

**Australian Academy of Law Patron's Address
Brisbane, 31 October 2019**

"The academy and the courts: what do they mean to each other today?"

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The Australian Academy of Law was launched in July 2007 at Government House in Brisbane¹. I was there for the launch and was honoured to be one of its Foundation Fellows. As at November 2018, there were 35 Foundation Fellows, "359 Fellows, 8 Life Fellows and 13 Overseas Fellows"². As was anticipated the fellows are academic lawyers, judges and legal practitioners.

At the launch, much was said about the benefits that could be gained from the development of a closer relationship between the academy, the judiciary and the legal profession. This is not to suggest that there has not always been something of a relationship between them, but rather that it was seen to be important that this relationship be maintained and if possible improved. After all, one of the stated purposes for which the AAL was founded was "[t]o provide a forum for cooperation, collaboration, constructive debate and the effective interchange of views amongst all branches of the legal community"³, which includes the academy and the courts. Consistently with that purpose, there have been many occasions since the launch for discussion between members of the AAL.

My focus today is upon a particular dialogue: academic writing which is directed to judges, to the profession and on occasion to the public. Materials of the former kind are a valuable resource for judges. Their use confirms our shared concern with the correct and coherent development of the law.

Academic lawyers are well placed to provide commentary both in terms of their focus on particular topics and the time available to them. Judges are under special constraints and therefore appreciate academic literature which is on point and useful⁴. Whether such writings are useful depends largely upon the understanding of an academic author of the role of a judge and how judge-made law is developed.

Today there are pressures on the academy which may have the effect of limiting the kind of research and writing which is useful to judges and professional lawyers. Funding may divert academic resources away from doctrinal law.

It would be a great pity if judge-directed academic writing were substantially to decline. I say that not only from the point of view of judges, but also from that of the academy, and in particular young academics who may never experience what can be a kind of collaboration with the courts. It is my purpose today to encourage the continuance of that collaboration.

(A comparative survey)

Common law courts have a different relationship with legal academics than do the courts of civilian jurisdictions. But even amongst common law courts the experience may be different. Many of these differences are attributable to our respective cultural and political histories.

In France, for example, a stricter separation of powers, applied since the Revolution, gives the courts a particular role. They must be seen only to be enforcing the law, not expounding it. Citations of any secondary materials are excluded from the text of judgments, even if the judges have read and considered academic writings in forming their opinions⁵, as undoubtedly they must often do.

On the other hand, the use by German courts of secondary authority is legendary. Professor Hein Kötz says that "[r]eactions by foreign lawyers [to the extent of this practice] have vacillated between amazement, envy and amusement"⁶. Choosing a 1985 volume at random, he found that academic texts and articles are cited on average 13 times per federal civil case⁷. He compares this

with British courts. A spot check of the whole of Volume 1 of the 1985 *All England Law Reports* disclosed just 0.77 citations to secondary authority on average per case⁸.

It is understandable that German courts differ in their use of academic materials. Historically the law professors have held a higher status than judges, who are usually appointed immediately following university. The judges all undertake lengthy doctoral studies which may influence their approach to academic opinion. Further it has been German law professors who, over many centuries, have shaped the ideas behind German law and were responsible for drafting the civil codes⁹.

In more modern times this extensive citation from academic writings has been criticised, including by academics. It has been suggested that the effect of heavy citation, seemingly after every clause or even sentence, is "to submerge the court's judgment"¹⁰. In any legal system, judgments of this kind may not give the appearance of "a clear and authoritative statement of the court's own view of the law"¹¹. In England and in Australia, overuse of citation is not the norm¹². Such a practice might be thought to convey that the judge lacks confidence in his or her own opinion, or in recent judgments of the courts, where the ratio is clear.

This problem is readily resolved in Italy. Like their French colleagues, Italian judges do not refer to academic writings in their judgments. But for them there is no ability to do so even if they were minded to. Statute forbids the practice¹³.

