



**SUPREME COURT
OF QUEENSLAND**

Australian Academy of Law - Annual Patron's Address
Thursday, 31 October 2024
Banco Court

Bridging the Gulf – the Role of the Academy in the Development of the Law

Chief Justice Helen Bowskill¹

1. Good evening everyone, and welcome to the Banco Court. I acknowledge the first owners and custodians of the lands and waters across Queensland; here in Brisbane, in particular, the Turrbal people and the Jagera people. I commend their ancestors and elders, for their wisdom, courage and leadership, and for the gift of their traditional culture, one aspect of which is on powerful display as we are watched over by the imagination and vision of the late Sally Gabori.
2. We are gathered together this evening at the initiative of the Australian Academy of Law, a body established in 2007 for the purpose of bringing together people from all parts of the legal community; legal scholars, the practising profession and the judiciary. Its purpose is to promote excellence in legal scholarship, research, education, practice, the administration of justice, law reform, ethical conduct and professional responsibility and the enhancement of the understanding and observance of the rule of law.²

¹ With thanks to my associate, Ms Bronte Donohoe, research assistant, Ms Alicia George, and the associate to Justice Williams, Ms Sylvia Stuen-Parker, for their assistance in preparing this lecture.

² [Australian Academy of Law Constitution](#), paragraph 4; Chief Justice Robert French AC, 'Judges and Academics – Dialogue of the Hard of Hearing', Inaugural Patron's lecture, 30 October 2012, p 4.

3. It has been 12 years since the inaugural Patron's Address was delivered for the Australian Academy of Law, by its then Patron, High Court Chief Justice Robert French AC. His Honour emphasised the importance of the Australian Academy of Law in "bridging the gulf", by encouraging dialogue and interaction between legal scholars, legal practitioners and the judiciary. We are more regularly aware of the dialogue and interaction between legal practitioners and the judiciary, for that is what takes place in courts like this every day. But for this, the 13th annual Patron's Address, I wish to shine a light on the industry and insight of legal scholars, and the significance of their work to the development and advancement of the law in Australia. I will do that in a practical way, by reference to some judicial decisions at first instance, by intermediate courts of appeal and at the ultimate appellate level, the High Court of Australia.

4. Lord Robert Goff, writing a post script to his judgment in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 at 488, paid tribute to the writings of certain legal scholars which had assisted him in that case (which considered the concept of the proper place in which to bring a claim, for the purpose of considering whether service out of the jurisdiction was allowed). Lord Goff described those scholars, or jurists, as "pilgrims with us [the judges] on the endless road to unattainable perfection". As a pragmatic perfectionist; that is, one who acknowledges that mostly unattainable state, that struck a particular chord with me. And, as he also said, "we have it on the excellent authority of Geoffrey Chaucer that conversations among pilgrims can be most rewarding".³

5. The Honourable Susan Kiefel, former Chief Justice of the High Court, has also described academic writing as a valuable resource for judges, observing that the use of it by judges confirms our shared concern "with the correct and coherent development of the law".⁴ One element of the value of good legal scholarship identified by Chief Justice Kiefel is the *time* that an academic lawyer may have to consider and refine their opinions, in contrast to judges who have to carry out their work under the pressure of time. As we are frequently reminded, justice

³ A reference to *The Canterbury Tales*, by Geoffrey Chaucer.

⁴ The Hon Chief Justice Susan Kiefel AC, 'The Academy and the Courts: What do they mean to each other today?' *Melbourne University Law Review*, (2020) Vol 44(1): 447 at 448.

delayed is justice denied. Another element of the value of good legal scholarship is *specialisation*, which enables careful and close analysis of a particular field of knowledge.⁵

6. The value, and utility, of academic work in the development of the law also depends upon the *style* of scholarship – useful, practical scholarship, which accepts the nature of judicial decision-making and reflects an understanding of the limits of the judicial function, is more helpful than highly theoretical and esoteric scholarship. One scholar whose work has been highlighted in this regard is Professor Jane Stapleton. Professor Stapleton exemplifies a style of scholarship which she describes as “reflexive”, in contrast with what she calls the “Grand Theorists”. According to Stapleton, the reflexive scholar:

“[s]eeks a creative interactive conversation with Bench and Bar, and so writes primarily for these, demanding, real-world constituencies. The meat of this style of scholarship is the critical evaluation of the substantive justifications judges offer in support of the outcomes of cases. The value added includes identification of: overlooked arguments; more convincing justifications as well as more illuminating conceptual arrangements; weaknesses, tensions and anomalies in judicial reasoning, terminology, and doctrinal outcomes; and novel perspectives from which to view the landscape of precedent perhaps suggesting a principle immanent therein...”⁶

7. Reflecting that idea of a conversation, when writing on “Judges and Professors” in 2013,⁷ Lord Neuberger of Abbotsbury, former Master of the Rolls, observed at [53]-[55] that:

⁵ See also The Hon Justice Michelle Gordon AC, ‘Taking Judging and Judges Seriously: Facts, Framework and Function in Australian Constitutional Law’, *Monash University Law Review* (2022) Vol 49(1): 1 at 4.

⁶ Professor Jane Stapleton, ‘Taking the Judges Seriously v Grand Theories’, published in *Three Essays on Torts*, based on the 2018 Clarendon Law Lectures (Oxford University Press, 2021), at p 33.

⁷ Published in *The Rabel Journal of Comparative and International Private Law*, April 2013.

“It is not for the judges to simply follow what is said in academic articles or textbooks. We have to assess the writings critically, and in the context of a system of common law precedent. In some cases such writings may justify the development of the common law in new directions. In others they will not. And in yet other cases they may appear to justify a certain development, which turns out to be precluded by precedent.

The important point is this: as judges we will often benefit from the perspective brought by academic experts to a particular subject and the rigorous examination which they have subjected it to. That perspective can often provoke ideas, which can be tested in court, but which would not otherwise have come to light in proceedings. In that way, we improve the means by which, to borrow from Oliver Wendell Holmes, we ensure that the law develops through experience, in this case as wider experience than would be the case if we confined ourselves to statute and strict precedent.

In this, I believe that we English judges have come a long way from the rather sterile state of affairs where judges and professors were ships which passed each other in the night. It seems to me that we now find ourselves in a position where – to swap Longfellow for Shakespeare – there is perhaps between the two professions a marriage of true minds.”⁸

8. Consistent with that notion of a “marriage of true minds”, delivering the Maccabean Lecture in Jurisprudence in 1983,⁹ Robert Goff described the complementary roles that judge and jurist play as follows:

“... the primary function of judges is not the formulation of legal principles. Their main task, more workaday, more humdrum, is to try cases: in civil cases, to adjudicate upon disputes between litigants, and in criminal

⁸ References omitted.

⁹ Maccabean Lecture in Jurisprudence, ‘[The Search for Principle](#)’, Robert Goff, 5 May 1983.

cases, to secure a fair trial of the accused. But in the exercise of their functions, judges have from time to time to expound the law. ...

For jurists, on the other hand, the formulation of legal principles is one of their main functions. Another is, of course, to instruct; and few academic lawyers are content with their lot unless they possess a vocation to teach. Judge and jurist, conditioned by their experience, adopt a very different attitude to their work. For the one [judges], the overwhelming influence is the facts of the particular case; for the other [jurists] it is the idea – often received, but sometimes an original brainchild... [and] different though judge and jurist may be, their work is complementary; ... today it is the fusion of their work which begets the tough, adaptable system which is called the common law.”

9. So, turning to some examples of how this has worked in practice. For logical reasons, the focus of this kind of analysis is usually on the development of the law by reference to decisions of the High Court. I will start there, but then move to some examples from lower courts.
10. Delivering an address on the “State of the Judicature”, in 1998, then Chief Justice Brennan identified the criteria of a judicature required to maintain the rule of law in a free and confident nation. One of the criteria was *competence*. As Brennan CJ said, “there must be judges and practitioners who know the law and its purpose, who are alive to the connection between abstract legal principle and its practical effect, who accept and observe the limitations on judicial power and who, within those limitations, *develop or assist in developing the law to answer the needs of society from time to time*”.
11. In that regard, in *Test Claimants in the Franked Investment Income Group Litigation v HMRC* [2020] UKSC 47 at [178], Lords Reed and Hodge observed that:

“Developments in judicial thinking ... do not take place in a vacuum. Judgments are the culmination of an evolution of opinion within a wider

community, to which practitioners, universities, legal journals and the judiciary all contribute.”

