Mutual Borrowing and Judicial Dialogue Between the Apex Courts of Australia and the United Kingdom

By Mary Arden and James Edelman*

I. Introduction

The common law is one of England's greatest exports. The more common it remains, the more cogent it will be. It is inevitable that common law jurisdictions will diverge in some applications of the common law in areas where local influences, such as the indirect effect of domestic statutes, play a part. But in areas where the common law is concerned with more universal issues, and not substantially affected by local considerations, the interrelationship between common law jurisdictions is a powerful force for the common law to "work itself pure", to use the expression of Lord Mansfield.[1]

One significant factor in the interrelationship between common law jurisdictions is the interaction of the apex courts in those jurisdictions. However, there has been little study of how the development of the common law is affected by particular relationships between courts or particular differences between courts. This article contributes to that understanding by focusing upon the relationship between the apex courts in the UK and Australia on which each of us sits or has sat: the United Kingdom Supreme Court (UKSC) and the High Court of Australia (HCA). The relationship between, on the one hand, the UKSC or its predecessor, the Appellate

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* Both authors sit or have sat on their respective countries' apex courts. The Rt Hon. Lady Arden DBE was a Justice of the Supreme Court of the United Kingdom from 1 October 2018 to 23 January 2022. The Hon. Justice Edelman is a Justice of the High Court of Australia. This article is a synthesis and expansion of the papers which the authors gave on 15 October 2020 on "Contrasts between the High Court of Australia and the Supreme Court of the United Kingdom" at a webinar organised by the Hellenic Australian Lawyers' Association, to whom the authors express their thanks. The authors thank their judicial assistant and associates for assistance: Annabelle Atkins, Annabel Beech, Angela Kittikhoun, and Leila Hunnam-Driscoll. The description of statutory provisions and other matters is as at 1 May 2021 unless otherwise stated.

[1] *Omychund v Barker* (1744) 1 Atk. 21 at 33; 26 E.R. 15 at 23 (then William Murray, Solicitor General).

Committee of the House of Lords[2] and, on the other hand, the HCA, is one that has evolved over time. In particular, the HCA initially developed the common law in a subordinate role to the House of Lords. But the position has evolved to one in which the HCA and the UKSC now borrow from each other in the development of the common law.

Comparison of the substantive common law developed by our courts is a common matter for academic comment and discussion. The development by each court of the common law has been part of a dialogue between the two courts, sometimes intermediated by important academic comment. What is far less well known is how our courts are similar or different in their conventional practices—those procedures and processes that are not usually set out in statutes or other written rules. A comparison of these conventional practices and procedures is useful for all courts when considering how to develop or improve their own practices. But, perhaps more fundamentally, an understanding of these practices, and particularly the ways in which they differ, can reveal the context in which the dialogue occurs for the separate development of the common law by the apex courts in our two jurisdictions and might further advance dialogue between our courts beyond the substance of the common law to include also the institutional machinery by which the common law is developed by our courts.[3]

Against that background, we begin with a brief account of the evolution of the relationship between the courts before going on to give examples of how they have referred to and borrowed from one another and, importantly, developed a judicial dialogue. We then turn to the area of conventional practices which shape the context in which this dialogue can occur but upon which little has been

[2] Unless otherwise stated, references in this article to the House of Lords are to the Appellate Committee of the House of Lords, which was the final court of appeal in the UK prior to the creation of the UKSC. The UKSC inherited all the powers of the Appellate Committee as well as its jurisprudence in relation to the conduct of appeals, and the UKSC follows the decisions of the Appellate Committee to the same extent as its own decisions, and its own decisions to the same extent that the Appellate Committee followed its own decisions, as to which, see *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234; [1966] 3 All E.R. 77 (*Austin v Southwark LBC* [2010] UKSC 28; [2011] 1 A.C. 355 at [24] and [25].

[3] At the time of writing there is no established pattern of informal dialogue through meetings between the two courts, given the distance, but individual Justices meet from time to time.

written, perhaps due to their non-public nature. We describe and compare some of the important conventional practices and analyse how they differ.

II. Historical Evolution of the Relationship

The UKSC and the HCA came into being in different ways. The UKSC is much younger than the HCA—it was set up only in 2009,[4] as the successor to the House of Lords. While the UK does not have a written constitution, the HCA was established through the written Constitution of Australia.[5] What is similar, however, is that neither court has responsibility for the administration of the lower courts of its respective country—neither the state nor the federal courts in Australia, nor the courts of England and Wales,[6] Scotland or Northern Ireland in the UK.

Regarding the relative status of the two courts, the HCA is no longer bound by decisions of some English courts, as it once was. Prior to the abolition of appeals from the HCA to the Privy Council,[7] Australian courts were bound by the decisions of the Privy Council on appeals from Australia. In practice, Australian courts also treated themselves as bound by decisions of the House of Lords from which the Privy Council took most of its judges. Decisions of the Court of Appeal of England and Wales were also followed if they had finally settled a question of law after full consideration. In 1948, in the HCA, Dixon J. said that it was best to avoid diversity in the development of the common law merely because the HCA held a different opinion.[8] But by 1963, and since becoming Chief Justice, Dixon C.J.'s resolve had weakened. He said that the HCA should no longer follow decisions of the House of Lords at the expense of its own opinions.[9] This

[4] Pursuant to the Constitutional Reform Act 2005 (UK), s.23. As to the basis it was created, see fn.3 above.
[5] The Constitution, s.71 provides: "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes."
[6] At the present time the legal systems of England and Wales are unified and so references in this article to England should be read as including Wales, even if not expressly mentioned.
[7] References to the Privy Council are to the Judicial Committee of the Privy Council.
[8] *Wright v Wright* [1948] HCA 33; (1948) 77 C.L.R. 191 at 210–211.
[9] *Parker v The Queen* [1963] HCA 14; (1963) 111 C.L.R. 610 at 632.

conclusion was accepted in 1967 by the Privy Council in a case concerning exemplary damages.[10] As the jurisdiction of the Privy Council was eroded by a series of Australian statutes, there was corresponding diminution of the direct authority of the Privy Council and, indirectly, of English courts.[11]

Following the almost-complete abolition of appeals from Australia to the Privy Council,[12] in a decision in 1986 the HCA considered remarks by an Australian intermediate appellate court that it was bound to follow decisions of the Court of Appeal of England and Wales in the absence of "controlling authority".[13] In the HCA, four Justices (with whom the fifth agreed on this point)[14] disagreed, saying that there was no longer any rule of practice that required Australian courts to follow decisions of the House of Lords or of the Court of Appeal. They added that:

> "The history of this country and of the common law makes it inevitable and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of United Kingdom courts just as Australian courts benefit from the learning and reasoning of other great common law courts."[15]

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[10] *Australian Consolidated Press Ltd v Uren* (1967) 117 C.L.R. 221 at 241; [1969] 1 A.C. 590 at 644.
[11] Judiciary Act 1968 (Cth), s.3; Privy Council (Limitation of Appeals Act) 1968 (Cth); Privy Council (Appeals from the High Court) Act 1975 (Cth); Australia Act 1986 (Cth); Australia Act 1986 (UK).
[12] Leaving only a "theoretical possibility" in circumstances falling within s.74 of the Constitution: see *Attorney-General (Cth) v Finch (No. 2)* [1984] HCA 40; (1984) 155 C.L.R. 107 at 113. Today, the Justices of the UKSC are also the permanent members of the Judicial Committee of the Privy Council (JCPC). The JCPC continues to sit regularly to hear appeals from several Commonwealth countries which have provisions for appeals to the JCPC in their constitution and from UK overseas territories, Crown dependencies and sovereign military base areas. Some cases concern relatively small matters, but others concern proceedings which involve substantial sums of money or the financial services and banking industries in important offshore jurisdictions (see generally, Lady Arden, "The Judicial Committee of the Privy Council as an important source of financial services jurisprudence", 3 February 2020, *https://www.jcpc.uk/docs/speech-200203.pdf*).
[13] *Cook v Cook* [1986] HCA 73; (1986) 162 C.L.R. 376.
[14] *Cook* (1986) 162 C.L.R. 376 at 394.
[15] *Cook* (1986) 162 C.L.R. 376 at 390.