It cannot really be said that the common law has a long tradition in the use of academic writing. In England and Australia, it only flourished in the late 20th century. This may in large part be explained by the fact that the law faculties in Oxford and Cambridge were not established until the 1870s¹⁴. By the mid-20th century teaching was still primarily undergraduate and, as a result, there was less emphasis on academic writing and research. It is therefore only relatively recently that such writing came to be produced in significant quantity.

Even amongst common law courts, the relationship with the academy may differ and reflect historical influences. The history of the United States may

account for the law professors having greater influence. Understandably, it was considered preferable to rely on authors who, whilst drawing upon common law and civilian sources, emphasised the American character of the law rather than English case law¹⁵. The law professors grew in prestige as a result.

In 1931, Justice Cardozo observed that "leadership in the march of legal thought" appeared to be passing from the courts of the United States to the professors¹⁶. Professor Kötz is somewhat sceptical of such statements which, he says, are usually made in speeches to law faculties or in the foreword to academic legal publications¹⁷. These days some judges, including the current Chief Justice of the United States Supreme Court, regard the relationship between the courts and the academy as somewhat estranged compared with some decades ago¹⁸. Judge Posner has suggested that this is in large part because academics are now more involved in theory and write for each other rather than for judges or practitioners¹⁹. Curiously though, a significant number of the members of the US Supreme Court are former law professors²⁰.

(The extent of use of secondary materials in Australia)

For some time, English and Australian courts were subject to a self-imposed restraint concerning the use of academic writings. When I came to the Bar in 1975, the "living author" rule was still enforced by some of the older judges. This convention prevented counsel or judges citing living authors as authoritative. This was also known as the "better read when dead" approach²¹. In one case in the late 19th century, counsel's attempt to refer to Lord Justice Fry's book on Specific Performance was rejected on this account²². The rule was applied by Lord Buckmaster in *Donoghue v Stevenson*²³. In that same case, Lord Atkins was influenced by the Bible²⁴. The rule had no application to its authors.

In his paper "Concerning Judicial Method", Sir Owen Dixon suggested that textbooks and periodicals were often used by judges of the High Court²⁵. On another occasion he commented that the use by the judges of academic writing was "very great indeed" — although he added that "the Court has always

administered the law as a living instrument and not as an abstract study"²⁶, thereby identifying a judicial aversion to pure theory.

It has been observed that while members of the Dixon Court may have used academic writing, they actually did not refer to it very often in their judgments, at least by comparison with modern rates of citation²⁷. This may, in part, be attributable to the aforesaid "living author" rule and also to the relatively small number of legal academics in Australia at the time²⁸.

More generally, it has been said that judges have often written by reference to legal academic material, but without acknowledgement. This has been referred to in the United Kingdom as the "well-established tradition of 'licensed plagiarism' by both Bar and Bench"²⁹. I would like to think that this is a practice of the past and that these days acknowledgement is given where it is due.

In a study conducted in Australia, it was found that there was a sharp "rise in the [High] Court's use of secondary authority between 1960 and 1990, and then a significant increase between 1990 and 1996"³⁰. Legal texts were cited most often, but legal periodicals were cited more over time³¹.

The High Court's own Library recently conducted a small review, limited to books and articles, by comparing three (3) years of High Court decisions – 1963, 2016 and 2018. Of the 67 cases decided in 1963, there were 88 citations of such materials; of the 50 cases in 2016, there were 277; and of the 60 cases in 2018, there were 399. I would not like to contemplate that this more recent figure suggests something of the German approach.

(More recent acknowledgements)

If a judge is quoting directly from academic writing, or expressing the opinion of an academic lawyer, there can be no doubt that acknowledgement should be given. It may be less clear where texts or journal articles have had some influence on a judge's thinking, where they may confirm a contrary view or otherwise shape the judge's thinking. Judgments may not be thought to lend themselves to general

acknowledgements. Nevertheless, in more recent times they have been made in some important cases.

In 1983, in the course of delivering a lecture, Lord Goff of Chieveley expressed the view that "the work of the judges has become more and more influenced by the teaching and writing of jurists" and that this was "likely to continue to increase"³². It is just possible that his Lordship had in mind the growing influence at that time in the United Kingdom of the law of restitution, in which growth he was involved.

