

AUSTRALIAN LEGAL PRINCIPLES IN PRACTICE – TAKING REASONING AND RESEARCH SERIOUSLY*

by

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Abstract

The best lawyers are fully skilled lawyers. Fully skilled lawyers unify legal theory and legal practice, by integrating four key components of legal education - jurisprudence, substantive law (or “black letter” law), client-based work, and legal methodology (ie legal reasoning and research). In other words, lawyers cannot fully analyse law without enhanced skills in legal methodology, and they cannot fully appreciate important legal developments without appreciating their jurisprudential implications, their place within the body of Australian law, and their practical implications. Applied jurisprudence supplies the conceptual framework for the unification of legal theory and legal practice. Topical developments in legal areas as varied as High Court reasoning, pre-receivership contracts, and native title illuminate the value of this over-arching enterprise of applied jurisprudence and the need for fully skilled lawyers.

Introduction - An Opening Challenge

“The more we study the more we discover our ignorance” - Percy Bysshe Shelley

(a) Fully Skilled Lawyers

One of the greatest challenges facing Australian lawyers is to impose meaning on the High Court’s current revision of Australian law. As the High Court moves away from exclusively rule-based reasoning and towards “policy”-oriented (or non-rule-based) reasoning, all Australian lawyers must review their skills for finding, interpreting, and applying Australian law. This applies equally to academic research and client-based research.¹

Accordingly, the current challenge for all Australian lawyers is to join the enterprise of becoming fully skilled lawyers. Fully skilled lawyers keep the three components of theory, substantive law, and practice in balance, whereas some academics (ie, those who focus exclusively on theory and substantive law) and some practitioners (ie, those who focus exclusively on substantive law and practice) do not keep the three components in balance. In short, fully skilled lawyers encounter the balance between theory and practice every day, and are better equipped to manage that balance than lawyers in academia or practice who do not join that enterprise.

Two key examples in this paper illustrate the enterprise of becoming a fully skilled lawyer. Somebody who understands the jurisprudential nature of rights is better equipped to understand how competing rights are accommodated when a receiver of a company seeks to repudiate a pre-receivership contract. Similarly, somebody who understands Australian native title develop-

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¹ The difference between academic research and client-based research lies more in a difference of focus than in a difference of method. Academic research is usually more concerned with conceptual answers, and client-based research is usually more concerned with practical answers. For example, the key objective of client-based research is to produce practical recommendations for clients via a cost-effective and efficient process of research, matched to what the client really needs by a given deadline. Often, that means framing practical options which avoid or accommodate areas of legal uncertainty, and therefore reduce the need to explore unsettled areas of law. The best academic and client-based research is produced by fully skilled lawyers.

ments from the perspectives of jurisprudence, Australian property law, and legal practice is in a better position to guide students and clients through the seas of uncertainty surrounding native title claims on all of these levels.

Fully skilled lawyers unify all essential components of legal education by striking a coherent balance between:

1. Legal theory (eg what counts as "law", what legally permissible arguments are available to judges deciding cases, and to what extent are such concerns of analytical jurisprudence paramount given the insights of postmodern jurisprudence?);
2. Substantive law (eg what are the topical Australian legal developments affecting commercial practice in contract, equity, corporations law, property law, securities, trade practices, and constitutional and administrative law?);
3. Legal practice (eg what are the practical options and recommended solutions for key problems for clients?); and
4. Legal methodology (eg what are the key orientations and techniques for academic research and client-based research?).

So, fully skilled lawyers recognise that legal reasoning occurs in neither a practical vacuum (because the point of much legal reasoning and research is the settlement of practical legal problems for clients, by lawyers or ultimately the courts) nor a theoretical or social vacuum (because the substantive or "black letter" law has an underlying theoretical and societal basis).

