The common law in Australia 40 years on from the *Australia Act 1986* (Cth)

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Marking the fortieth anniversary of the Australia Act 1986 *(Cth), Chief Justice Gageler examines the enduring significance of the* Australia Act *for the nature of the common law in Australia and its relationship with the Australian Constitution. He contrasts Sir Owen Dixon's conception of the common law as an antecedent and transnational body of law supplying the ultimate foundation of the Australian Constitution with an account which recognises that the common law is law made by judges operating within a judicial hierarchy. Chief Justice Gageler argues that, by terminating the remaining legislative and judicial links between Australia and the United Kingdom, the* Australia Act *established the Australian Constitution as autonomous higher law and completed the conditions necessary for the emergence of a single common law of Australia. The common law in Australia is consequently understood not as antecedent or superior to the Constitution, but as a subordinate body of judge-made law deriving its authority from and necessarily developing in conformity with the Constitution.*

Introduction

2026 marks the fortieth anniversary of the commencement of the *Australia Act 1986* (Cth). That anniversary makes this an appropriate occasion to reflect on the enduring impact of the *Australia Act* on the discernment and declaration of the common law in Australia. I use the term "the common law" in its widest sense to refer to judge-made law and to include judge-made principles of equity and statutory interpretation.

Forty years on from the commencement of the *Australia Act*, we take for granted that:

- the common law in Australia is the common law of Australia;
- the source of the authority of the common law of Australia is the Australian Constitution; and

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- the common law of Australia must conform to the Australian Constitution.

Forty years ago, none of those three propositions would have been beyond controversy. Indeed, Sir Owen Dixon, whose intellectual influence then remained ascendant, had taken a very different view of the common law in Australia and of the relationship between the common law and the Australian Constitution. The significance of the *Australia Act* to our contemporary understanding of our foundational legal structure what I want now to explore.

The Dixonian view

Dixon had first publicly articulated his view of the common law in Australia and of its relationship with the Australian Constitution in an address titled "Sources of Legal Authority" which he gave to the International and Comparative Law Section of the American Bar Association in Detroit in 1943 when serving as Australia's Ambassador to the United States.[1] He elaborated on it in a paper he gave when Chief Justice of Australia at the 10th Australian Legal Convention held under the auspices of the Law Council of Australia in Melbourne in 1957. The paper was titled "The Common Law as an Ultimate Constitutional Foundation".[2] Both the paper and the address have been published in each edition of his collected extra-judicial work, *Jesting Pilate*.[3]

Dixon's address to the American Bar Association was delivered just five years after the Supreme Court of the United States in *Erie Railroad Co v Tompkins*[4] had overruled its own century-old precedent of *Swift v Tyson*.[5] In overruling *Swift v Tyson*, the Supreme Court in *Erie* discarded the century-long understanding of the existence of a "federal general common law" in the discernment and application of which federal courts had exercised independent judgement. The Supreme Court replaced it with an understanding of the common law administered by federal courts being confined to the common law of each State as ultimately declared by the highest court of each State.

In that context, Dixon selected as a foil for the expression of his own view a well-known statement which had been made by Oliver Wendell Holmes Jr in *Black & White Taxicab & Transfer Co v Brown & Yellow Taxicab & Transfer Co*[6] in criticism of *Swift v Tyson*. The explanation of the

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1 (1943) 17 *Australian Law Journal* 138.
2 (1957) 31 *Australian Law Journal* 240.
3 See Judge Woinarski (ed), *Jesting Pilate And Other Papers and Addresses* (Law Book, 1965); Judge Woinarski (ed), *Jesting Pilate And Other Papers and Addresses* (WS Hein, 2nd ed, 1997); Susan Crennan and William Gummow (eds), *Jesting Pilate And Other Papers and Addresses* (Federation Press, 3rd ed, 2019).
4 (1938) 304 US 64.
5 (1842) 41 US 1.
6 (1928) 276 US 518 at 533–534.

nature of the common law contained in the statement had been influential in the reasoning in *Erie* which led to the rejection of *Swift v Tyson*.