The following examples illustrate how, in some cases, the HCA and the successor to the House of Lords, the UKSC, have diverged while in other cases they have developed the common law by reference to one another's approaches.

1. Diverging approaches

In some cases, there has been a conscious divergence between the approaches taken by the HCA and the UKSC. In *Andrews v Australia and New Zealand Banking Group Ltd*,[16] the HCA held that a contractual term could be a penalty even if a required payment was not conditional upon breach. In *Cavendish Square Holding BV v Makdessi*,[17] the UKSC considered this approach but rejected it, insisting that a required contractual payment could be a penalty only if it was payable upon breach of contract. At one level, the divergence might be thought simply to be a difference in view about the correct approach, much like the earlier difference between the approaches taken by the two jurisdictions concerning exemplary damages.[18] But, at another level, and one that emerges from a recent monograph,[19] the difference might be an illustration of two rational doctrines developing in parallel.

On the English view, parties cannot agree to a remedy for breach which is of a nature which the law would never have permitted. On the Australian view, a security right must be limited to providing security, or as the HCA put it, a term "in the nature of a security" must not be "in terrorem of the satisfaction of the primary stipulation".[20] It is arguable that the description of both doctrines as "the rule against penalties" might conceal the existence of two doctrines, namely a rule against penalties and a rule limiting security rights, with different remedies. For instance, consider the disputed cl.5.1 and cl.5.6 in *Makdessi* by which if Mr Makdessi traded contrary to a restrictive covenant then he was not entitled to the final two instalments of the price paid for his shares by Cavendish (cl.5.1); and (ii) Cavendish would have a call option to buy Mr Makdessi's remaining shares, at a

[16] [2012] HCA 30; (2012) 247 C.L.R. 205.
[17] [2015] UKSC 67; [2016] A.C. 1172.
[18] *Australian Consolidated Press Ltd v Uren* (1967) 117 C.L.R. 221.
[19] N. Tiverios, *Contractual Penalties in Australia and the United Kingdom: History, Theory and Practice* (Alexandria: The Federation Press, 2019), at p.4. But although he describes both approaches as rational, he assumes that a legal system should choose between them.
[20] *Andrews v Australian and New Zealand Banking Group Ltd* (2012) 247 C.L.R. 205 at [10].

price excluding the value of the goodwill of the business. Arguably, it might not be inconsistent with the Australian decision in *Andrews* for an Australian court to ask, on the same fact pattern, whether cl.5.1 or cl.5.6 were terms that were conditional upon breach and, if so, whether those terms were so out of proportion with the interest protected that to enforce them would enable the parties to circumvent rules that limit the availability of legal remedies such as damages or disgorgement of profits. It might also, arguably, not be inconsistent with the English decision in *Makdessi* for a lower court to ask—on the approach of Lord Neuberger, Lord Sumption and Lord Carnwath that cl.5.1 and cl.5.6 were effectively price adjustment clauses and primary obligations—whether cl.5.1 or cl.5.6 were designed to secure the performance of the restrictive covenant and, as security rights, whether they were out of all proportion to the legitimate interest in enforcement of the primary obligation[21] so that they would not apply only to that extent.[22] The point is that although the result would be the same, the different approaches have different rationales with different consequences.

2. Cross-referring

In other cases, the common law in Australia has developed by borrowing from English law, and sometimes the flow of jurisprudence is in the other direction. Whether accepting or diverging from the UK, the HCA has often referred to apex court decisions in the UK. Similarly, Australian cases are often cited in the Court of Appeal of England and Wales, on which Lady Arden (as Arden L.J.) sat for 18 years, and even more so in the UKSC. Altogether, the relationship between the UKSC and the HCA has undoubtedly been fruitful. A recent example in each direction can be given.

i) The common law in Australia developing by reference to English law

In *R. (on the application of Lumba) v Secretary of State for the Home Department*,[23] a person had been detained unlawfully by the Secretary of State or prison authorities but could have been detained lawfully under powers vested in the person or body. *Lumba* was controversial and resulted in a split decision in the

[21] *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 C.L.R. 525 at [54].
[22] *Paciocco* (2016) 258 C.L.R. 525 at [248].
[23] [2011] UKSC 12; [2012] 1 A.C. 245.

UKSC. A majority held that only nominal damages were available for false imprisonment where detention would have lawfully occurred in any event: the rights of a claimant who has suffered no loss could be vindicated by nominal damages, a declaration, and, where necessary, exemplary damages.[24] A minority of three Justices would have awarded more than nominal damages (£500–£1,000) to vindicate the claimant's rights. As Lord Walker put it:

> "The notion that no more than nominal damages should ever be awarded for false imprisonment by the executive arm of government sits uncomfortably with the pride that English law has taken for centuries in protecting the liberty of the subject against arbitrary executive action."[25]

Several years later, in *Lewis v Australian Capital Territory*,[26] the HCA expressly followed the approach of the majority in *Lumba*, concluding that Mr. Lewis was entitled only to nominal damages since he suffered no adverse consequences caused by an imprisonment that could and would have occurred in any event. However, even the minority approach in *Lumba* would not have provided much assistance to Mr. Lewis because he sought AU $100,000 in damages, rather than around AU $1,000, which would have been the likely quantum of an award on the approach of the minority in *Lumba*.

ii) The common law in England developing by reference to Australian law

Clone Pty Ltd v Players Pty Ltd (In Liquidation)[27] concerned the equitable power of a court to set aside a perfected judgment. The HCA decided that the primary category where this power existed was in cases of actual fraud and that it was not a precondition to the exercise of the power that the party seeking to set aside the judgment exercised reasonable diligence to attempt to discover the fraud during the earlier proceeding. In so deciding, the HCA departed from the English approach described in obiter dicta in *Owens Bank Ltd v Bracco*[28] and preferred the approach of Handley J.A. in the Court of Appeal of the Supreme Court of New

[24] *Lumba* [2012] 1 A.C. 245 at [101], [237], [238], [335] and [361]–[362].
[25] *Lumba* [2012] 1 A.C. 245 at [181].
[26] [2020] HCA 26; (2020) 94 A.L.J.R. 740.
[27] [2018] HCA 12; (2018) 264 C.L.R. 165.
[28] [1992] 2 A.C. 443 at 483; [1992] 2 All E.R. 193 at 198.

South Wales.[29] Subsequently, in the case of *Takhar v Gracefield Developments Ltd*,[30] the UKSC also relied on the same judgment of Handley J.A. in holding that a lack of reasonable diligence of itself was not a bar to setting aside a judgment obtained by fraud. In a separate judgment, Lady Arden observed that the drafters of the Civil Procedure Rules applying in England and Wales might wish to consider whether to impose a procedural rule restricting a rescission action. She observed that the Australian and Canadian law was instructive, although it did not reflect a universal position in common law jurisdictions, and that in *Clone v Players* the HCA had only been concerned with a lack of reasonable diligence before the fraud was discovered.[31]

III. Ongoing Dialogue

It would, however, be an error to see the relationship between the HCA and the UKSC as one which has evolved to a point of merely using the corpus of decisions of the other as evidence of one choice that might be made in the development of the common law. The process of development of the common law is now much richer than that. The UKSC and the HCA develop the common law not merely by borrowing from one another but by a process of dialogue and mutual learning. Two examples can be given.