Becoming a fully skilled lawyer assumes increasing importance if the gap between academic and client-based research is closing:

"... legal work is becoming more 'academic' than ever before. This is not to suggest that the work is of less 'practical' relevance or application ... However, such factors as:

- the de-professionalisation of routine legal work (such as conveyancing);
- the increasingly specialised and creative nature of solicitors' work;
- the trend towards written pleadings and submissions in the courts, especially the higher courts; and
- the increasing need for international and comparative perspectives,

have substantially narrowed the gap between what academics and practitioners actually do."²

This paper explores significant modern developments in Australian legal reasoning, with a view to establishing a conceptual framework for applied jurisprudence in Australia. Establishing such a conceptual framework is a significant way of illuminating the connection between legal theory and legal practice. Many recent developments in Australian law have broader implications for Australian legal reasoning, the substantive law of which such developments form part, and everyday legal practice. The starting point is to consider changes in Australian legal reasoning, with a view to developing the conceptual framework for applied jurisprudence. Applying that conceptual framework to a quintessential "black letter law" subject such as pre-receivership contracts illustrates the insights of applied jurisprudence. Finally, highlighting the different legal dimensions of Australian native title law similarly illustrates the insights of applied jurisprudence and the need for all lawyers to join the over-arching enterprise of becoming fully skilled lawyers.

2 Professor David Weisbrot, New South Wales Law Reform Commissioner, 'Competition, Co-operation and Legal Change' (1993) 4 *Legal Education Review* 1 at 25. At the same time, nobody should underestimate both the significance of the current debate about teaching and research priorities in universities, and the legitimate differences between academic and client-based research.

3 (1988) 62 ALJR 508.

Developments in Australian Jurisprudence - Form and Substance

“Beware that you do not lose the substance by grasping at the shadow” - Aesop

(a) Shifting Styles of Judicial Reasoning

Twenty years ago, the decisions of the High Court in *Trident General Insurance Co Ltd v. McNiece Bros Pty Ltd*³ (about privity of contract and third party beneficiaries), *Cole v. Whitfield*⁴ (about the test for section 92 of the Constitution), *Nationwide News Pty Ltd v. Wills*⁵ and *Australian Capital Television Pty Ltd v. Commonwealth*⁶ (about an implied constitutional guarantee of “free speech”, derived from the structure of the Constitution and to the extent necessary to facilitate political discussion in a representative democracy), and *Mabo v. Queensland (No 2)*⁷ (about aboriginal native title rights) would have seemed unthinkable to many lawyers schooled in an atmosphere of “black letter” law and Dixonian “strict legalism”. If strict legalism ever meant that mere logical extrapolation from the closed system of rules in legislation and previous cases could supply answers for every legal problem, that notion is now openly recognised as the myth it always was.

To paraphrase England’s Law Reid, many once thought that the law lay waiting to be discovered in some Aladdin’s cave, that appointment as a judge mysteriously revealed the right password for entering the cave, and that bad decisions happened when judges muddled the password. Recently, Brennan J exploded this myth by making a timely admission:

“Nowadays, nobody accepts that judges simply declare the law; everybody knows that, within their area of competence and subject to the legislature, judges make law. Within the proper limits, judges seek to make the law an effective instrument of doing justice according to contemporary standards in contemporary conditions.”⁸

The concept of “doing justice according to contemporary standards in contemporary conditions” sits easily with increasing judicial reference to “substance” rather than “form”, purposive statutory interpretation rather than literal statutory interpretation, consensus community values, “policy” considerations, abstract notions of fairness and justice, and other High Court innovations such as the enhanced infusion of equity into traditional common law doctrines. It illuminates the modern tension in assigning priorities between rule-based standards and non-rule-based standards in legal reasoning.

As an academic lawyer, I welcome these developments because they represent a triumph of justice over certainty. They reveal the full complexity of the obligation to decide according to law. As a practising lawyer, I also appreciate the commercial inconvenience of legal certainty losing force as a paramount consideration for judges. This is where current criticism of the High Court bites. High Court justices are skilfully infusing the strict letter of the law with better notions of fairness and justice, even at the cost of some certainty. That manifestation of the preference for “substance” over “form” is admirable. However, it leads to significant academic and community debate about the factors informing judicial reasoning. This debate is still in its infancy in Australia, given the public reaction to Mason CJ’s recent comments about policy:

“... consideration of policy is [not] alien to the judicial function ... The formulation of legal principle is, and always has been, undertaken in the light of policy considerations ... Because policy is a relevant factor in determining the shape of legal principle, the formulation of legal principle and a change in legal principle may wear the appearance of being a legislative act, but the principle enunciated by a judicial decision can be overridden by the legislature and replaced by a rule of its choice ... The fact that in *Mabo* and the *Political Advertising* and *Nationwide News* cases the Court had regard to policy consid-

4 (1988) 62 ALJR 303.

5 (1992) 66 ALJR 658.

6 (1992) 66 ALJR 695.