Holmes had earlier proclaimed with characteristic pithiness that "[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified". That was so, Holmes had said, notwithstanding that some decisions with which he disagreed, including *Swift v Tyson*, seemed to him to have "forgotten [that] fact".[7] His statement in *Black & White Taxicab* was a development of that theme. What Holmes had then said was this:[8]

> "Books written about any branch of the common law treat it as a unit, cite cases from [the Supreme Court of the United States], from the Circuit Courts of Appeals, from the State Courts, from England and the Colonies of England indiscriminately, and criticise them as right or wrong according to the writer's notions of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else."

After quoting that statement of Holmes in full, Dixon told his American audience in 1943 that "[i]n Australia we subscribe to a very different doctrine". He told them that "[w]e conceive [of] a State as deriving from the law; not the law as deriving from a State". He told them that whilst we do not "treat the common law as a transcendental body of legal doctrine", "we do treat it as antecedent in operation to the constitutional instruments which first divided Australia into separate colonies and then united her in a federal Commonwealth". The common law of which Dixon spoke, he then said, was "the general common law" not only of Australia but of "every jurisdiction of the British Commonwealth where the common law [ran]" which it was the duty of the courts to "ascertain as best they may". Even the doctrine of parliamentary supremacy, Dixon told his American audience, "developed under the common law", "forms part of the common law", and

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7 *Southern Pacific Co v Jensen* (1917) 244 US 205 at 222.

8 (1928) 276 US 518 at 533–534.

"may be considered as deriving its authority from the common law rather than as giving authority to the common law".[9]

Dixon told his Australian audience much the same thing in 1957. He quoted Professor Hearn to the effect that "[t]he English constitution forms part of the Common Law"[10] and explained that "[a]t bottom it is because of this fact that in the working of our Australian system of government we are able to avail ourselves of the common law as a jurisprudence antecedently existing into which our system came and in which it operates".[11] "We act every day", he said, "on the unexpressed assumption that the one common law surrounds us and applies where it has not been superseded by statute".[12] The doctrine of parliamentary supremacy, he repeated, "is part of the constitutional law of the United Kingdom and is to be ascribed to the common law".[13]

The Dixonian view was therefore founded on the conception of the common law in Australia forming part of an antecedent and transnational, and in that sense transcendent albeit not transcendental, body of judge-made law. In taking that view of the common law, Dixon remained consistent throughout his long judicial career. A close reading of *Parker v Queen*[14] will reveal that when Dixon CJ famously declared, in the year of his retirement, that the decision of the House of Lords in *Director of Public Prosecutions v Smith*[15] "should not be used as authority in Australia at all", he was not declaring the common law of Australia to have been different from the common law of England. He was using the authority of his office to give effect to his profoundly held opinion that the decision of the House of Lords as to the content of the transcendent common law was "misconceived and wrong".

On the Dixonian view, the common law as an antecedent and transcendent body of judge-made law comprised a constitutional dimension in so far as the common law incorporated the doctrine of the supremacy of the Parliament of the United Kingdom. Given that the Australian Constitution had derived its original legal force from having been enacted by that Parliament as a

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9 Owen Dixon, "Sources of Legal Authority" in Susan Crennan and William Gummow (eds), *Jesting Pilate And Other Papers and Addresses* (Federation Press, 3rd ed, 2019) 246 at 247.

10 Owen Dixon, "The Common Law as an Ultimate Constitutional Foundation" in Susan Crennan and William Gummow (eds), *Jesting Pilate And Other Papers and Addresses* (Federation Press, 3rd ed, 2019) 203 at 203, quoting William E Hearn, *The Government of England: Its Structure and Its Development* (Longmans, Green, Reader, and Dyer, 1867) at 1.

11 Owen Dixon, "The Common Law as an Ultimate Constitutional Foundation" in Susan Crennan and William Gummow (eds), *Jesting Pilate And Other Papers and Addresses* (Federation Press, 3rd ed, 2019) 203 at 204.

12 Owen Dixon, "The Common Law as an Ultimate Constitutional Foundation" in Susan Crennan and William Gummow (eds), *Jesting Pilate And Other Papers and Addresses* (Federation Press, 3rd ed, 2019) 203 at 204–205.

13 Owen Dixon, "The Common Law as an Ultimate Constitutional Foundation" in Susan Crennan and William Gummow (eds), *Jesting Pilate And Other Papers and Addresses* (Federation Press, 3rd ed, 2019) 203 at 206.

14 (1963) 111 CLR 610 at 632.