1. Remedies for claims arising where there has been illegality

In this example, the story begins in 1994. But first, it will be recalled that there is an ancient common law principle: *ex turpi causa non oritur actio*—no cause of action can be founded on an illegality. In *Tinsley v Milligan*,[32] the House of Lords approved a somewhat arbitrary exception to this principle. Two same sex partners had jointly bought a house to be used as a lodging house but registered the property in the name of only one of them so that the other could claim social security benefits. The two partners fell out. The partner in whose name the property was registered claimed the entire beneficial interest. The House of Lords

[29] *Toubia v Schwenke* [2002] NSWCA 34; (2002) 54 N.S.W.L.R. 46 (Heydon J.A. and Hodgson J.A. agreeing).
[30] [2019] UKSC 13; [2020] A.C. 450 at [49]–[50] and [65].
[31] *Takhar* [2020] A.C. 450 at [102].
[32] [1994] 1 A.C. 340; [1993] 3 All E.R. 65.

by a majority held that, if the other partner had contributed to the price, there was a presumption of resulting trust so that she could establish an equitable interest in the property without relying in any way on the underlying illegality. The result was that, if a claimant to an interest in property could establish title to property transferred under an illegal contract without relying on the illegality, they could recover their property but not otherwise. This distinction was somewhat arbitrary.

A similar fact pattern came before the HCA in *Nelson v Nelson*,[33] and the HCA declined to draw the same distinction. Deane J. and Gummow J. observed that the approach in *Tinsley v Milligan* depended on form at the expense of substance.[34] The wheel came full circle in *Patel v Mirza*,[35] where the UKSC adopted the HCA's approach in *Nelson v Nelson*. A lender had lent money for the purpose of unlawful insider dealing. The loan, however, was never used for this purpose and the lender sought to recover it. Unlike (as explained in the preceding paragraph) the claimant in *Tinsley v Milligan*, the claimant in *Patel v Mirza* had to rely on the illegal agreement of loan. The jurisprudence of the HCA was examined, and the UKSC noted how in *Nelson v Nelson*, a case which raised essentially the same issues as those in *Tinsley v Milligan*, the HCA took into account the ability of the Commonwealth to recover any social security benefits that should not have been received and similar matters, and decided that the court should not impose a further sanction on the wrongdoer by declining to enforce their equitable rights in the relevant property. The HCA took into account the proportionality of the result, and the conduct of the claimant.

In *Patel v Mirza*, the UKSC went on to decide that the two broad public policy reasons for the common law doctrine of illegality as a defence to a civil claim were, first, that a party should not be allowed to profit from their own wrong, and, secondly, that the law should be coherent and not self-defeating. The crucial question was whether the claim was harmful to the integrity of the legal system. The rule that a party to an illegal contract could not enforce a claim against the other party to the agreement if they had to rely on their own illegal contract to

[33] [1995] HCA 25; (1995) 184 C.L.R. 538.
[34] *Nelson* (1995) 184 C.L.R. 538 at 558.
[35] [2016] UKSC 42; [2017] A.C. 467.

establish the claim did not meet the requirement of coherence and integrity in the legal system and should therefore not be followed. Although other Commonwealth jurisprudence was relied on, the UKSC clearly drew considerable support from the decision of the HCA in *Nelson v Nelson*.[36] Because it related to essentially the same fact pattern as in *Tinsley v Milligan*, the decision of the HCA in *Nelson v Nelson* powerfully demonstrated that a more just and proportionate result could be reached which both prevented the parties to the illegal arrangement from receiving a windfall and facilitated the repayment to the state of the funds of which it had been defrauded.

In 2020, the UKSC decided two cases about the effect of illegality on the right of an injured party to recover damages in tort when the complainant had been involved in the commission of a criminal act. In *Stoffel & Co v Grondona*,[37] the appellant was held entitled to claim damages from her solicitors who had failed to register her interest in property even though her acquisition of the property was pursuant to a mortgage fraud to which she was party. In *Henderson v Dorset Healthcare University NHS Foundation Trust*,[38] the UKSC held that the appellant, who suffered from a mental illness, could not recover damages for clinical negligence for her detention following her conviction for the manslaughter of her mother. But these cases are consequential: the principle was established in *Patel v Mirza*.

2. Interpretation of written instruments and threshold of ambiguity

A second example is how the two courts deal with ambiguities in contracts and statutes. As we explain in this section, there is a small difference of approach between Australia and England and Wales in relation to the need for ambiguity before recourse can be had to parliamentary debates on questions of statutory interpretation and a potentially more significant difference in relation to whether ambiguity is required before recourse can be had to extrinsic material on questions of contractual interpretation. That ambiguity threshold as it applies to contracts is

[36] (1995) 184 C.L.R. 538.
[37] [2020] UKSC 42; [2021] A.C. 540.
[38] [2020] UKSC 43; [2021] A.C. 563.

an area where the HCA has begun to develop the common law by dialogue with the English courts.

In England and Wales, there is in general no ambiguity threshold in relation to either contracts or statutes.[39] So far as contracts are concerned, the court is required to consider the meaning of a term which the parties have used in their contract in its matrix of fact, and, while the court cannot take into account evidence as to the parties' negotiations or subjective intentions or actions on the basis of the contract, the court can and should consider anything which a reasonable person would have regarded as relevant, and which would have been reasonably available to both parties.[40] However, the courts of England and Wales, having considered decisions including those of the HCA, did not take this approach where the contract appears on a public register and a third party would have no means of knowing about the existence of the material in question.[41]

In statutory interpretation, too, the courts of England and Wales will commonly look at extrinsic materials available to Parliament which will show the mischief to which the legislation was directed. With one qualification, it does not have to be shown that the legislation is ambiguous.[42] That qualification relates to the

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[39] See *R. (on the application of Westminster City Council) v National Asylum Support Service* [2002] UKHL 38; [2002] 1 W.L.R. 2956 at [5], approved in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44; [2011] 1 A.C. 662 at [36].

[40] See, for example, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896; [1998] 1 All E.R. 98.

[41] *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736; [2013] Ch. 305, which considered the decision of the High Court of Australia in *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2007] HCA 45; (2007) 233 C.L.R. 528 cited in fn.48 below and the decision of the Court of Appeal of the Supreme Court of New South Wales in *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64.

[42] See, for example, *Royal Mencap Society v Tomlinson-Blake* [2021] UKSC 8; [2021] I.C.R. 758, where, in construing statutory provisions for calculating the national minimum wage, the UKSC took into account reports of the Low Pay Commission, a statutory body which was asked to recommend to the government how the national minimum wage should be calculated. The extrinsic material may be a Law Commission report, a select committee report, a departmental consultation paper or response to consultees or other authoritative and publicly available report. The court will therefore look at extrinsic material to determine the mischief to which the legislation was directed, and the purpose of the legislation (*R. (on the application of Spath Holme Ltd) v Secretary of State for the Environment, Transport and the Region*s [2001] 2 A.C. 349 at 397; [2001] 1 All E.R. 195 at 216–217 per Lord Nicholls). Such material may inform the court about the context and so influence its interpretation: see *Fothergill v Monarch Airlines Ltd* [1981] A.C. 251 at 281; [1980] 2 All E.R. 696 at 705–706 per Lord Diplock, and *Attorney General v Prince of Hanover* [1957] A.C. 436 at 460–461; [1957] 1 All E.R. 49 at 53 per Viscount Simonds. The materials may also show that there was an ambiguity which was not apparent from the statutory wording. But the issue will always remain what the words of the enactment mean.

circumstances in which a court can consider what was said in parliamentary debates. The courts of England and Wales will not look at what was said in parliamentary debates for the purpose of ascertaining the meaning of a statutory provision unless a number of conditions are fulfilled, one of which is that the provision is ambiguous or obscure or leads to absurdity.[43]

In Australia, it is uncontroversial that there is no ambiguity threshold at all when interpreting statutes.[44] Resort even to parliamentary debates is permissible without ambiguity.[45] But there has been vociferous debate about whether there is a threshold of ambiguity before the court can refer to contextual materials to interpret the meaning of words in written contracts and other instruments,[46] albeit it is also established in Australia that this is not possible where the instrument is part of a public register.[47]