12. In important cases, legal scholars assist judges to develop the law to answer the needs of society. Among other things, the writings of scholars can help to place a particular dispute into a larger context, or provide important historical or doctrinal context, and in that way assist the proper judicial development of principle for the benefit of society.¹⁰

13. One of the most significant decisions made by the High Court, which illustrates the valuable contribution of the work of legal scholars, is *Mabo v Queensland (No 2)* (1992) 175 CLR 1. Writing what has been described as the leading judgment in that case, then Justice Brennan drew upon, and cited, a range of academic sources, including Sir William Blackstone’s *Commentaries on the Laws of England*, to explain the manner in which sovereignty may be acquired in a new territory, the consequences of the manner of acquisition on the body of law that applies in that territory, and the development of the concept of *terra nullius* in an international law context.¹¹ Academic scholarship was also referenced by Brennan J in his discussion about the distinction between Crown title to colonies and Crown ownership of colonial land.¹² Justice Toohey and Justice Dawson (the latter, in dissent) also identified their use of academic works, of both legal and history scholars. In addition to citing scholarly works in support of various steps along the way to their ultimate conclusion, Justices Deane and Gaudron expressly commented, at 120, that:

“... in 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.”

¹⁰ Lord Burrows, ‘[Judges and Academics, and the Endless Road to Unattainable Perfection](#)’, The Lionel Cohen Lecture 2021.

¹¹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 32-42.

¹² *Ibid*, commencing at p 43.

14. The *Mabo* decision is significant for its recognition and acknowledgment of the truth of our shared history. The unjust and discriminatory expanded doctrine of *terra nullius* was rejected as a fiction that was both incorrect and no longer acceptable, in terms of the expectations of the international community and the contemporary values of the Australian people.¹³ It was acknowledged that, by acquiring sovereignty over the land, the Crown had acquired what might be called the radical title to the land; but that acquisition of sovereignty did not of itself confer absolute beneficial title to previously occupied land. At common law, a mere change in sovereignty over a territory does not extinguish pre-existing rights and interests in land in that territory.¹⁴ The rights and interests in relation to land which were held by the original inhabitants survived the Crown's acquisition of sovereignty and continued, as a burden on the radical title. Although, those rights and interests were susceptible to extinguishment by subsequent valid exercise of the sovereign power in a manner inconsistent with their continued existence. The customary laws acknowledged and observed by those original inhabitants also survived the acquisition of sovereignty – not as a separate legal system that could operate in opposition to or alongside the Australian legal system,¹⁵ but as a basis for the foundation of rights capable of recognition within the Australian legal system – with native title being a clear example of that.¹⁶
15. The work of legal, and history, scholars, across the decades, facilitated the development, and explanation, of the common law in this significant respect, which has been said to have “led to the redemption” of “a grave injustice” and marked “the day on which the dignity [of Aboriginal people] was recognised”.¹⁷ Although that could not have occurred without the incremental judicial “nudges”¹⁸ which preceded *Mabo*, nor without the intellectual rigour of the judges and the

¹³ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42 per Brennan J.

¹⁴ *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 422-423.

¹⁵ *Walker v New South Wales* (1994) 182 CLR 45 at 48-50 per Mason CJ (also, *Coe v Commonwealth* (1993) 68 ALJR 110 at 115), *Wik Peoples v Queensland* (1996) 187 CLR 1 at 214 per Kirby J, *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [44]. See also *Love v Commonwealth* (2020) 270 CLR 152 at [200]-[205] per Keane J.

¹⁶ *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244 at 248.

¹⁷ FitzGerald, J, ‘Sir Gerard Brennan, The Law’s Good Servant’ (Federation Press, 2024) at 345.

¹⁸ S Kiefel, ‘A nudge in the right direction; some landmark cases and the development of the law’ (Hal Wootten Lecture, University of NSW, 24 November 2022), referred to in FitzGerald, J, ‘Sir Gerard Brennan, The Law’s Good Servant’ (Federation Press, 2024) at 308.

lawyers for the multiple parties, this is one of the most significant examples of the complementary role played by scholars and judges, for the benefit of Australian society.