The statement also presaged his declaration in a postscript in 1986 in *Spiliada Maritime Corp v Cansulex*,³³ which was in these terms: "I feel that I cannot conclude without paying tribute to the writings of jurists which have assisted me in the preparation of this opinion"³⁴. He singled out two articles in particular and named the authors. He said that even where he disagreed with them, he had "found their work to be of assistance", and added: "For jurists are pilgrims with us on the endless road to unattainable perfection; and we have it on the excellent authority of Geoffrey Chaucer that conversations among pilgrims can be most rewarding"³⁵.

More recently in the United Kingdom, in the judgment of the majority of the Supreme Court in the first Brexit case³⁶, it was said: "We have ... been much assisted by a number of illuminating articles written by academics following the handing down of the judgment of the Divisional Court"³⁷. As a result, it was said, the arguments presented to the Supreme Court were "more refined"³⁸.

In Australia, the joint judgment of Justices Deane and Gaudron in the *Mabo (No 2)* case in 1992³⁹ contains similar expressions of gratitude. Their Honours said⁴⁰:

"[I]n the writing of this judgment, we have been assisted not only by the material placed before us by the parties but by the researches of the many scholars who have written in the areas into which this judgment has necessarily ventured. We acknowledge our indebtedness to their writings

and the fact that our own research has been largely directed to sources which they had already identified."

(Why academic writings are useful)

Citation of commentary on constitutional law continues to be more extensive than that of commentary on most other areas of the law⁴¹. The contribution of academic law professors such as Leslie Zines has been significant in its development. There can be little doubt that, if he has not shaped some opinions, he has at least required judges to think harder about some topics. His influence continues—and not only through the work of Professor Stellios, who has built on Zines's text⁴². I recently attended a Symposium held in honour of Professor Zines, where leading constitutional lawyers (both academic and practising), together with judges, exchanged views on many topics of interest and of difficulty.

The contribution of academic lawyers is not limited to constitutional law. Recently the High Court decided a case⁴³ involving contract law where the debate was started by academic lawyers. The question it raised was whether the law had taken a wrong turn and, if so, whether it should be corrected. A few years ago, an article written on the origin of common law spousal immunity from giving evidence⁴⁴ raised questions which were finally answered by the High Court⁴⁵. The courts are particularly beholden to legal historians, as well we should be, given the difficulties and dangers that an incorrect understanding of history presents. Judges in this country are almost entirely reliant upon comparative law texts and articles for assistance in understanding how issues such as causation and damage are approached in different jurisdictions⁴⁶.

It should be apparent that from all perspectives – of advocates, judges and the proper maintenance and development of a coherent body of the law – that academic opinion is a valuable resource. (I would add that in novel cases, so too would the opinions of intermediate appellate courts be useful⁴⁷).

Lord Dyson has spoken of the "symbiotic co-existence" of judges and scholars⁴⁸. He has said that "[t]he influence of academic writings on judicial

decision-making is considerable"⁴⁹. He gave as an example the criticism made by Glanville Williams⁵⁰ and another professor⁵¹ of a decision relating to criminal law, which resulted in the House of Lords overturning an earlier decision⁵².

A good example of academic legal writing shining a light on complex legal issues is Professor Jane Stapleton's writings on causation, which are directed to practitioners and to judges. They have often been referred to and cited. In the first of the Clarendon Law Lectures delivered last year⁵³, Professor Stapleton said that a dialogue may not only absorb legal developments signalled by the courts but can also prompt them, for example, by influencing them "to confront tensions in judicial reasoning and doctrinal outcomes, to re-structure precedents and reassess terminology"⁵⁴. She describes this process as "reflexive tort scholarship". By the adjective "reflexive" she means a "conversation between legal academics and the Bench" (rather than to other academics)⁵⁵.

It should be clear enough why judges value good legal scholarship. In the first place, judges carry out their work under the pressure of time. Even with the research assistance that judges have from their associates, they are not able to devote a lot of time to study a particular area relevant to the case at hand. Academic lawyers to a larger extent are able to refine their opinions and to delay their publication to that end. They tend to be specialists and have a fund of knowledge in their field which they may deploy. Judges, particularly at appellate level, are required to determine cases across a broad spectrum of the law⁵⁶.