The central issue of difference therefore between the two systems, derived from decisions of their apex courts, relates to the ambiguity threshold for the interpretation of contracts. Part of the reason for the debate in Australia arose from a perception by members of the HCA that intermediate appellate courts had followed the approach taken in England at the expense of what was thought to be binding reasoning in the HCA.[48] In other words, the rules of precedent were suggested to operate as a restraint upon the dialogue and development of the common law between Australia and England at the level of intermediate appellate courts. But, at least at the level of the HCA, in one decision since this debate

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[43] *Pepper v Hart* [1993] A.C. 593; [1993] 1 All E.R. 42. The other conditions are that the material consists of statements made by a minister or other promoter of the Bill and that those statements are clear.
[44] *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 C.L.R. 384 at 408.
[45] Acts Interpretation Act 1901 (Cth) s.15AB; Acts Interpretation Act 1931 (Tas) s.8B; Acts Interpretation Act 1954 (Qld) s.14B; Interpretation Act 1978 (NT) s.62B; Interpretation of Legislation Act 1984 (Vic) s.35; Interpretation Act 1984 (WA) s.19; Interpretation Act 1987 (NSW) s.34; Legislation Act 2001 (ACT) ss.141, 142.
[46] See *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45; (2011) 86 A.L.J.R. 1 and the discussion in J. Edelman "The Interpretation of Written Contracts" in C. Mitchell and S. Watterson (eds), *The World of Maritime and Commercial Law: Essays in Honour of Francis Rose* (Oxford: Hart Publishing, 2020), Ch.14.
[47] *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 C.L.R. 528.
[48] See *Western Export Services Inc v Jireh International Pty Ltd* (2011) 86 A.L.J.R. 1 at [3], referring to *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; (1982) 149 C.L.R. 337 at 352.

began, four Justices spoke of the relevance of extrinsic circumstances by reference to English decisions concerning commercial context and without suggestion of an ambiguity constraint.[49] The principal work used in England and Wales on contractual interpretation observes that the position in relation to the ambiguity threshold remains uncertain in Australia, with the authorities pulling in different directions as to whether ambiguity is a necessary pre-condition to recourse to extrinsic evidence.[50] The development has nevertheless been, and will no doubt continue to be, by reference to materials that include English law.

IV. Conventional Practice as a Source of Potential Mutual Learning

The process of dialogue between the UKSC and the HCA in the development of the common law does not occur in a vacuum. There are institutional forces that shape the way in which cases are received and heard in each jurisdiction. Those forces sometimes arise from constitutional and statutory requirements but more often than not they are the result of conventional practices. Despite the statutory foundation for the jurisdiction of the UKSC and the HCA, many practices adopted by each court in the process of adjudicating cases which establish the rules of common law are matters of unwritten convention and procedure, little known to the public, although not concealed. These practices and procedures are not direct reasons for any adoption or departure from approaches taken to the common law in either jurisdiction, but any commonalities and differences in approach to the process of decision making are matters that can indirectly affect the mutual development of the common law.

Although the comparative development of the common law by dialogue between the UKSC and the HCA is reasonably well known, the comparative operation of these conventional practices is not well appreciated. Such an appreciation,

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[49] *Electricity Generation Corp (t/a Verve Energy) v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 C.L.R. 640 at [35], referring, inter alia, to *Re Golden Key Ltd* [2009] EWCA Civ 636 at [28] per Arden L.J.

[50] K. Lewison, *The Interpretation of Contracts*,7th edn (London: Sweet & Maxwell, 2021) at pp.17–18. Compare J.D. Heydon, *Heydon on Contract* (Pyrmont: Thomson Reuters (Professional) Australia Ltd, 2019) at p.346, where it is argued that the position in Australia is that ambiguity is a necessary condition for the reception of extrinsic evidence in aid of contractual interpretation.

however, forms the setting in which dialogue between the two courts occurs and explains why the process of development of the common law is best approached as a dialogue rather than as a borrowing between institutions, which have different conventional practices. Perhaps most significantly, as appreciation of the differences in conventional practices grows, those conventions might themselves become part of a process of dialogue and development. We turn then to a comparison between these conventional practices.

1. Permission/special leave to appeal

It is important for an apex court to be able to limit the appeals it hears to the most important cases, and so it is unsurprising that appeals to both the UKSC and the HCA require an application for permission (UK) or special leave (Australia) to appeal. This is dealt with by a smaller number of Justices than would be required for a full hearing of an appeal. It appears that the two apex courts approach permission to appeal in a broadly similar way.

Most civil appeals to the UKSC require the permission of the court from which the appeal emanates or the permission of the UKSC itself. Applications for permission to appeal to the UKSC are considered by panels of three Justices. They are nearly always determined on paper, rather than at a hearing in open court. In determining whether or not to grant permission, the panel considers whether the application raises an arguable point of law of general public importance which ought to be considered by the UKSC at that time, bearing in mind that the matter will already have been the subject of judicial decision and will in most cases have already been reviewed on appeal. The parties are informed of the decision regarding permission and the outcome is also published on the UKSC's website.

In a criminal case for which a right of appeal exists in England and Wales or Northern Ireland, permission to appeal to the UKSC may in general be granted only if it is certified by the court below that a point of law of general public importance is involved in the decision of that court, and it appears to that court or to the UKSC that the point is one which ought to be considered by the UKSC.[51]

[51] See, in the case of England and Wales, Administration of Justice Act 1960 s.1(2) and Criminal Appeal Act 1968 s.33(2), as now amended in each case by the Constitutional Reform Act 2005.

No permission is required in a contempt application unless the order below was made on appeal.[52] If in a criminal case certification is required but the court below has not certified a point of law of general public importance, the UKSC has no jurisdiction.[53] No appeal lies to the Supreme Court from criminal proceedings in the High Court of Justiciary in Scotland,[54] unless in the course of criminal proceedings the High Court of Justiciary determines whether a public authority (including the court) has acted incompatibly with a right guaranteed by the ECHR. In that situation, the UKSC may hear an appeal on an arguable point of law of general importance against the decision of the High Court of Justiciary on that issue.[55]

Like the UKSC, most of the HCA's cases are appeals that come by a process of leave which, in the language of the Judiciary Act 1903 (Cth), is described as "special leave to appeal". Some of the matters that the court considers when deciding whether to grant special leave[56] include whether the matter raises a question of law that is of public importance, whether there are differences of opinion in Australian courts about the state of the law, and the interests of the administration of justice. There are no restrictions on criminal cases in the special leave process. Indeed, one of the most likely types of case to attract a grant of special leave if no point of public importance or difference of opinion in Australian courts is involved is where a convicted applicant serving a sentence of imprisonment satisfies the HCA that there is a strong likelihood that a miscarriage of justice has occurred.[57]

Certification is not required for appeals from original orders in contempt made by the court below (Administration of Justice Act 1960 s.13), or appeals against orders of the High Court in habeas corpus proceedings (Administration of Justice Act 1960 s.15), or civil appeals. For Northern Ireland, see Judicature (Northern Ireland) Act 1978 s.41(1) and (2), s.44(4) and s.45(3).

[52] Administration of Justice Act 1960 s.13. For Northern Ireland, see Judicature (Northern Ireland) Act 1978 s.44(4) as amended by the Constitutional Reform Act 2005 Sch.9 Pt 1 para.66(1) and (3).

[53] *Gelberg v Miller* [1961] 1 W.L.R. 459; [1961] 1 All E.R. 618; *Jones v DPP* [1962] A.C. 635; [1962] 1 All E.R. 569.

[54] Criminal Procedure (Scotland) Act 1995 s.124(2) (amended by the Scotland Act 1998 (Consequential Modifications) (No. 1) Order 1999 (SI 1999/1042) art.3, Sch.1 para.13(6)).

[55] Criminal Procedure (Scotland) Act 1995, s.288AA as inserted by the Scotland Act 2012 s.36. Leave is required unless the appellant is the Lord Advocate of Scotland or the Advocate General of Scotland.

[56] See Judiciary Act 1903 (Cth) s.35A.