15 [1961] AC 290.

schedule to the *Commonwealth of Australia Constitution Act 1900* (Imp), the common law thereby provided the ultimate source of its authority.

Professor Goldsworthy has pointed out[16] that Dixon at no time suggested that the common law admitted of any qualification to the doctrine of the supremacy of the Parliament of the United Kingdom. For that reason, Dixon cannot be understood to have embraced "common law constitutionalism" of the kind later to emerge in some academic[17] and judicial[18] writing in the United Kingdom and New Zealand, or of the kind manifested in the recent decision of the Supreme Court of Fiji in which "the common law of Fiji" was held to provide a "rule of recognition" according to which some parts of Fiji's 2013 Constitution were recognised as "legally effective" whilst others were not.[19]

Nor, perhaps, was Dixon "suggesting that the common law is superior or inferior to the Constitution" as distinct from simply "setting the scene in which the Constitution operates".[20] Nevertheless, Dixon was clear and consistent in locating the ultimate source of the authority of the Australian Constitution in the common law as he conceived of it.

When he presented his paper at the Australian Legal Convention in 1957, Dixon had the confidence and grace to submit it to commentary. One of the commentators, Professor Derham, then Professor of Jurisprudence at Melbourne Law School and later to become founding Dean at Monash Law School, had the capacity and courage to subject it to criticism.

Translated into my own words, Derham's essential criticism of Dixon's view of an antecedent and transcendent common law was that it left out of account a fundamental feature of the common law: that, as judge-made law, the common law is law made by judges within a judicial hierarchy. Derham pointed out that it was only through the existence of appeals to the Privy Council providing "a unified system of judicial authorities to declare what the common law is" that the "common law" was able to be treated as "one pervasive antecedent system of jurisprudence".[21] Understood in light of their different judicial hierarchies, Derham pointed out,

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16 Jeffrey Goldsworthy, "The Constitution and its Common Law Background" (2014) 25 *Public Law Review* 265 at 268.

17 eg Lord Woolf, "Droit Public – English Style" [1995] *Public Law* 57; John Laws, "Law and Democracy" [1995] *Public Law* 72; TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001); Thomas Poole, "Questioning Common Law Constitutionalism" (2005) 25 *Legal Studies* 142.

18 eg *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398, cited in *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10; *R (Jackson) v Attorney General* [2006] 1 AC 262 at 302–303 [102]; *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868 at 910–913 [42]–[51].

19 *In the Matter of a Reference by Cabinet for an Opinion from the Supreme Court on a Matter Concerning the Interpretation and Application of Sections 159 and 160 of the Constitution of the Republic of Fiji* [2025] FJSC 20.

20 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 126.

21 (1957) 31 *Australian Law Journal* 240 at 249.

there was no juristic difference between the apparently disparate and piecemeal common law in the United States and the apparently transcendent common law in Australia. Consistently with Holmes' identification of the common law as the "articulate voice of some sovereign or quasi-sovereign that can be identified", each was explicable as the work-product of the system of courts having authority to ascertain and declare it.[22]

The burden of the thesis I now present is that the course of authority in Australia since the commencement of the *Australia Act* has vindicated Derham's criticism of the Dixonian view of the nature of the common law in Australia. In consequence, it has exposed the Dixonian view of the relationship between the common law in Australia and the Australian Constitution to have been upside down.

The enactment and impact of the *Australia Act*

The Commonwealth Parliament enacted the *Australia Act* under s 51(xxxviii) of the Australian Constitution at the request of each State Parliament. The commencement of the *Australia Act* at 5.00 am Greenwich Mean Time on 3 March 1986 was the ultimate, carefully choreographed and technically precise, legislative step in what Barwick CJ had a decade before referred to as the "inevitable progression" of the Commonwealth of Australia from the status of a British colony to the status of an independent nation in external and internal affairs.[23] The progression had until that moment occurred for the most part in barely perceptible increments through "the silent operation of constitutional principles",[24] the most significant earlier formal legislative step having been the adoption by the Commonwealth Parliament through the enactment of the *Statute of Westminster Adoption Act 1942* (Cth) of the *Statute of Westminster 1931* (Imp) with retrospective effect from 3 September 1939 having been the day of Australia's entry into World War II.