In order for academic writing to be useful, the writer must have an appreciation of the other major constraint a judge is under. A judge is not free to change the law as he or she sees fit. The development of the common law does not, like civilian law, proceed from theory to resolution. The common law judicial method recognises that the law is developed incrementally to the point where a rule or principle might emerge. And it proceeds incrementally not the least because it does so from the resolution of the case at hand, limited as it is by the issues arising from the pleadings, the evidence adduced by the parties and how the case is argued⁵⁷.

It may be as well at this point to clarify the difference in the roles of judges and of academic lawyers.

Judges decide cases. They resolve controversies. True it is that they also develop the law, but they do so in a way which is clear and certain, especially where guidance is necessary to lower courts. It is no part of their role to create ambiguity by identifying especially fine distinctions or points of difference, let alone attempting new classifications. This kind of thinking may properly be deployed by academics in critical analysis, but rarely is it of real assistance to the resolution of a case.

Nor, generally speaking, is it part of the judicial function to expound grand theories or aspirational ideas. I say generally speaking because of course history shows that there have been exceptions. But it is academic lawyers who are best placed to put a question in a broader context, identify the larger ideas involved around decided cases and suggest alternative means of resolution than those thus far employed.

There is another point of clarification which should perhaps be made. The dialogue of which I have spoken is in reality more one-way. It is in the first place addressed by the academy to the courts. It is then either taken up by practitioners and raised with the court in submissions or it is noticed by the judges and taken up in the course of argument so that the lawyers have an opportunity of addressing it. The judiciary participates in the dialogue when they take up the idea of an academic lawyer and use it to resolve the case at hand. Needless to say, its purpose is not to further the development of academic theory or to elicit commentary from the academy.

Professor Kötz says that "the weight to be given [to] a view expressed by a legal writer depends on the cogency of the argument, the reputation of the author, and the honesty of [the] scholarship"⁵⁸. I would agree. But I think we have moved on from the days where an academic had to have the status of Glanville Williams or Bracton to qualify. Certainly the established reputation of some academics will

lend weight to their opinion. But I believe judges these days are more open to views of less established academic writers where they are cogent and persuasive.

(Pressures affecting academic writings)

Of course there are factors which work against academic writing being directed to judges. Principal amongst them is funding for research. At a workshop on research impact conducted by the Council of Australian Law Deans in 2016, it was observed by some participants that citation of legal academic work in judgments shows that it has an impact, yet this does not appear to be adequately taken into account by the Australian Research Council⁵⁹. A law professor observed that legal research often clarifies, reframes and develops new ways of identifying matters. But the question is: how is this to be measured when a criterion for grants is a measurable benefit to society? Echoing what I have said earlier, a judge present at the workshop said that everything a judge reads has an impact on his or her work, even if it is not always cited. Engagement between academics and judges is essential, he said.

A criterion such as a measurable benefit to society is likely to produce bigger picture research than useful doctrinal writings. The result can be greater collaboration between the disciplines, but at the expense of careful, refined analysis of the law. The conversation becomes one as between academics alone, where the courts do not matter⁶⁰.

(Media commentary)

There is another area where academic commentary may serve a useful purpose and indirectly assist the courts. In these days where commentary is freely given in the media, including on social media, legal academics can have an important part to play. The information that they can provide to journalists, and through them to the public, can be of real utility. The courts are appreciative of articles or commentary which further explain a decision in a way in which the court's reasons cannot grapple with. They are less appreciative where commentators (not always legal academics, I hasten to add) raise fears or concerns about the effects of a decision. By way of example, it is not especially helpful to

suggest that a decision relating to a sperm donor who was recognised under the applicable statute law as being a father has "sent panic" through some circles⁶¹ or that the court's decision "suggests an ongoing conservative presumption of a two-parent family"⁶². It is sometimes useful to reporting to read the judgement or even the case summary which the court provides. But examples of this kind are few. Most commentary is reliable and useful.