[57] For a recent example see *Pell v The Queen* [2020] HCA 12; (2020) 94 A.L.J.R. 394. The same would apply with even greater force in the rare instances where the application for special leave is from a Crown appeal which has been allowed from an acquittal.

In 2016, the manner of determination of special leave applications in Australia was reformed in order to reduce unnecessary delay and expense to the parties. The reforms moved the HCA's approach to special leave closer to that of the UKSC in that many more decisions are now made on the papers. The reforms included the introduction of three panels, each comprised of two Justices, to determine on the papers whether an oral hearing of an application for special leave is warranted. Each of the six puisne Justices, that is each Justice other than the Chief Justice, sits on one panel for applications by unrepresented litigants ("unrepresented applications") and another panel for applications by represented litigants ("represented applications"). There are three panels for unrepresented applications and three panels for represented applications. Applications are collated by the Registry and sent to the panels on a monthly basis.

In respect of unrepresented applications, the HCA does not initially require the respondent to file submissions. If there is some merit in the application then the court will often require submissions in response before referring the application for an oral hearing, usually with a request for pro bono assistance for the applicant. In respect of these applications, and all other represented applications, within several weeks of receipt of each monthly allocation, each panel circulates memoranda to all Justices for comment upon any proposed dismissal without an oral hearing. If no oral hearing is required by any Justice, then a brief determination is published. The most common reason for the determination dismissing the application is that the application did not cast sufficient doubt upon the decision of the court below. In cases where liberty is not involved, the sufficiency of doubt that is required will often be informed by the public importance of the question raised.

Occasionally, special leave will be granted even without an oral leave hearing in cases such as where there is little doubt that the issue raised by the application is important, where the answer is not clear on the state of the law, and where the proposed grounds of appeal are precise. More rarely still, but particularly in cases where the issue appears to be important or the result unjust but there is doubt about the importance or where (such as in cases involving a considerable volume of material) there is uncertainty as to whether injustice will be sufficiently

exposed, the application can be referred for hearing by a Full Court[58] as if it were an appeal. If written or oral submissions reveal the issue not to be as important as it initially appeared or do not sufficiently expose the prospect of injustice then special leave might be refused during the oral hearing.

2. Composition of the bench for hearing an appeal

The practice of the UKSC as to the composition of the bench for any appeal is also different from that in the HCA. In the UKSC, normally the number of Justices assigned to sit on an appeal is five though it may be increased to seven or possibly nine. There are specified circumstances when this will happen, for example if a party wishes the court to depart from one of its precedents.[59] On two occasions, 11 Justices have sat, and those two cases were *R. (on the application of Miller) v Secretary of State for Exiting the European Union* (on whether the executive could bring to an end the UK's membership of the EU without the consent of Parliament),[60] and *R. (on the application of Miller) v Prime Minister* (on whether the prorogation of Parliament for five weeks was lawful).[61] There is no principle that there should be a majority of the Justices or indeed all available Justices sitting on a case because the appeal raises a finely balanced question.[62]

There has been criticism of the position in the UK—some argue that the court should sit *en banc* so that the view of the Justices on an issue can be considered to be final.[63] One point is clear and fundamental. No Justice can ask to sit on a particular case. The decision as to which Justices sit on a particular case is made

[58] The constitution of a "Full Court" is defined in s.19 of the Judiciary Act 1903 (Cth) as "any two or more Justices of the High Court sitting together" but, in practice, a reference to the Full Court for hearing will be to the court sitting as five or seven Justices.
[59] The following criteria are set out in the Rules of the UKSC to be used when considering whether more than five Justices should sit on a panel: if the court is being asked to depart, or may decide to depart from a previous decision, if the case is of high constitutional importance, if the case in one where a conflict between decisions in the House of Lords, the Privy Council and/or the UKSC has to be reconciled and a case raising an important point in relation to the ECHR.
[60] [2017] UKSC 5; [2018] A.C. 61.
[61] [2019] UKSC 41; [2020] A.C. 373.
[62] In any event s.42 of the Constitutional Reform Act 2005 (UK) requires the panel to consist of an uneven number of judges in most situations.
[63] See, for example, S. Brown (who, as Lord Brown of Eaton-Under-Heywood, was a Justice of the Supreme Court from 2009–2012 and prior to that a member of the House of Lords from 2004–2009) "In praise of dissenting judgments", *Prospect Magazine*, 28 May 2020.

by the Registrar under the supervision of the President and Deputy President of the UKSC.

The Constitutional Reform Act 2005 (UK) contains provisions which have been used on at least two occasions to deal with the situation that can arise if, between the hearing and delivery of the judgment, a Justice is unable to continue because of ill-health or death. The presiding Justice on the appeal may direct that the panel hearing the appeal is still duly constituted even if one or more of its members is unable to continue, but only if the parties agree, the panel still consists of at least three Justices, and at least half of those Justices are permanent Justices. If the number of Justices on the panel is reduced to an even number and the members of the panel are equally divided on the case, the case must be reargued before a properly constituted panel. There is no statutory provision which attributes different precedential weight to decisions of the Supreme Court according to the number of Justices sitting on the relevant case, but this may be tacitly accepted in some cases. For instance, a larger panel of Justices usually sits on cases in which the court is being asked to depart from one of its earlier decisions.

In Australia, s.71 of the Constitution provides that the HCA shall consist of a Chief Justice and so many other Justices, not fewer than two, as Parliament prescribes. Initially the court was comprised of three Justices, including the Chief Justice. In 1906, this was expanded to five and then later, in 1912, to seven where it has remained.

There are no statutory rules about how many Justices are to sit on a Full Court or how the composition of the Full Court bench on a particular case in the HCA is to be determined so, again, this is determined by convention. The convention, unlike the UKSC, and more like the Supreme Court of the United States, is for all available Justices of the HCA to sit on cases of particular importance. This includes almost all constitutional cases, and it usually also includes cases where an earlier decision of the HCA is challenged, and cases where there is a point of particular significance involved. Otherwise, the common size of the bench is five of the seven Justices. That panel is initially proposed by the Chief Justice. But, as Kirby J. observed, care:

> "has always been taken ... to treat such assignments as 'proposals'. All of the Justices enjoy a constitutional commission for the performance of their

> duties. Famously, Justice Starke not infrequently obliged his tipstaff to 'pull up my chair' in appeals for which he had not been rostered to sit".[64]

Occasionally, the Full Court will sit on appeals with only three Justices, as was common when there was a considerable backlog of appeals that had been brought directly to the HCA, as of right at that time, from the Supreme Court of Nauru.[65] Like the UKSC, the precedential force of a decision of the HCA given by a panel of three Justices will tacitly be less than that of a panel of seven Justices, although the same general criteria will be employed in deciding whether to overrule the earlier decision.[66]

3. Judicial conferences

The practices as to deliberations are fundamentally similar. If anything, the UKSC practice is more formal but that is because every Justice sitting on the appeal is given an opportunity to speak about the case and the junior Justice has the advantage of being the first to do so. The principal substantive difference seems to be in the attribution of authorship of judgments.

We start with deliberations or judicial conferences. The practice of the UKSC in relation to deliberations on a particular case, that is, formal judicial conferences before or after a case has been heard, is well known, and did not change even during the COVID-19 crisis in 2020–21 when remote working was necessary. There is a short meeting before the case starts, mainly to deal with any procedural issue but also to discuss any substantive issue which the Justices think needs to be covered at the hearing. Immediately after the hearing, the Justices will generally meet, and each Justice will give their view, starting with the most junior. There is likely to be a further discussion at the same meeting when all those views have been expressed. The presiding Justice will then choose who is to write the lead judgment. When that lead judgment is circulated, Justices may either agree or add their own judgments, or dissent. They are not encouraged to write separate judgments unless they have something material to add which the writer of the lead judgment cannot incorporate. As a rule, there is no further meeting when the draft

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[64] M. Kirby "Maximising Special Leave Performance in the High Court of Australia" (2007) 30 U.N.S.W.L.J. 731 at 741.
[65] Nauru (High Court Appeals) Act 1976 (Cth) s.5(1). But see Judiciary Act 1903 (Cth) s.23.
[66] *John v Commissioner of Taxation (Cth)* [1989] HCA 5; (1989) 166 C.L.R. 417 at 438–439.

is available, or at any other point, save in cases where some difficulty has arisen which needs face-to-face discussion. So, the UKSC does not have a series of Justices' conferences as some supreme courts do.