The *Australia Act* is described in its long title as "[a]n Act to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation". Together with the *Australia (Request and Consent) Act 1985* (Cth), by which the Commonwealth Parliament concurrently requested and consented to the enactment by the Parliament of the United Kingdom

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22 (1957) 31 *Australian Law Journal* 240 at 248–249, quoting *Southern Pacific Co v Jensen* (1917) 244 US 205 at 222.

23 *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 373. See generally Leslie Zines, *The High Court and the Constitution* (Butterworths, 4th ed, 1997), ch 13.

24 *Port MacDonell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 at 378, quoting *The Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393 at 413, in turn quoting *Cooper v Stuart* (1989) 14 App Cas 286 at 293.

of legislation in substantially identical terms, the *Australia Act* was described in its second reading speech as "giv[ing] effect to the agreement between the Commonwealth Government and all State governments to seek the removal of the outmoded residual constitutional links that still exist[ed] between Australia and the United Kingdom Parliament, Government and judicial system".[25] The continuing existence of those residual links was described in its explanatory memorandum as having "long been anachronistic".[26]

Professor Twomey, in her comprehensive study of the subject, referred to the *Australia Act* and the legislation in substantially identical terms which was in fact enacted by the Parliament of the United Kingdom and which commenced simultaneously as together "Australia's Statutes of Independence".[27] The High Court in a series of cases has taken the more robust position, consistent with that adopted by successive Commonwealth Governments and favoured by Professor Zines,[28] that the operative provisions of the *Australia Act* derive legal force as Australian law from s 51(xxxviii) of the Australian Constitution alone and that the request for and consent to the enactment of the corresponding legislation by the Parliament of the United Kingdom was unnecessarily cautious and ultimately redundant.[29]

My present concern is less with the sufficiency of s 51(xxxviii) of the Australian Constitution to sustain the *Australia Act* than with the legal effect of operative provisions of the *Australia Act* concerning the exercise of legislative and judicial power. The provisions concerning the exercise of legislative power include the provision forever terminating the power of the Parliament of the United Kingdom to legislate for Australia.[30] They also include the provisions forever terminating restrictions on State legislative power which had until then derived from the continuing application to State legislative power of the *Colonial Laws Validity Act 1865* (Imp),[31] in the same way as similar restrictions on Commonwealth legislative power had earlier been terminated by the *Statute of Westminster*.[32] The provision concerning the exercise of judicial power is that which finally terminated appeals to the Privy Council "from or in respect of any decision of

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25 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 13 November 1985 at 2685.

26 Australia, House of Representatives, *Australia Bill 1986; Australia (Request and Consent) Bill 1985*, Explanatory Memorandum at 1 [2].

27 Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, 2010).

28 Leslie Zines, *Constitutional Change in the Commonwealth* (Cambridge University Press, 1991) at 20–21.

29 *Sue v Hill* (1999) 199 CLR 462 at 490–492 [60]–[65]; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 339 at 408–409 [9]; *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 570–571 [66]–[67]; *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 251–252 [74].

30 Section 1 of the *Australia Act 1986* (Cth).

31 Sections 3 and 5 of the *Australia Act 1986* (Cth).

32 Sections 2 and 8 of the *Statute of Westminster 1931* (Imp), contained in Sch 1 to the *Statute of Westminster Adoption Act 1942* (Cth).

an Australian court",[33] appeals to the Privy Council from the High Court and all other federal courts having been earlier abolished through the cumulative effect of the *Privy Council (Limitation of Appeals) Act 1968* (Cth) and the *Privy Council (Appeals from the High Court) Act 1975* (Cth).

The immediate and enduring impact of the provisions of the *Australia Act* concerning the exercise of legislative power was to establish the autonomous status of the Australian Constitution as higher Australian law. The effect was thereby to supersede any notion of the binding nature of the Australian Constitution being found in the supremacy of the Parliament of the United Kingdom and in turn to supplant the basis on which the transcendent and constitutive common law as conceived of by Dixon had provided the ultimate foundation for the Australian Constitution through its recognition of that supremacy. The immediate and enduring impact of the provision concerning judicial power was in any event to remove the conditions which had been pointed out by Derham to have been necessary for the transcendent and constitutive common law as conceived of by Dixon to have existed and to establish in their place the conditions for the emergence of a distinctive common law both in and of Australia. The impact of the provisions in combination has been to ensure the subordination of the common law of Australia to the Australian Constitution and thereby to shape its development in conformity with the Australian Constitution.