(Conclusion)

In conclusion, I would like to return to what Professor Stapleton said in her Clarendon Lecture about the style of scholarship which is directed to judges. She said that it accepts the "nature of judicial decision-making and the constitutional basis of what judges do when they are identifying the common law"⁶³. It is, she said, "a style of scholarship that is well placed to assist judges, and indeed to collaborate with them in that process"⁶⁴. In Professor Stapleton's opinion (I quote) "this is quite a thrilling prospect for any young legal scholar"⁶⁵. I hope that this is so.

¹ Australian Law Reform Commission, *Annual Report 2007-08* (Report 109, 2008) at 2, 8, 59.

² Australian Academy of Law, "Welcome to the Australian Academy of Law" accessed at <<http://www.academyoflaw.org.au/>> .

³ Australian Academy of Law, *Constitution: Australian Academy of Law* at 6 [4.1] accessed at <[http://www.academyoflaw.org.au/resources/Documents/\(FINAL\)%20AAL%20Constitution_updated_18%20June%202019%20.pdf](http://www.academyoflaw.org.au/resources/Documents/(FINAL)%20AAL%20Constitution_updated_18%20June%202019%20.pdf)> .

⁴ See, eg, La Forest, "Who is Listening to Whom? The Discourse Between the Canadian Judiciary and Academics" in Markesinis, *Law Making, Law Finding and Law Shaping: The Diverse Influences— The Clifford Chance Lectures*, Vol 2 (1997) 69 at 69-70, 89-90.

⁵ Kötz, "Scholarship and the Courts: A Comparative Survey" in Clark (ed), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* (1990) 183 at 186.

⁶ Kötz, "Scholarship and the Courts: A Comparative Survey" in Clark (ed), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* (1990) 183 at 193.

⁷ Kötz, "Scholarship and the Courts: A Comparative Survey" in Clark (ed), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* (1990) 183 at 193.

⁸ Kötz, "Scholarship and the Courts: A Comparative Survey" in Clark (ed), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* (1990) 183 at at 188.

⁹ See, eg, Twining et al, "The Role of Academics in the Legal System" in Cane and Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) 920 at 936.

¹⁰ Rodger, "Judges and Academics in the United Kingdom" (2010) 29 *University of Queensland Law Journal* 29 at 32.

¹¹ Rodger, "Judges and Academics in the United Kingdom" (2010) 29 *University of Queensland Law Journal* 29 at 32.

¹² See, eg, French, "Judges and Academics: Dialogue of the Hard of Hearing" (2013) 87 *Australian Law Journal* 96 at 103-104.

¹³ Rodger, "Judges and Academics in the United Kingdom" (2010) 29 *University of Queensland Law Journal* 29 at 32. See also, eg, Braun, "Professors and Judges in Italy: It Takes Two to Tango" (2006) 26(4) *Oxford Journal of Legal Studies* 665 at 674-675.

¹⁴ Neuberger, "Judges and Professors – Ships Passing in the Night?" (9 July 2012, Hamburg) at [21] accessed at <<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-hamburg-lecture-09072012.pdf>> .

¹⁵ Kötz, "Scholarship and the Courts: A Comparative Survey" in Clark (ed), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* (1990) 183 at 190.

¹⁶ Cardozo, "Introduction" in Committee of the Association of American Law Schools (ed), *Selected Readings on the Law of Contracts from American and English Legal Periodicals* (1931) at ix.

¹⁷ Kötz, "Scholarship and the Courts: A Comparative Survey" in Clark (ed), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* (1990) 183 at 191.

¹⁸ Twining et al, "The Role of Academics in the Legal System" in Cane and Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) 920 at 929; Petherbridge and Schwartz, "An Empirical Assessment of the Supreme Court's Use of Legal Scholarship" (2012) 106 *Northwestern University Law Review* 995 at 996.

¹⁹ Posner, "The Judiciary and the Academy: A Fraught Relationship" (2010) 29 *University of Queensland Law Journal* 13, especially at 15.