In the HCA, the Justices also have a conference both before and after each hearing. The conferences before a hearing also tend to be brief and to involve discussion of any issues concerning the progress of the hearing, such as any particular issues that one or more Justices think need to be ventilated, issues which have not been raised in sufficient detail, or matters concerning how the hearing might progress. There is also a conference following the hearing. That conference is informally chaired by the Chief Justice or the presiding Justice from the hearing. The modern post-hearing conference originated in 1998 out of a suggestion from the presiding Justice that the others might join her for a cup of tea afterwards to discuss the case.[67] It was not initially, and has never become, a formal event. There is no order of speaking and no formal agenda. Tea is still served during the conference. Although only one post-hearing conference is usual, there is sometimes a second conference if issues arise in the first conference which require further reflection and later discussion. On rare occasions there might be memoranda exchanged after the second conference, and this can lead to a third conference.

At the conclusion of the conference, the presiding Justice will usually allocate to one Justice the task of writing reasons which, by convention, are the reasons which are the first circulated to the other Justices. The allocation is usually to a Justice whose views are shared by all others or who is likely to form part of a majority. Like the UKSC, those who are not certain that they will dissent from that view will usually wait until the allocated writer circulates a judgment before deciding whether it is necessary to write separately. After circulation, there are several options. One possibility is to circulate a concurrence, which will conventionally be followed by an invitation from the author to join in the judgment. Another is to send a memorandum to the author, and any others who have joined, suggesting additions or amendments, which, if accepted, would typically be followed by a concurrence and joinder. A third possibility, if the

[67] The case was *Garcia v National Australia Bank* [1998] HCA 48; (1998) 194 C.L.R. 395.

reasoning process of the concurring Justice is different in material respects, is to write a concurring judgment.

One quirk of the Australian process of producing joint judgments, in comparison with the UKSC process of judgments with which there is expressed agreement, is that there can sometimes be a guessing game conducted by members of the academic or practising profession about the identity of the author of the judgment. Some studies have begun to employ computational linguistics to attempt to identify authorship of various judgments of the HCA. Whatever the merit in doing so, there are difficulties with such analyses. One difficulty is that sometimes joint judgments contain large parts written by different Justices in close collaboration with each other. And, even where the majority of the writing is by one Justice, some joint judgments will contain substantial contributions or amendments from all Justices who are party to the judgment. Even brief additions might sometimes be a crucial sentence or paragraph which shapes the ratio of the decision. Another difficulty for identification of a single author is that, since the joinder in a judgment signifies agreement with what has been written rather than authorship, it is not even necessary for the author of the judgment to be a party to it. An example is a case where the lead judgment was written by one Justice and three others joined in that judgment. A dissent was then circulated with which the remaining two Justices joined. The Justice who wrote the lead judgment then changed their mind and joined the dissent, which then became the majority judgment. The effect was that the dissenting judgment bore the names of three Justices, none of whom was the author of it.

Like the HCA, the UKSC does not adhere to any convention that the lead judgment should be a majority judgment or where there is no majority, a plurality judgment, as is commonly found in judgments of the Supreme Court of the United States. But in the UKSC, by contrast with the HCA, Justices who agree with a judgment are not treated as the authors of it but as simply agreeing with it. However, there are some signs of an increase in the practice of two Justices producing a single, jointly authored judgment, as opposed to a judgment written by a single Justice with which other Justices agree. This enables the burden of producing the lead judgment to be shared and it has the benefit that the two lead

judgment writers can treat each other as a sounding board before sharing the draft with their colleagues.

4. Balancing written and oral argument

Technological change has made it easier to file long written submissions, and both apex courts have sought to balance written and oral submissions and to ensure that both are focused. The UKSC receives substantial amounts of both written and oral argument. There may well also be interveners.[68] However, the UKSC sets timetables for the parties' oral submissions. In general, an appeal lasts one to one-and-a-half days. Both forms of argument are considered helpful but time limits on oral arguments are strictly enforced: the advocates have to plan their time carefully.

The UKSC has recently imposed a flexible outer limit of 50 pages on written cases, though this may be extended. Previously, the court was sometimes receiving written submissions of 100 pages. The present published practice is as follows:

> "A party's case is the statement of a party's argument in the appeal. The Court does not prescribe any maximum length but the Court favours brevity and a case should be a concise summary of the submissions to be developed. A case should not (without permission of the Court) exceed 50 pages of A4 size and in most cases fewer than 50 pages will be sufficient."[69]

There is then a reference to requirements such as font size and line spacing etc.

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[68] For example in the recent case of *G v G* [2021] UKSC 9; [2021] 2 W.L.R. 705, there were six interveners: (1) the Secretary of State for the Home Department (written and oral submissions); (2) the International Centre for Family Law, Policy and Practice (written and oral submissions); (3) Reunite International Child Abduction Centre (a charity supporting families involved with international child abduction issues) (written submissions only); (4) Southall Black Sisters (a not-for-profit organisation highlighting and challenging all forms of gender-related violence against women, particularly Black (Asian and African-Caribbean) women) (written submissions only); (5) United Nations High Commissioner for Refugees (written and oral submissions); and (6) International Academy of Family Lawyers (written submissions only).

[69] UKSC Practice Direction 6 para.6.3.1.

In Australia, procedures as to written and oral argument are similar to those of the UKSC. In both cases, oral argument is longer and more important than it is in the Supreme Court of the United States, which limits the parties to one-half hour unless a contrary direction is provided.[70] Written cases in the HCA are usually confined to 20 pages.[71] However, even though interventions from parties other than Attorneys-General are not common, oral submissions by one party often last for half a day or longer. Nevertheless, the advent and development of written submissions has substantially reduced the time taken by oral submissions. It is doubtful whether the HCA will ever again hear a case over 24 days as it did in the *Communist Party* case[72] or 39 days as in the *Bank Nationalisation* case.[73]

5. Appointment and mandatory retirement age of Justices

Appointment and mandatory retirement age are two of the areas where there is greatest divergence between the conventional practices of the two apex courts. In the UK, a special selection commission selects persons for appointment to the UKSC.[74] The commission is convened by the Lord Chancellor when a vacancy occurs, and generally consists of five members, of whom two members are judges and three are persons drawn from the appointment commissions for the jurisdictions of England and Wales, Scotland and Northern Ireland, one of whom must be a lay person.[75] The chair of the commission is generally the President of the UKSC,[76] and a second judge may be drawn from any part of the UK. Selection must be on merit.[77] The minimum qualifications for applicants and provisions about the procedure are contained in the Constitutional Reform Act 2005 (UK) (as amended by the Crime and Courts Act 2013 (UK)). In making selections, the commission must ensure "that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom".[78] That means in practice

[70] Rules of the Supreme Court of the United States r.28.3.
[71] See High Court Rules 2004 (Cth) rr.44.02.1, 44.03.1 and 44.04.1.
[72] *Australian Communist Party v Commonwealth* [1951] HCA 5; (1951) 83 C.L.R. 1.
[73] *Bank of New South Wales v Commonwealth* [1948] HCA 7; (1948) 76 C.L.R. 1.
[74] Constitutional Reform Act 2005 s.26 as amended by the Crime and Courts Act 2013 Sch.13 para.3.
[75] See the requirements of Constitutional Reform Act 2005 s.27(1B) as amended by the Crime and Courts Act 2013 Sch.13 para.4.
[76] Supreme Court (Judicial Appointments) Regulations 2013 (SI 2013/2193) reg.11.
[77] Constitutional Reform Act 2005 s.27(5).
[78] Constitutional Reform Act 2005 s.27(8).

that there must be at least one Justice of the Supreme Court from each of Scotland and Northern Ireland.[79] The commission must consult the existing Justices and certain other members of the senior judiciary in the UK and certain members of the executive in each of the jurisdictions of the UK.[80] When the selection commission has completed its processes, it recommends a name to the Lord Chancellor, who may accept or reject the name or require the name to be reconsidered.[81] If the Lord Chancellor approves the name it is sent to the Prime Minister for approval. The Prime Minister must approve the name submitted to him or her.[82] The appointment is made by HM The Queen on the advice of the Prime Minister.

