150.

Mason Anthony, 'The Use and Abuse of Precedent' (1988) 4 Australian Bar Review 93.

Mason Anthony Sir, 'Statutory Interpretive Techniques Under the Charter—Section 32' (2014) Judicial College of Victoria Online Journal 69.

Nessen Paul E von, 'The Use of American Precedents by The High Court of Australia 1901–1987' (1992) 14 Adelaide Law Review 181.

Quick John and Garran Robert Randolph, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths 2002).

Rich William, 'Converging Constitutions: A Comparative Analysis of Constitutional Law in the United States and Australia' (1993) 21 Federal Law Review 202.

Saunders Cheryl, 'The Use and Misuse of Comparative Constitutional Law' (2006) Indiana Journal of Global Legal Studies 37.

Saunders Cheryl, 'Judicial Engagement with Comparative Law' in T Ginsburg and R Dixon (eds.), *Comparative Constitutional Law* (Edward Elgar Publishing 2011) 571.

Saunders Cheryl and Stone Adrienne, 'Reference to Foreign Precedents by the Australian High Court: A Matter of Method' (with Cheryl Saunders) in Tania Groppi and Marie-Claire Ponthereau (eds.), *The Use of Foreign Precedents by Constitutional Judges* (Hart 2013).

Saunders Cheryl and Stone Adrienne, 'The High Court of Australia' in Andras Jakab et al. (eds.), *Constitutional Reasoning* (Cambridge University Press 2017).

Smyth Russell, 'Citations by Court' in Michael Coper, Tony Blackshield, George Williams (eds.), *The Oxford Companion to the High Court of Australia* (Oxford University Press 2001), www.oxfordreference.com/view/10.1093/acref/9780195540222.001.0001/acref-9780195540222-e-59, access 28 June 2021.

Stellios James, *The Federal Judicature: Chapter III of the Constitution* (Lexis Nexus 2020, 2nd ed).

Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 American Journal of Comparative Law 707.

Stone Adrienne, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27 Sydney Law Review 29.

Stone Adrienne, 'Comparativism in Constitutional Interpretation' (2009) New Zealand Law Review 45.

Stone Adrienne, 'Review Essay: Constitutional Orthodoxy in Australia and the United Kingdom: The Deepening Divide' (2015) 38 Melbourne University Law Review 836.

Stone Adrienne, 'Judicial Reasoning' in *The Oxford Handbook of the Australian Constitution* (Oxford University Press 2018) 479.

Topperwien, B., 'Foreign precedents' in Michael Coper, Tony Blackshield and George Williams (eds.), *The Oxford Companion to the High Court of Australia* (Oxford University Press 2001), www.oxfordreference.com/view/10.1093/acref/9780195540222.001.0001/acref-9780195540222-e-160, access 28 June 2021.