²⁰ Supreme Court of the United States, "Current Members" accessed at <<https://www.supremecourt.gov/about/biographies.aspx>> . See further, eg, Posner, "The Judiciary and the Academy: A Fraught Relationship" (2010) 29 *University of Queensland Law Journal* 13 at 13.

²¹ See, eg, Duxbury, *Jurists and Judges: An Essay on Influence* (2001) at 78; Neuberger, "Judges and Professors – Ships Passing in the Night?" (9 July 2012, Hamburg) at [4]ff accessed at <<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-hamburg-lecture-09072012.pdf>> .

²² *Union Bank v Munster* (1887) 37 Ch D 51 at 54.

²³ [1932] AC 562 at 567.

²⁴ See, eg, *Phillips (Inspector of Taxes) v Bourne* [1947] KB 533 at 537.

²⁵ Dixon, "Concerning Judicial Method" (1956) 29 *Australian Law Journal* 468 at 470.

²⁶ Commonwealth of Australia, *Welcome by the Bar Council of Victoria and the Law Institute of Victoria to the Right Honourable Sir Owen Dixon KCMG on his Appointment as Chief Justice* (Transcript, 7 May 1952) at 6.

²⁷ Gava, "Law Reviews: Good for Judges, Bad for Law Schools?" (2002) 26 *Melbourne University Law Review* 560 at 561-563, discussing Smyth, "Other Than 'Accepted Sources of Law': A

Quantitative Study of Secondary Source Citations in the High Court" (1999) 22 *University of New South Wales Law Journal* 19.

28 See, eg, Gava, "Law Reviews: Good for Judges, Bad for Law Schools?" (2002) 26 *Melbourne University Law Review* 560 at 563.

29 Twining et al, "The Role of Academics in the Legal System" in Cane and Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) 920 at 929. See also, eg, Duxbury, *Jurists and Judges: An Essay on Influence* (2001) at 64-65; Neuberger, "Judges and Professors – Ships Passing in the Night?" (9 July 2012, Hamburg) at [31], [40] accessed at <<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-hamburg-lecture-09072012.pdf>>.

30 Smyth, "Other Than 'Accepted Sources of Law'?: A Quantitative Study of Secondary Source Citations in the High Court" (1999) 22 *University of New South Wales Law Journal* 19 at 29.

31 Smyth, "Other Than 'Accepted Sources of Law'?: A Quantitative Study of Secondary Source Citations in the High Court" (1999) 22 *University of New South Wales Law Journal* 19 at 32-33.

32 Goff, "Appendix: The Search for Principle" in Swadling and Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (1999) 313 at 325.

33 [1987] AC 460 at 488.

34 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 488.

35 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 488.

36 *R (on the application of Miller & Anor) v Secretary of State for Exiting the European Union* [2018] AC 61.

37 *R (on the application of Miller & Anor) v Secretary of State for Exiting the European Union* [2018] AC 61 at 131 [11].

38 *R (on the application of Miller & Anor) v Secretary of State for Exiting the European Union* [2018] AC 61 at 131 [11].

39 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

40 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 120.

41 See, eg, Smyth, "Other Than 'Accepted Sources of Law'?: A Quantitative Study of Secondary Source Citations in the High Court" (1999) 22 *University of New South Wales Law Journal* 19 at 33, 42.

42 Stellios, *Zines's The High Court and the Constitution* (6th ed, 2015).

43 *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32.

44 Lusty, "Is There a Common Law Privilege against Spouse-Incrimination?" (2004) 27 *University of New South Wales Law Journal* 1.

45 *Australian Crime Commission v Stoddart* (2011) 244 CLR 554.

46 See, eg, *Tabet v Gett* (2010) 240 CLR 537, especially at [125]ff and accompanying footnotes (Kiefel J).

47 But see *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

48 Dyson, "Academics and Judges" in Dyson, *Justice: Continuity and Change* (2018) at 35.

49 Dyson, "Academics and Judges" in Dyson, *Justice: Continuity and Change* (2018) at 35.

50 Glanville Williams, "The Lords and Impossible Attempts, or *Quis Custodiet Ipsos Custodes?*" (1986) 45 *Cambridge Law Journal* 33.