16. If we fast forward about 30 years, a more recent example is *Vanderstock v Victoria* (2023) 98 ALJR 208; [2023] HCA 30, a case which required the High Court, for the first time since 1997 to examine the scope and operation of s 90 of the Constitution, in the decidedly modern context of a Victorian legislative provision which purported to oblige the registered operator of a “zero or low emissions vehicle” to pay a charge for use of that vehicle on roads in Victoria and elsewhere in Australia. The charge was determined annually at a prescribed rate for each kilometre travelled.
17. Section 90 of the Constitution provides for the power of the Commonwealth Parliament to impose duties of customs and excise which is exclusive of the powers of the States and self-governing Territories. The question for the Court was whether the Victorian provision was invalid, on the basis that it imposes a duty of excise within the meaning of s 90? The answer to the question turned on whether the charge was a “tax on goods”, which in turn required the Court to grapple with the question whether a tax on *consumption* of goods may be a tax on goods and therefore an excise within the scope of s 90. The majority (Kiefel CJ, Gageler and Gleeson JJ (in joint reasons) and Jagot J (in separate reasons) held that the answer was yes. The minority (separately, each of Gordon J, Edelman and Steward J) were stridently of the opposite view.
18. The judgments in *Vanderstock* are a contemporary example of the valuable contribution of the work of a range of academic scholars to the understanding, development and explanation of the law.
19. The plurality (Kiefel CJ, Gageler and Gleeson JJ) utilised a range of sources to explain what they described as “the illusion of etymological certainty” concerning the word “excise”, including Blackstone and the work of John Quick and Robert Garran, who famously published contemporaneous commentaries on the Constitution in 1901, and subsequently, as well as others.

20. The case identifies two elements of a duty of excise:
 - (a) first, that the tax must bear a close relation to the production or manufacture, sale, distribution, or consumption of goods (at [147]); and
 - (b) second, the tax must be of such a nature as to affect the goods as the subjects of manufacture or production or as articles of commerce (at [148]).

21. The plurality also made reference to economic literature and what were described as “economically literate legal texts” (at [125]) to support their analysis of the second of these elements. Justice Jagot, likewise, called in aid “orthodox economic principles”, informed by the work of scholars, to support, and explain, a legal conclusion (at [923]). The use of historical, legal and economic analysis by well-renowned academics can also be seen throughout the judgments of those forming the minority.

22. *Vanderstock* is a good example of the practical assistance that the work of academic scholars can provide to judges, as part of judicial decision-making, which seeks to quell a controversy (that is, answer a question and resolve a dispute) in a technical as well as a legal context.

23. Analysis of the kind undertaken in cases like *Mabo* and *Vanderstock* is to be expected of our ultimate appellate court. But the marriage of the minds between judges and scholars does not only take place at the altar of our highest court.

24. Returning to my starting point for High Court cases, native title; that is an area of the law in which both the development of legal principle, and the establishment of the constitutional facts of a case, at first instance and intermediate appellate level, has depended heavily upon the work of scholars – legal, anthropological, historical and linguistic. One exemplar of this, which is geographically apt, is the decision of Jessup J in *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15, a consolidated proceeding involving two competing claims for determinations of native title over the Brisbane and surrounding area. The evidence before the Court included evidence from anthropologists, linguists and historians. Among other resources, the Court drew

heavily on the social historical scholarship of Constance Campbell Petrie, who recorded her father, Tom Petrie's, reminiscences of early Queensland, in a book bearing that title.¹⁹ Where such materials are available, that is a common theme in native title cases around Australia.

25. At a more “workaday”, although certainly not “humdrum” level, some particularly complex legal questions can arise in matters which are heard in the Supreme Court’s “Applications” jurisdiction, in which we deal with civil applications – both for interlocutory and final relief – which have a time estimate for hearing of two hours or less. A broad range of matters can arise – from bail applications, to judicial review, wills and estates, property, commercial, trust and corporations disputes and many others.
26. An example of such a matter is the decision of Applegarth J, fellow of the Australian Academy of Law, in *20 Trevis Court Pty Ltd v Emmapeel Holdings Pty Ltd* [2023] QSC 254. This case involved an application to strike out parts of a pleading, on the basis that the argument underpinning it was not open as a matter of law. The particular question was whether a claim for knowing participation in a breach of duty was confined to a breach of trust or a breach of fiduciary duty, under the second limb in *Barnes v Addy*, or whether it extends to breaches of other equitable duties, relevantly, breach of the equitable duty of good faith as a mortgagee. The Australian law touching on the question, including a decision of the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, had not been required to go down that particular avenue, and so Applegarth J looked further afield, at a decision of the UK Supreme Court and, importantly for present purposes, academic commentary on the topic.
27. The academic commentary included a 2014 article by Professor Ridge, in which it was said that accessorial liability might attach to equitable wrongs other than breach of trust or fiduciary duty (at [33]); a 2013 article by Professor Gummow, which had cautioned against over-refinement of the two “limbs” of *Barnes v Addy*,

