SYMPOSIUM: THE HIGH COURT OF AUSTRALIA, 1960–1993

PREFACE

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This edition of *The University of Western Australia Law Review* contains a number of papers presented on 26 March 1993 at a symposium on The High Court of Australia. The symposium was organised and funded by the Postgraduate Legal Education Committee of The University of Western Australia Law School. It was a great success and the papers presented by a panel of eminent speakers were both stimulating and challenging.

When the speakers were asked to present papers at the symposium they were requested, so far as possible, to limit their scope to the last 30 years of the history of the High Court. It will be seen from an examination of the papers that this period has been an active one for the Court, particularly in more recent years.

The papers have identified an increasing progressiveness on the part of the High Court which has been attributed to the passage of the Australia Acts in 1986, which marked the time when the High Court became in both substance and form the apex of the Australian court system, as well as to the changing composition of the Court and the general progress in legal response to changing social values. Associate Professors Carter and Stewart say in their paper, "Commerce and Conscience: The High Court's Developing View of Contract", that the current High Court is composed of "the most talented group yet to grace the bench in this country".

Mr Doyle's paper, "Constitutional Law: 'At the Eye of the Storm'", focuses on the role of the High Court as the constitutional court of Australia.

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He reviews some of the different methods of interpretation of the Constitution that the Court has utilised over time, particularly in the last 30 years. He comments particularly on the change in the Court from narrow legalistic methods of construction to broader methods looking at the purpose and substance of particular provisions and extending to considerations of what he terms the "Grand Design" of the "federal compact" whereby the Constitution is founded on the consent of the people. Mr Doyle also discusses the renewed focus of the Court on individual rights and the protection of the individual against the State. Associate Professor Cooper, by way of contrast, argues that, in the field of taxation law, the vehement protection of the individual in the past has led to the making of some decisions which have clearly absurd consequences. Supplementing its renewed interest in individual rights is the Court's movement towards recognising necessarily implied fundamental human rights in the Constitution. Mr Doyle's summary of the High Court's concept of its role as a constitutional court in creatively shaping the Constitution is enlightening.

In his paper, "Controlling the High Court's Agenda", Mr Solomon gives us a brief but informative overview of the structure and history of the Court from the enabling provision in the Constitution and the Court's creation in 1903 to the coming into operation of the Australia Acts in 1986. Mr Solomon reminds us of the vast jurisdiction of the High Court and how it is made manageable by the creation by Parliament of concurrent jurisdiction in other courts. This is followed by a most interesting inquiry into the special leave function of the Court and a discussion of the difficulties facing the Court in dealing with its ever increasing workload and the increasing complexity of matters before the Court.

Associate Professors Carter and Stewart in their paper, "Commerce and Conscience: The High Court's Developing View of Contract", consider contract law from a broad perspective and identify three periods of development in this area in the High Court in the last 30 years. The first of the periods, which lasted about 20 years, was a period of relative inactivity in which little happened to disturb the pattern established in the preceding six decades of deference to the decisions of the English courts. The second period, the "Cultural Revolution" of 1982 and 1983 saw a dramatic increase in contract cases dealt with by the High Court. The authors note that, in the absence of a genuinely Australian contract text, Volume 149 of the *Commonwealth Law Reports* was practically sufficient to serve as such, as nearly all aspects of contract law were considered. In the two years of 1982 and 1983 a foundation was laid for the building of an Australian law of contract. In the decade that

followed 1982–1983, the third period identified by the authors, the authors consider that the High Court consciously strove to build on the independence of Australian contract from English decisions, and promoted the concept of unconscionability as a pivot on which such concepts as estoppel and relief against forfeiture turn.

Parallel to the development of an Australian law of contract, there has also been development towards an Australian law of torts. This is described by Professor Trindade in his paper, "Towards an Australian Law of Torts". Professor Trindade notes, early in his paper, the comment of Brennan J in the *Mabo* case that "the law which governs Australia is Australian law". He goes on to identify where, in declaring the law of torts in Australia, the High Court has caused divergence of Australian law from English law. Professor Trindade carefully considers the High Court's proximity test in the law of negligence, the principal proponent of which is Deane J, and foreshadows its possible demise.

Associate Professor Cooper in his paper, "The Political Economy of Taxation and the Roles of the High Court", comments on the High Court's failure to offer guidance on fundamental issues of tax policy. This paper provides a very interesting contrast to the papers which comment on the progressiveness of the High Court over the last 30 years. Associate Professor Cooper identifies the Court's reluctance to take a creative role in construing tax statutes through its adherence to legalistic methods of construction and its failure to apply purposive or substantive interpretation techniques. While the reason for this may be based on the protection of the individual from oppressive powers of the State, it neglects to take into account the economic and social costs of failing to recognise the position of taxation in the social contract. Associate Professor Cooper considers that much of the complexity of our taxation laws has been necessitated simply because of judicial errors. He also comments on the increasing irrelevance of the High Court, in particular, and the judicial system generally, in the resolution of taxation disputes.

Finally, The Hon Mr Justice French in his paper, "The Rise and Rise of Judicial Review", comments that there have not been, in the last 30 years, dramatic changes of principle in administrative law, though there has been a balancing of forces between the users and subjects of executive power. The High Court's supervisory role in relation to executive action under Commonwealth law derives directly from the Constitution and is therefore proof against legislative attempts to restrict judicial review. The Hon Mr Justice French considers a number of areas of administrative law in his paper,

including the effect of jurisdictional and non-jurisdictional errors on privative clauses, standing, the reach of judicial review into the highest levels of government decision-making and procedural fairness and legitimate expectation.

A common theme raised directly or indirectly by many of the authors is that of the increasing number and complexity of matters which face the High Court. The complexity of matters coming to the Court often means that there is a divergence of opinion between the judges, particularly given that they are all talented individuals. As a result of this, some of the authors have pleaded for more unanimous or majority judgments to facilitate the unification, simplification and application of Australian law. This is particularly important because of the position of the High Court at the apex of the Australian court hierarchy.

I commend these papers as an important contribution to the understanding of, not just the structure, operations and continuing development of the High Court, but also of the continuing development of Australian law.