In recent years, there have been active steps taken to increase the pool of candidates who apply for appointments with a view to increasing diversity on the UKSC. As of 19 April 2021, the Justices consisted of ten men and two women. Justices have usually been selected from serving judges of lower courts, but one Justice has been chosen directly from the Bar[83] and one from the academic profession.[84] The selection commission may prefer one candidate over another, where two persons are considered to be of equal merit, for the purpose of increasing diversity.[85]

Currently Justices[86] must retire when they reach the age of 70. However, on 8 March 2021, the Lord Chancellor announced in Parliament the intention of bringing forward legislation to increase the mandatory retiring age to 75 years for all members of the judiciary when parliamentary time allows.[87]

By contrast, appointments to the HCA, which are formally made by the Governor General in Council,[88] are not the result of any formal selection process. This approach bears some broad similarity to the approach that used to be taken to

[79] In addition, Lord Lloyd-Jones has knowledge and experience of the law of Wales.
[80] Supreme Court (Judicial Appointments) Regulations 2013 (SI 2013/2193) reg.18.
[81] Supreme Court (Judicial Appointments) Regulations 2013 (SI 2013/2193) reg.20.
[82] Constitutional Reform Act 2005 s.26(3).
[83] Lord Sumption.
[84] Lord Burrows. Lord Burrows was also a member of the Bar, recorder and deputy judge of the High Court.
[85] See Constitutional Reform Act 2005 s.63(4) as amended by the Crime and Courts Act 2013 Sch.13 para.10(3).
[86] With the one exception of Lady Arden, who was appointed a judge before the age limit was reduced to 70 years, and to whom, therefore, the age limit of 70 years does not apply.
[87] *Hansard*, HC, Vol.690, col.23WS (8 March 2021).See now cl.109 of the Public Service Pensions and Judicial Offices Bill [HL] currently before Parliament.
[88] Constitution s.72(i).

appointments to the House of Lords. Although, by convention, consultation is usually very extensive, the only statutory requirement is that the Attorney General of the Commonwealth consult with the Attorneys General of the States in relation to the appointment.[89] The membership of the HCA has not historically been a diverse group. In nearly 120 years, and 55 Justices, there have been six female Justices (presently three of the seven Justices are women, including the Chief Justice), two Justices identifying as gay or lesbian, two Jewish Justices, but none from many of the other minority groups in the Australian community. Since a constitutional amendment in 1977, the age limit of a HCA Justice has been fixed at 70 years.[90]

6. Remuneration and pensions

In both jurisdictions, it is recognised as a principle of constitutional importance that judges should receive appropriate remuneration and benefits. In the UK, judicial salaries are decided following the recommendation of the Senior Salaries Review Body (SSRB), which is independent of government, and can be found on the UK Government's website.[91] In general, they are higher than the average wage but candidates for appointment are often giving up the possibility of earning more in the private sector. Pension benefits are also decided following the recommendation of the SSRB, and the pension scheme for judicial office-holders is for UK judges at all levels, and not just the Supreme Court. For senior judges, the scheme used to be a final salary scheme but in line with the reform of pensions in the public sector generally in 2015 the scheme was replaced by a new scheme under which several changes were made. In particular, it provided for benefits to be calculated on the average salary of the judges over his or her career on the bench. Moreover, for the first time, pension contributions paid by judges into their pension schemes prior to appointment had to be aggregated with contributions on the bench for the purpose of calculating tax limits on such contributions.

The 2015 scheme, among other factors, led to significant difficulties in the recruitment and retention of judges. Some declined appointment, and others who

[89] High Court of Australia Act 1979 (Cth) s.6.
[90] Constitution s.72.
[91] See *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836749/judicial-salary-schedule-oct-2019.pdf*.

accepted appointment opted out of the 2015 scheme altogether. The SSRB carried out a Major Review of the Judicial Salary Structure in 2018. It reported that the conditions of service for a judge had become much less attractive to potential applicants. Changes to tax and pensions meant that the total net remuneration for a new High Court judge, for example, was worth £80,000 less than it was 10 years previously (a 36% decrease).[92] The SSRB recommended significant increases in the remuneration of judges. Following this report, the government responded by agreeing to make increases in judicial remuneration and, once litigation over other legal difficulties in the 2015 pension scheme had been concluded, reforming the 2015 pension scheme.[93] Reforms to the 2015 scheme are being made and are expected to be fully implemented by April 2023.

In Australia, federal judicial salaries, including those of Justices of the HCA, are determined by an independent statutory body called the Remuneration Tribunal,[94] which is subject to the constitutional prohibition against diminution of a Justice's remuneration while the Justice remains in office.[95] The salaries of state judges are also determined by independent means.[96] Judges across Australia also usually receive a judicial pension on retirement, although the rules concerning pension entitlements vary slightly across the States and between State and federal courts. The position in respect of federal Justices, including HCA Justices, under the Judges' Pension Act 1968 (Cth), is that Justices who have reached at least the age of 60 and who have 10 or more years of service are entitled to a pension of 60% of the Justice's salary upon retirement[97] with reduced benefits for fewer years of

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[92] Senior Salaries Review Body, *Major Review of Judicial Salary Structure 2018* (TSO, 2018), *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/751903/Supp_to_the_SSRB_Fortieth_Annual_Report_2018_Major_Review_of_the_Judicial_Salary_Structure.pdf*.

[93] Ministry of Justice, *Government Response to Report No.90 by the Senior Salaries Review Body Major Review of the Judicial Salary Structure* (TSO, 2019), CP 107, *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/806480/government-response-ssrb-june-2019.PDF*.

[94] See Remuneration Tribunal Act 1973 (Cth). See also Remuneration Tribunal (Judicial and Related offices—Remuneration and Allowances) Determination 2020.

[95] Constitution s.72(iii).

[96] Determined by or on the recommendation of independent bodies: Statutory and Other Offices Remuneration Act 1975 (NSW); Salaries and Allowances Act 1975 (WA); Remuneration Act 1990 (SA). Pegged to salary of Federal Court Justice: Judicial Remuneration Act 2007 (Qld); Judicial Entitlements Act 2015 (Vic). Determined by Auditor General: Supreme Court Act 1887 (Tas.).

[97] Judges' Pension Act 1968 (Cth) ss.6 and 6A.

service.[98] There are also additional benefits such as pension entitlements upon retirement on the grounds of permanent disability or infirmity,[99] and provision upon death for spouses and eligible children of a deceased Justice.[100] Upon retirement, most jurisdictions permit a judge to practise without loss of the judicial pension, and although very few retired judges exercise the liberty to practise in court it is common for retired Justices to act as arbitrators and mediators. Some exceptions are: state judges in Western Australia, where any judge who practises as a barrister, solicitor, or proctor following their retirement forfeits the entitlement to a pension;[101] and state judges in Victoria, where the entitlement to a pension is suspended for any period that the retired judge takes up practice.[102]

7. Extra-curial work

There is a statutory prohibition against a Justice of the HCA holding any other office of profit within Australia.[103] In addition, Ch.III of the Constitution may impact upon on the out of court work that the Justices may do. The Constitution has been interpreted as conferring on the HCA judicial power and, subject to very confined exceptions,[104] judicial power only.[105] That requirement involves some consideration of what is a judicial power and what is a non-judicial power.