¹⁹ Petrie, CC ‘Tom Petrie’s Reminiscences of Early Queensland (University of Queensland Press, 4th ed, 1992).

which might obscure the need to have regard to the fact that accessorial or participatory liability is “fault based” in the sense of “responding to what in the eye of a court of equity is unconscientious conduct”; a 1985 essay by Professor Austin and a 2010 article by Professor Dietrich, each of which alluded to the potential for a broader scope of participatory or accessorial liability.

28. The point made by Applegarth J was that, on an application of the kind he had to determine – that is, to strike out part of a pleading – it was sufficient to conclude that the legal basis for the claim was arguable and not apparently foreclosed by authority (at [37]-[38]). Assisted by the academic commentary – which reflected that deeper analysis and consideration of a question, not yet determined by a court, with the benefit of both time for reflection and expertise from focussed study and learning – and in the absence of any concluded authority, Applegarth J was able to conclude that the form of liability pleaded was open to argument as a matter of law and therefore that the pleading should not be struck out.
29. Justice Peter Applegarth has only recently retired from the Supreme Court of Queensland. On the occasion of his recent valedictory ceremony, I referred to him as, among other things, a legal scholar, practical lawyer and thoughtful judge. It is therefore not surprising to me, and perhaps not to you as well, that when I asked my associate to look for examples of first instance decisions which reflected the use of legal scholarship, it was predominantly decisions of Applegarth J that came to light.
30. The next example is his Honour’s decision in *Perpetual Trustee Company Limited v Shambrook* [2024] QSC 105. This decision addressed some complex issues which arose consequent upon the Court’s much earlier sanction of the compromise of a claim for damages made on behalf of a person who suffered cerebral palsy at birth due to medical negligence. An element of the sanctioned compromise involved payment of money to Perpetual Trustees Queensland Ltd (PTQ), as trustee for the injured person. While trustee, and on the basis of advice, PTQ paid most of the money into a superannuation fund of which a related entity, Perpetual Trustee Superannuation Ltd, was the trustee. One of the questions for determination was whether any conflict of duty and interest

arose in this circumstance (for example, because the indirect interests of PTQ, and its successor Perpetual Trustee Co Ltd – in fees being earned by another company within the Perpetual Group – conflicted with their duties as trustees for the injured child). Justice Applegarth concluded that there was no breach of the “no conflict rule” because there was no “real sensible possibility of conflict” in the circumstances (see [106]).

31. In reasoning towards that conclusion Applegarth J had the benefit of submissions on the law by capable and experienced lawyers. Particular reliance was placed on a New Zealand decision of *Jones v AMP Perpetual Trustee Company NZ Ltd* [1994] 1 NZLR 690. Justice Applegarth records in his reasons that, after he had reserved his decision, he located an “illuminating article”, by the Honourable J C Campbell KC, entitled “Obligations and Powers of Superannuation Trustees Concerning Situations of Actual or Possible Conflict”, published in (2020) 49 Australian Bar Review 1. The article was said to contain an insightful analysis of the “no conflicts duty” and to criticise the *Jones* decision. His Honour provided the article to the parties and invited further submissions. The decision goes on to provide a comprehensive discussion of the scope and operation of the “no conflicts duty”, including by reference to the Campbell article, as well as a critical analysis of the decision in *Jones*.
32. It is clear from the decision that the judge was considerably assisted in that regard by the scholarly analysis set out in the Campbell article – it plainly raised issues the parties had not, initially at least, agitated before his Honour. The conclusion first pressed by the applicant in that case – that there was in fact no breach of duty in the circumstances – prevailed. But what emerges from the decision is that the analysis of the legal principles, and application of them to the facts of the case, was enhanced and assisted by the academic scholarship of Campbell. He no doubt had spent quite some time analysing this particular issue, and writing about it – reflecting the observations already made about the particular *style* of academic scholarship which is most beneficial to judges in the application and/or development of the law.