Let me explain those impacts.

The legal status of the Australian Constitution

If the Australian Constitution derived its original legal force from having been a schedule to the *Commonwealth of Australia Constitution Act 1900* (Imp) enacted in the exercise of the recognised authority of the Parliament of the United Kingdom to legislate for Australia, and if that legislative authority has been terminated, what gives the Australian Constitution its continuing legal force?

The simplest, most elegant and most statesmanlike answer to that question was given by the Constitutional Commission (comprising Sir Maurice Byers QC, Sir Rupert Hamer, the Hon EG Whitlam QC and Professors Campbell and Zines) in 1988. The Constitutional Commission clearly and boldly proclaimed that the termination by the *Australia Act* of the power of the Parliament of the United Kingdom to legislate for Australia had "the effect of doing away with the concept of the [Australian Constitution] having an inferior status to any other law".[34] This is not to say that the Australian Constitution is "because it is" but rather that the Australian Constitution retains within the Australian system of government which it created and sustains the same status

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33 Section 11 of the *Australia Act 1986* (Cth).

34 *First Report of the Constitutional Commission*, vol 1 (1988) at 187.

as higher law which it has always had without need to find an external source for that internally recognised status. As the Constitutional Commission explained, "the *Commonwealth of Australia Constitution Act* 1900 (including the Constitution) remains part of our law. It was law because it was made by an external sovereign power (although, of course, that power acted in accordance with the will of the electorates in the colonies). It is now law because it is the constitutive instrument that creates the Commonwealth and defines the structure and powers of the organs of government in Australia". [35]

Implicit in the reasoning of the Constitutional Commission is that, despite the attraction of the positivist's quest for a "grundnorm", to sustain the status of the Australian Constitution as higher law in Australia there is no need to engage in a process of regression so as to find that its status as higher law rests on some other foundation. As Goldsworthy has explained, it is enough that the Australian Constitution is "fundamental law": its legal authority "does not need the support of deeper legal principles".[36] There is simply no need to find "turtles all the way down".

To view the Australian Constitution as autonomous higher law is not inconsistent with the location of sovereignty under the Australian Constitution in the Australian people whose approval in a nationwide referendum the Australian Constitution requires for its own amendment.[37] Nor at a more prosaic level is it inconsistent with the preamble to and covering clauses of the *Commonwealth of Australia Constitution Act* being capable of amendment under the Australian Constitution whether through legislation enacted by the Commonwealth Parliament under s 51(xxxviii) at the request of each State Parliament[38] or through the direct effect of an appropriately formulated amendment to the Australian Constitution.[39]

The point for present purposes is that, as Professor Gummow noted,[40] the removal by the *Australia Act* of the authority of the Parliament of the United Kingdom to legislate for Australia removed the basis on which Dixon saw common law recognition of that legislative authority as

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35 *First Report of the Constitutional Commission*, vol 1 (1988) at 187. See also Leslie Zines, "The Sovereignty of the People" in Michael Coper and George Williams (eds), *Power, Parliament and the People* (Federation Press, 1997) 91 at 93.

36 Jeffrey Goldsworthy, "The Constitution and its Common Law Background" (2014) 25 *Public Law Review* 265 at 282. See also at 268 and Liam Boyle, "The Significant Role of the Australia Acts in Australian Public Law" (2019) 47 *Federal Law Review* 358 at 362.

37 Geoffrey Lindell, "Why is Australia's Constitution Binding? – The Reasons in 1900 and Now, and the Effect of Independence" (1986) 16 *Federal Law Review* 29.

38 Stephen Gageler and Mark Leeming, "An Australian Republic: Is a Referendum Enough?" (1996) 7 *Public Law Review* 143.

39 Geoffrey Lindell and Dennis Rose, "A Response to Gageler and Leeming: 'An Australian Republic: Is a Referendum Enough?'" (1996) 7 *Public Law Review* 155.