These legal rules in Australia are complemented by a strong convention that Justices of the HCA do not sit on other courts or tribunals, nor do they act as royal commissioners or other executive officers, during their tenure. Some exceptions to this modern rule occurred during the World Wars and post-war reconstruction. Griffith C.J. and Rich J. chaired Royal Commissions during the First World War. Rich J. served as a member of the official Australian delegation to the Third

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[98] Justices who reach the mandatory retirement age and have less than ten, but not less than six, years of service, are entitled to a pension at the annual rate of 0.5 per cent of the appropriate judicial salary for each completed month of service: Judges' Pension Act 1968 (Cth) ss.6(2D) and 6A(4). Justices who have less than six years of service are entitled to a lump sum benefit at a level sufficient to meet the superannuation guarantee requirements, plus interest: See Superannuation (Productivity Benefit) Act 1988 (Cth) s.3 definition of "qualified employee".
[99] Judges' Pension Act 1968 (Cth) s.6(2).
[100] Judges' Pension Act 1968 (Cth) s.4AA and 4AB.
[101] Judges' Salaries and Pensions Act 1950 (WA) s.15.
[102] Constitution Act 1975 (Vic) s.83(4)(ii).
[103] High Court of Australia Act 1979 (Cth) s.10.
[104] Most obviously a legislative power to make rules of court, see High Court Rules 2004 (Cth).
[105] See *R. v Kirby Ex p. Boilermakers' Society of Australia* [1956] HCA 10; (1956) 94 C.L.R 254.

Assembly of the League of Nations in 1922. During the Second World War, McTiernan J. undertook a top-secret wartime commission of inquiry, while Latham C.J. and Dixon J. served as Ministers to Japan and Washington respectively. Dixon J. also served as United Nations Mediator between India and Pakistan in the Kashmir conflict beginning in 1950.

No such limitations or statutory provision about these matters exist in the UK. Judges, for instance, have often been chairs of tribunals, inquiries or Royal Commissions. Clearly, their appointment to such positions is appropriate only if the matter is not party political. The judiciary must keep a close eye on the appointment of judges to such positions because, obviously, the inappropriate appointment of a judges could reduce public confidence in the impartiality of the judiciary. There is some debate as to what sitting judges can properly do outside sitting as a judge. Some judges, for instance, have become involved with charities or public bodies or corporations. The general view is that sitting Justices can accept these appointments provided they do not impact on their judicial work in any way. Many Justices accept honorary positions in universities, such as that of chancellor or as chair of the appeals board in disciplinary matters. Other Justices sit on law reform committees set up by the Lord Chancellor. The President of the UKSC is a member of the House of Lords (legislative body) in order to represent the interests of the UKSC in any debate in the legislature.

8. Promoting public awareness of the courts' roles

Both the UKSC and the HCA seek to promote public awareness of their role. In the UK, the confidence of the public is recognised as a matter of great importance to the courts. The UKSC in particular spends a great deal of time on outreach and education. As much information about cases and judgments as is possible is made available over the internet. There are often tours around the building to help visitors, particularly school children, understand what Justices do, moots are held for university students, and short sessions are held with schools in which Justices participate. At the end of the day, the work of the courts depends on public support.

Improving public access is equally important in Australia. The Justices deliver numerous speeches during the year, at venues across Australia, many of which are

published on the HCA website. One recent innovation in the HCA has been a Constitutional Centre which, together with attending court hearings, has been a focal point for the tens of thousands of school children who visit the court annually. The HCA building serves also as a lecture hall, a chamber for orchestras, and a moot court throughout the year. Since moving into the HCA building in Canberra in 1980, the court has regularly sat on circuit in other states and territories,[106] usually with two weeks of circuit sittings each year and sittings for oral special leave hearings in Sydney and Melbourne. Before the COVID-19 crisis in 2020–21, the UKSC too had started to sit out of London in Belfast, Edinburgh and Cardiff, and it may also sit in other cities when that becomes possible once more.

9. Improving public access to the apex courts

Both the UKSC and the HCA have sought to use new technologies to bring proceedings before each court to a wider section of the public and to hold remote hearings where in-person hearings would not have been possible. In addition, both courts seek to make use of electronic documents rather than hard copies in order to improve efficiency.

The proceedings of the UKSC are not televised but they are generally streamed simultaneously with the hearing on the internet. They are then recorded and made available on the UKSC's website and so they can be viewed either at the time of the hearing or thereafter without limit of time. During *R. (on the application of Miller) v Prime Minister*,[107] there were about 150,000 hits to the website at the start of the proceedings. The UKSC's use of the internet gave it a considerable advantage in moving to online hearings during the COVID-19 crisis in 2020–21. The UKSC sat largely as usual but with the hearings conducted through the internet. The Justices were filmed as they listened to the case, generally from home. Counsel addressed the court also on camera from their homes or from chambers. This system worked well and will continue in use for so long as it is needed.

[106] The first High Court sitting in the Northern Territory was in 2018 to hear the appeal in *Northern Territory v Griffiths* [2019] HCA 7; (2019) 93 A.L.J.R. 327.
[107] [2020] A.C. 373.

As to the future, there are many walks of life where the habit of remote meetings built up during the COVID-19 crisis will remain even after the crisis is over and there is no longer any official advice about home-working or other relevant restrictions to be taken into account. The UKSC, however, recommenced in person hearings in June 2021. The continuation of remote hearings was opposed by the bar. On 5 May 2021, the bodies which represent the bars of the UK and Ireland issued a joint press release stating that they were opposed to the continued use of remote hearings in any court after the COVID-19 crisis is over for the hearing of any application which was dispositive in whole or part of a case, unless the parties and the court agreed.[108] They cited several factors, including their experience that judicial interaction is different and less satisfactory. Almost all hearings in the UKSC are appeals not interim hearings.

On e-filing and electronic case management, the position of the UKSC is that the Registry is able to accept and issue applications and appeals electronically. During the COVID-19 crisis in 2020–21 it moved to a paperless system both for lodging papers and hearing appeals. The UKSC has an electronic case management system, but it does not as of December 2021 yet have functions of direct case management such as a case tracker or the facility for litigants to check the progress of their case online.

The Australian approach to media and technology is similar. Prior to the COVID-19 outbreak, hearings were available to be viewed online after a short delay and transcripts can also be read online. Very shortly before the COVID-19 outbreak in 2020, the HCA moved to a new system of electronic case management, including a new Digital Lodgement System, which also made electronic hearings easier and much more efficient and effective. Up to 10 connections for counsel and solicitors, as well as Justices in different locations, are possible. There have been the inevitable hiccups, such as where internet connections of counsel have not been as strong as needed, or where counsel and Justices are interrupted due to short time lags in reception, but in many cases the hearings during the COVID-19

[108] See *https://www.barcouncil.org.uk/resource/four-bars-statement-on-the-administration-of-justice-post-pandemic.html*.

electronic appeal period were a reasonable substitute for in-person hearings for judges and counsel. The HCA will return to in-person hearings in 2022.

V. Concluding Thoughts

The Australian and United Kingdom legal systems have been close for many years, and the practical problem of distance is diminishing due to the increase in use of remote communication which became necessary during the COVID-19 crisis in 2020–21. It has been, we think, some time, if at all, since there has been any judicial contribution to the process of identifying similarities and differences in the practices of the apex courts in our two countries. This is particularly important because the process of developing the common law is not merely one of borrowing but also one of judicial dialogue which occurs in the context of different conventional practices of each apex court. As with many comparative exercises, even a limited exercise such as this one serves to shed new light on our own systems, to highlight fresh perspectives on the administration of justice in our respective countries, and to renew bonds. As the world becomes smaller, there is an increasing role for judicial dialogue of this kind. In the case of our courts with their shared traditions, exercises of this kind of dialogue may also make it easier for Justices of each court to reach out to the other for inspiration for or confirmation of their own decisions and may in future also lead to closer alignment of the conventional practices which form the institutional structure within which each court develops the common law.