33. I am going to wind the clock back now by 20 years to discuss the next example, *Callanan v B* [2004] QCA 478. By way of background, in 2002 the Crime and Misconduct Commission in Queensland undertook an investigation of certain criminal activities relating to drugs engaged in by an identified criminal “network”. Those in the network included Mr B, who was charged with offences under the *Drugs Misuse Act 1986*, including producing, supplying and trafficking in methylamphetamine. Mr Callanan was an Assistant Commissioner of the CMC, with responsibility for conducting hearings in relation to the criminal network being investigated. He issued an attendance notice to Mrs B, requiring her to attend such a hearing. She attended, but declined to answer questions, on the basis that she had a reasonable excuse for not doing so. The hearing was adjourned. Mr Callanan considered the matter and decided she had no reasonable excuse for not answering questions, and so proceeded to certify her refusal as a contempt.
34. Mrs B’s appeal against that decision to the Supreme Court was unsuccessful and she then appealed to the Court of Appeal. Obviously enough, Mrs B’s contended reasonable excuse was reliance upon a contended privilege against spouse incrimination. The judge at first instance had held that there was no such common law privilege. Justice McPherson, giving the reasons of the Court of Appeal (with which McMurdo P and Jerrard J agreed), said (at [6]) that he “would have been disposed to agree with that conclusion were it not for having seen a very recent paper by Mr David Lusty published in 2004 in vol 27 of the University of New South Wales Law Journal 1, entitled ‘Is there a common law privilege against spouse incrimination’”. Justice McPherson goes on to observe that Mr Lusty’s answer, which he supports by cogent authority and careful research, is that the common law has recognised such a “spousal privilege” for a very long time, going back to the 17th century and beyond. Justice McPherson charts the path of the common law, from a statement in 1618 that a wife “is not bound to give evidence, nor be examined against her husband”, to the statement of principle by the House of Lords in 1912 that a wife was not a compellable witness in criminal proceedings against her husband. As explained by Lord Atkinson in that case, *Leach v The King* [1912] AC 305 at 309:

“The principle that a wife is not to be compelled to give evidence against her husband is deep seated in the common law of this country, and I think if it is to be overturned it must be overturned by a clear, definite, and positive enactment, not by an ambiguous one.”

35. Justice McPherson noted that more recent affirmation of the principle, in New Zealand and in the United States, had recognised the privilege as applying reciprocally to “spouses”, observing that “if it did not do so, the rule would nowadays almost certainly be consigned to oblivion”. It was also observed that the fact the proceedings were investigative in character, rather than traditional court proceedings, did not matter – Mrs B was entitled at common law to rely upon the “free standing” privilege.
36. The academic research enabled McPherson JA to comment that the justification currently assigned for maintaining the privilege is that it is founded on the preservation of matrimonial harmony.
37. The next question to be determined was whether the privilege had been abrogated by statute, which involved interpretation of the relevant provisions of the *Crime and Misconduct Act 2001*. The conclusion reached was that the privilege had not been abrogated by the statute. Even though it was accepted that it was likely Parliament had intended to do so, the provision, read with a defined term, resulted in ambiguity. Consequently, it could not be said the privilege had been removed by a “clear, definite and positive enactment”.
38. Justice Jerrard concurred with McPherson JA, and also wrote his own reasons, addressing in some detail the “common law cases, feudal codes and textbook treatises” examined by the delightfully named Mr Lusty.
39. So, in the result, Mrs B was not in contempt, and she was vindicated in her refusal to answer questions. She did indeed have a reasonable excuse.
40. In a decision given the following year, *S v Boulton* [2005] FCA 821, Kiefel J, then a judge of the Federal Court, expressed her disagreement with the conclusion

reached in *Callanan*. Justice Kiefel's analysis, also assisted considerably by the work of legal scholars, lead to the conclusion that whilst a spouse may not be a compellable witness, that was not the same thing as a privilege. However, as a single judge, her Honour accepted that for reasons of judicial comity it was appropriate for her to follow the decision of an intermediate appellate court. Justice Dowsett, in a decision made in the same year, *Stoten v Sage* [2005] FCA 935, also accepted the decision in *Callanan* as authority for the proposition that there is a spousal privilege of the kind described in Mr Lusty's article. His Honour observed, however, that "given the uncertain nature of the authorities, the ultimate decision to recognise or reject spousal privilege is very much a matter of policy [and] in the absence of statutory intervention, the High Court will eventually consider the matter" (at [14]).