40 WMC Gummow, "Common Law" in Saunders and Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 190 at 193.

providing the ultimate legal foundation of the Australian Constitution. The statutory removal of the one removed the conceptual hook for the other. As a result, "constitutional norms, whatever may be their historical origins, are now to be traced to Australian sources"[41] and "[t]he time now is past for the treatment of Australian constitutionalism as controlled by ... the continuing intellectual agonies attending British constitutionalism".[42]

The emergence of the common law of Australia

Within months of the *Australia Act* having terminated appeals to the Privy Council from or in respect of any decision of any Australian court, four members of the High Court proclaimed in *Cook v Cook*[43] that "[w]hatever may have been the justification for [statements of deference to decisions of English courts as to the content of the common law] in times when the Judicial Committee of the Privy Council was the ultimate court of appeal or one of the ultimate courts of appeal for this country, those statements should no longer be seen as binding upon Australian courts". The following year, Sir Anthony Mason referred to the High Court as then being in the process of "developing an Australian common law".[44] A little more than a decade later, the High Court unanimously proclaimed in *Lange v Australian Broadcasting Corporation*[45] that "[t]here is but one common law in Australia which is declared by this Court as the final court of appeal". Although the High Court in that context repeated Dixon's statement that "[w]e act every day on the unexpressed assumption that the one common law surrounds us and applies where it has not been superseded by statute",[46] it did so in the context of contrasting the one national common law in Australia with the numerous State common laws in the United States before immediately adding that "that one common law [of Australia] operates in the federal system established by the Constitution".[47]

The causal link between the termination of appeals to the Privy Council and the recognition of the emergence of a single common law in Australia had been identified by Gummow J the previous year in *Kable v Director of Public Prosecutions (NSW)*[48] as the High Court, since the termination of appeals to the Privy Council, having "final superintendence over the whole

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41 *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 570 [66].

42 WMC Gummow, "The Constitution: Ultimate Foundation of Australian Law?" (2005) 79 *Australian Law Journal* 167 at 171.

43 (1986) 162 CLR 376 at 390.

44 Anthony Mason, "Future Directions in Australian Law" (1987) 13 *Monash University Law Review* 149 at 152.

45 (1997) 189 CLR 520 at 563.

46 See Owen Dixon, "The Common Law as an Ultimate Constitutional Foundation" in Susan Crennan and William Gummow (eds), *Jesting Pilate And Other Papers and Addresses* (Federation Press, 3rd ed, 2019) 203 at 204–205.

47 (1997) 189 CLR 520 at 563–564.

48 (1996) 189 CLR 51 at 138.

of an integrated national court system". The link was expounded two years later in the joint judgment of Gaudron, Gummow and Hayne JJ *Lipohar v The Queen*[49] as lying in the combination of: (1) the closed appellate structure established by Ch III of the Australian Constitution, by which, upon the abolition of appeals to the Privy Council, the High Court alone became the sole court of final appeal; and (2) the doctrine of precedent implicit in that appellate structure, at the core of which lay the principle that a lower court is bound by a statement of legal principle "that a court or tribunal higher in the hierarchy of the same juristic system, and thus able to reverse the lower court's judgment, has laid down".[50] Echoing Derham's critique of the Dixonian conception of a transcendent common law, the joint judgment in *Lipohar* explained the "common law": to be "a body of law created and defined by the courts" and explained that "[w]hatever may once have been the case in England the doctrine of precedent is now central to any understanding of the common law in Australia".[51]

In the meantime, a subtle but significant change was occurring in the use of prepositions to describe the common law in Australia. In 1970, two years after the first step was taken towards the termination of appeals to the Privy Council by the *Privy Council (Limitation of Appeals) Act*, Sir Garfield Barwick when Chief Justice told an Israeli audience that it "could be said that there has emerged with a clarity not earlier perceived a common law *of* England and a common law *of* Australia".[52] The perception was ahead of its time. Following criticism by Gummow J in the Federal Court of Australia of the continuing reference in s 80 of the *Judiciary Act 1903* (Cth) to "the common law of England" applying in courts exercising federal jurisdiction even after the commencement of the *Australia Act*,[53] s 80 was cautiously amended by the *Law and Justice Amendment Act 1988* (Cth) to refer instead simply to "the common law in Australia".

When in *Mabo v Queensland [No 2]*[54] the High Court took the momentous step of recognising the existence of native title, the leading judgment of Brennan J did so, with express reference to the effect of the *Australia Act*'s final termination of appeals to Privy Council, in the exercise of the responsibility the High Court then recognised itself as having for the development of "the common law *of* Australia". The following year, the language of "the common law *of*

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49 (1999) 200 CLR 485 at 505–507 [44]–[50]. See generally Liam Boyle, "An Australian August Corpus: Why There is Only One Common Law in Australia" (2015) 27 *Bond Law Review* 27.