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- 51 J C Smith, "Case and Comment" [1985] *Criminal Law Review* 502 at 504-508. See also, eg, J C Smith, "Attempts, Impossibility and the Test of Rational Motivation" in Legal Research Foundation Inc, *Auckland Law School Centenary Lectures* (1983) 25 at 25-43.
- 52 *Anderton v Ryan* [1985] AC 560 overruled by *R v Shivpuri* [1987] AC 1.
- 53 Stapleton, "Taking the Judges Seriously" (Clarendon Law Lectures, University of Oxford, May 2018) accessed at <<https://ox.cloud.panopto.eu/Panopto/Pages/Viewer.aspx?id=c43ce0fc-7623-47ec-a1e8-a8cf0099a581>>.
- 54 Stapleton, "Taking the Judges Seriously" (Clarendon Law Lectures, University of Oxford, May 2018) at 3:37-3:55 accessed at <<https://ox.cloud.panopto.eu/Panopto/Pages/Viewer.aspx?id=c43ce0fc-7623-47ec-a1e8-a8cf0099a581>>
- 55 Stapleton, "Taking the Judges Seriously" (Clarendon Law Lectures, University of Oxford, May 2018) at 3:55-4:11 accessed at <<https://ox.cloud.panopto.eu/Panopto/Pages/Viewer.aspx?id=c43ce0fc-7623-47ec-a1e8-a8cf0099a581>>
- 56 See, eg, French, "Judges and Academics: Dialogue of the Hard of Hearing" (2013) 87 *Australian Law Journal* 96 at 103; La Forest, "Who is Listening to Whom? The Discourse Between the Canadian Judiciary and Academics" in Markesinis, *Law Making, Law Finding and Law Shaping: The Diverse Influences—The Clifford Chance Lectures*, Vol 2 (1997) 69 at 69-70, 89-90.
- 57 See, eg, French, "Judges and Academics: Dialogue of the Hard of Hearing" (2013) 87 *Australian Law Journal* 96 at 102; Glazebrook, "Academics and the Supreme Court" (2017) 48 *Victoria University of Wellington Law Review* 237 at 246-247.
- 58 Kötz, "Scholarship and the Courts: A Comparative Survey" in Clark (ed), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* (1990) 183 at 189.
- 59 See, eg, Australian Research Council, "Research Impact Principles and Framework" (27 March 2019) accessed at <<https://www.arc.gov.au/policies-strategies/strategy/research-impact-principles-framework>>.
- 60 See, eg, Twining et al, "The Role of Academics in the Legal System" in Cane and Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) 920 at 931; Rodger, "Judges and Academics in the United Kingdom" (2010) 29 *University of Queensland Law Journal* 29 at 34-35; Hutchinson, "Legal Research in the Fourth Industrial Revolution" (2017) 43 *Monash University Law Review* 567 at 569, 573-574.
- 61 Price, "Parenting and the Rights of a Child" in *Canberra Times* (ACT, 21 June 2019) at 20.
- 62 Lee, "Parental Guidance" in *The Saturday Paper* (Victoria, 29 June 2019) at 3.
- 63 Stapleton, "Taking the Judges Seriously" (Clarendon Law Lectures, University of Oxford, May 2018) at 48:25-48:40 accessed at <<https://ox.cloud.panopto.eu/Panopto/Pages/Viewer.aspx?id=c43ce0fc-7623-47ec-a1e8-a8cf0099a581>>.
- 64 Stapleton, "Taking the Judges Seriously" (Clarendon Law Lectures, University of Oxford, May 2018) at 48:40-48:49 accessed at <<https://ox.cloud.panopto.eu/Panopto/Pages/Viewer.aspx?id=c43ce0fc-7623-47ec-a1e8-a8cf0099a581>>.
- 65 Stapleton, "Taking the Judges Seriously" (Clarendon Law Lectures, University of Oxford, May 2018) at 48:49-48:54 accessed at <<https://ox.cloud.panopto.eu/Panopto/Pages/Viewer.aspx?id=c43ce0fc-7623-47ec-a1e8-a8cf0099a581>>.