41. The High Court did consider the matter, in *Australian Crime Commission v Stoddart* (2011) 244 CLR 554. The majority (French CJ and Gummow J in joint reasons, Crennan, Kiefel and Bell JJ in separate joint reasons; Heydon J dissenting) held that no spousal privilege exists. Unsurprisingly perhaps, given the role played by Mr Lusty in the earlier case, the work of scholars is extensively referenced in the judgments in *Stoddart*. But Mr Lusty's analysis did not prevail; or, as some might say, it lacked lustre.
42. In the concluding paragraph of the joint reasons of Crennan, Kiefel and Bell JJ, reference is made to the observations of Justice Oliver Wendell Holmes in 'Codes, and the Arrangement of the Law',²⁰ about the creation of legal doctrine. He referred to a "well settled legal doctrine" as embodying "the work of many minds" and having "been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step". In the context of this lecture, that seemed to me to be a very apt description of the joint contribution to the development of the law that is made as a result of "reflexive" scholarship and judicial competency.

²⁰ Holmes, 'Codes, and the Arrangement of the Law', in S Novick (ed), *The Collected Works of Justice Holmes*, 1995, Vol 1, 212 at 213.

43. Crossing the border into New South Wales, the next example I will refer to is a decision of the New South Wales Court of Appeal in *Caron v Jahani (No 2)* (2020) 102 NSWLR 537. This case is described in its opening words as raising “a classic insolvency conundrum”, involving a contest between two groups of investors in relation to limited funds originally deposited in a bank account operated by the erstwhile operators of a Ponzi scheme. The conundrum was how the limited funds should be distributed between investors, whose funds were deposited into and co-mingled in that account over a number of years, where there were innumerable deposits and withdrawals over that time.
44. The lead judgment was written by Bell P, as his Honour the Chief Justice then was, with the agreement of Bathurst CJ and Macfarlan JA. President Bell identified various approaches which could be taken – the “first in, first out” approach established in *Clayton’s Case*;²¹ simple *pari passu* distribution, which treats the funds in the account as a mixed pool that is divided proportionately among all beneficiaries based on their individual contributions, ensuring that each claimant receives a share relative to their investment; or what he termed the “lowest intermediate balance” approach, which recalculates each investor’s interest in the mixed fund after every withdrawal, effectively ensuring that withdrawals are attributed to the proportionate interests of contributors at the time of those withdrawals. His Honour noted essentially that the search was for the fairest, or perhaps “least unfair” result for investors (at [18]).
45. His Honour made extensive reference to the work of academic scholars, including Professor Austin Scott, Professor Lionel Smith and the learned authors of *Jacobs’ Law of Trusts in Australia* and *Meagher, Gummow and Lehane’s Equity Doctrines and Remedies*, in relation to the identification of the nature of an investor’s interest in a mixed fund as well as critical analysis of the three approaches. Principle and pragmatism, informed by the many minds referred to in the judgment, lead to the conclusion that, in that particular case, the intermediate balance rule was the preferred approach (at [145]).

²¹ *Devaynes v Noble* (1816) 1 Mer 529 (*Clayton’s Case*).

46. Staying in New South Wales, it is fitting that I finish this brief journey with a decision of the very same J C (Joe) Campbell, mentioned earlier, when he was a judge of the Equity Division of the Supreme Court of New South Wales. The case, *White v Shortall* (2006) 68 NSWLR 650, is a really interesting example of the assistance provided by academic scholarship to resolving a complex legal issue and developing the law. The case involved a claim for damages for breach of contract relating to the transfer of shares, and to enforce a trust over those shares; a dispute which appears to have arisen in a complicated personal relationship between the plaintiff and the defendant, which extended to a dispute about ownership of shares in a company. There were many issues to be addressed, including whether there was a valid contract between the plaintiff and the defendant, for the transfer of the shares, which had been breached; and alternatively, even if there had been no contract, whether the defendant held the shares on trust for the plaintiff, on terms that they were transferable to the plaintiff.
47. For the defendant, it was argued the purported trust was invalid for insufficient certainty of subject matter (because it was not possible to identify the particular shares). A decision of *Hunter v Moss* [1994] 1 WLR 452 was referred to, which was against the defendant's argument. In that case, it was held that a trust created by declaring that a person who held 95% of a company's shares, held 5% of the company's shares on trust for another person, was not void for uncertainty of subject matter. Counsel for the defendant argued the reasoning in *Hunter v Moss* was not binding, and was not persuasive and therefore should not be followed (at [154]).
48. Commencing at [155], Campbell J addressed that argument, by reference to the varied academic reception of *Hunter v Moss* – first, criticising the reasoning in it as erroneous – including by Professor Hayton, Professor Birks and Heydon and Leeming, in *Jacobs' Law of Trusts in Australia* – and then by its defenders – including Professor Jill Martin, Professor Roy Goode, Professor Sarah Worthington and the authors of Dal Pont and Chalmers' *Equity and Trusts in Australia* (see at [159]-[160]).