50 *Favelle Mort Ltd v Murray* (1976) 133 CLR 580 at 591, quoted in *Lipohar v The Queen* (1999) 200 CLR 485 at 506 [46].

51 (1999) 200 CLR 485 at 505 [44].

52 Garfield Barwick, "Precedent in the Southern Hemisphere" (1970) 5 *Israel Law Review* 1 at 39 (emphasis added).

53 *Adams v ETA Foods Ltd* (1987) 19 FCR 93 at 95.

54 (1992) 175 CLR 1 at 29, 69 (emphasis added). See also at 15.

Australia" was incorporated into the statutory definition of "native title" in the *Native Title Act 1993* (Cth).[55]

As a direct structural consequence of the termination of appeals to the Privy Council which began with the *Privy Council (Limitation of Appeals) Act* and which was completed upon the commencement of the *Australia Act*, it therefore came to pass and is now beyond controversy that "the common law *in* Australia is the common law *of* Australia".[56] Just as the appellate structure established by Ch III of the Australian Constitution was held in *Lipohar* to have left no room for the existence of a separate common law of each State, there was no room left for any conception of the common law in Australia forming a part of some more expansive body of judge-made law once that appellate structure became closed upon the abolition of appeals to the Privy Council.

The subordination of the common law of Australia to the Australian Constitution

Having proclaimed there to be but one common law in Australia, the High Court in *Lange* went on to proclaim that "[o]f necessity, the common law must conform with the Constitution". "The development of the common law in Australia", the Court said, "cannot run counter to constitutional imperatives". "The common law and the requirements of the Constitution cannot be at odds."[57]

How could it be otherwise if the Australian Constitution is to retain the status of higher law given that the common law is made by judges, that judges are members of courts, and that all courts in Australia, including State courts, ultimately owe their continuing existence to the Australian Constitution? No stream can rise higher than its source.

Since *Lange*, the High Court has repeatedly acknowledged that the Australian Constitution informs the development of the common law,[58] with the result for example that "[a]ny burden which the common law places upon communication respecting matters of government and politics must be reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of [the constitutionally established] system of government".[59] That said, the observation made by Goldsworthy[60] more than a decade ago that "[a] comprehensive

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55 Section 223(1)(c) of the *Native Title Act 1993* (Cth) (emphasis added).

56 *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 at 539 [9] (emphasis added), quoted in *Hunt Leather Pty Ltd v Transport for NSW* (2025) 100 ALJR 89 at 98 [16].

57 (1997) 189 CLR 520 at 566.

58 eg *Roberts v Bass* (2002) 212 CLR 1 at 26–27 [65]; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 245 [180]–[181]; *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539 at 555–556 [44].

59 *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 241 CLR 539 at 556 [44].

60 Jeffrey Goldsworthy, "The Constitution and its Common Law Background" (2014) 25 *Public Law Review* 265 at 270.

theory of the subordination of the common law to the Constitution has yet to be clearly articulated" remains valid. I am not about to articulate such a theory extra-judicially.

The only point I am currently making is that recognition of the common law in Australia as the common law of Australia combined with recognition of the ultimate source of the authority of the common law of Australia as the Australian Constitution has been recognised to have set parameters for the development by Australian courts of the Australian common law.

Conclusion

I commenced by identifying certain features of the contemporary Australian legal system which we now take for granted, the most elementary of them being the existence of a common law of Australia and the subordination of the common law to the Australian Constitution.

I conclude by reiterating the significance of the *Australia Act* to our contemporary perception of those features. I have explained the outworking of the *Australia Act* as conforming to Holmes' conception of the nature of the common law and as vindicating Derham's critique of Dixon's quite different conception of the common law in Australia and of its relationship with the Australian Constitution. The common law in Australia 40 years on from the *Australia Act* is not conceived of as antecedent and transcendent – as a "brooding" and constitutive "omnipresence" in the southern sky – but as a subordinate body of judge-made law declared and administered by Australian courts in accordance with the doctrine of precedent under the authority of the Australian Constitution. The common law of Australia is none the worse for that.