49. In the absence of any Australian authority on the point, Campbell J proceeded to consider the matter on the basis of general principle. In the ensuing 100 or so paragraphs, Campbell J does just that, in a manner that contradicts my earlier contention of a distinction between the roles of a scholar and a judge. By that I mean it is apparent his Honour must have spent a very considerable amount of time, thinking deeply and researching comprehensively about the point. He ultimately concluded that, whilst he would not follow the broad and unqualified approach in *Hunter v Moss*, “there was no difficulty of principle in recognising the validity of the trust” in the case his Honour was considering (at [268]). That was because it was possible to construe the declaration of trust in such a way that all the shares were held on trust (see at [237]), and any unidentifiability issues would be resolved by the rights and duties imposed on the trustee (see at [257]). Campbell J went on to become a judge of the Court of Appeal in New South Wales, and, following his retirement in 2012, became an adjunct professor at Sydney Law School, writing scholarly papers including the one Peter Applegarth found illuminating in the decision earlier discussed.
50. An appeal against this decision was dismissed (*White v Shortall* [2007] NSWCA 372), but the *Hunter v Moss* point, if I can call it that, does not seem to have arisen on the appeal. It was in any event an alternative argument to the contractual point, and Campbell J’s conclusions in relation to that were upheld.
51. For completeness, I note that the issue was subsequently addressed by the Full Court of the Federal Court in *Ellison v Sandini Pty Ltd* (2018) 263 FCR 460, including by reference to *Shortall v White* and later English decisions. The conclusion reached in that case (by Jagot J, then of the Federal Court, with whom Siopis J agreed), at [148], was that:
- “In terms of principle, the weight of authority is that there can be a valid trust over a fungible pool of assets provided the assets and relevant proportions for the different beneficiaries are identified with sufficient certainty. The better view is that for the requirement of certainty to be satisfied the trust must be over all of the fungible assets in the pool, the beneficial co-ownership proportions reflecting the respective interests of the beneficiaries.”

52. Scholars also have another role to play, in our general education, edification and enjoyment. One whose work I am currently enjoying is Sarah Ogilvie, lexicographer and technologist. As a lexicographer, she has worked as an editor at the Oxford English Dictionary and was Chief Editor of Oxford Dictionaries in Australia. As a technologist, she apparently worked in Silicon Valley at Lab 126, Amazon's innovation lab, where she was part of the team that developed the Kindle. She is the author of 'The Dictionary People', a marvellous record of "the unsung heroes who created the Oxford English Dictionary". One of those heroes is a quite remarkable woman, an archaeologist called Margaret Alice Murray, and I would like to leave you with her beautiful words, which I think convey more powerfully than I could ever do, the valuable contribution of research and scholarship. Writing in the context of the exhilaration she felt when her first article was published, she said, apart from that feeling:

"I think that researchers have a keener pleasure, for besides the glory and splendour of becoming a real author there is the additional splendour of having added to the knowledge of your subject, of having filled a small and possibly not a very important gap, but still a gap. That is one of the purest joys that life can give."

53. Many important gaps are filled by the work of academic scholars, whose work can help to identify, understand, explain, test, question and expand concepts and ideas, all to the benefit of the development of complex legal problems. In the end, I do not think there is really any gulf between us as jurists. Whilst academic scholars, lawyers and judges have different roles to perform, and ends to meet, we all ultimately have a common goal; the development, recognition and protection of the rule of law for the benefit of our society.