7 (1992) 175 CLR 1.

8 *O’Toole v. Charles David Pty Ltd* (1990) 171 CLR 232 at 267.

erations does not indicate that the Court is trespassing beyond its judicial function or going beyond what courts have traditionally done in the past.”⁹

The common criticism that the High Court is highjacking Parliament’s role misfires at the point where the boundaries between legislative and judicial roles become blurred. Moreover, “policy” means different things to different people, and community values are sometimes hard to identify or do not supply obvious legal answers. For example, is there a demonstrable community consensus about giving contraceptive advice to teenagers, permitting sterilisation of handicapped children as a means of menstrual management and to prevent pregnancy, the rights and wrongs of abortion or pornography, the desirable limits of affirmative action under anti-discrimination legislation, and the desirability of limiting free speech in some situations?

More importantly, the rule-book approach to clear divisions between legislative and judicial roles belies the reality that both roles encompass legitimate law-making dimensions but in contexts which differ because of the range of arguments legitimately available, the processes of decision-making involved, the institutional constraints, or other things about which jurisprudential scholars favouring everything from positivism to postmodernism can debate to infinite levels of analysis forever. Clearly, the rule-book approach to law has its limits, and those limits are never more evident than when High Court justices engage in their own form of “law in context” analyses:

“... the ecclesiastical natural law foundations of equity, its concern with standards of conscience, fairness, equality and its protection of relationships of trust and confidence, as well as its discretionary approach to the grant of relief, stand in marked contrast to the more rigid formulae applied by the common law and equip it better to meet the needs of the type of liberal democratic society which has evolved in the twentieth century.”¹⁰

Here, the pervasive distinction between “form” and “substance” permeates the ongoing Australian debate about the intermingling of common law and equity, to the extent that Mason CJ can refer to “the notion, still regarded as heretical by some Australian commentators, that equity and common law are capable of constituting together a single body of law rather than two separate bodies of law administered together”.¹¹ As Aesop reminds us, we should not let arguments about the form distract us from the substance.

The subtle shift in Australian judicial attitudes is neatly crystallised by juxtaposing the thoughts of Dixon CJ and McHugh J respectively on the benefits of strict legalism, which is the Australian manifestation of what jurisprudence calls “legal formalism”:

“There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism”¹²; and

“... if, as I believe is the case, policy factors are decisive in hard cases, then the judiciary should not be composed exclusively of those who are masters only of a strict and complete legalism.”¹³

During this infant stage of informed Australian debate about the High Court’s activism, many criticisms misfire:

“Ill-informed commentators simplistically charge the High Court with abandoning passive interpretation of the law for active revision of the law. Anyone who maintains that the High Court is wholly importing legally impermissible notions into its decisions, or that High Court answers simply correlate to the political preferences or other idiosyncrasies of the seven individual justices, fails to appreciate the full complexity of the judicial

9 Interview with Mason CJ (1993) *Australian Lawyer* 18 at 23.

10 Mason CJ ‘The Place of Equity and Equitable Remedies in the Contemporary Common Law World’ (1994) 110 *LQR* 238 at 239.

11 *Ibid* at 240.

12 Sir Owen Dixon ‘Address Upon Taking the Oath of Office as Chief Justice’ *Jesting Pilate*, 1965, at 247.

13 McHugh J ‘The Law-Making Function of the Judicial Process - Part II’ (1988) 62 *ALJ* 116 at 124.

obligation to decide in accordance with the law. Similarly, anyone who maintains that judges merely rationalise their value preferences is not conscientiously attempting to explain all facets of adjudication.

... It is one thing to accept that values colour judicial conceptions [of the law], but it is quite a different matter, entailing further supportive argument, to proceed to claim that such values are not only (on occasions) simply reproduced as justifications (or even answers) but are also rationally determinative of judicial solutions.”¹⁴

Elsewhere, I have praised the High Court for its revision of the rationales underlying Australian law, and also criticised it for re-interpreting Australian law without outlining its guidelines for re-interpretation (particularly of precedent) as fully as it outlines its substantive revision of our law’s rationales.¹⁵ In light of its most recent decisions, that criticism warrants amplification:

“It is one thing to criticise the Court’s development of the law. It is another thing to ring warning bells about how it does it... Criticising the Court for making ‘policy’ decisions or hijacking parliament’s role misfires in the absence of general agreement on specific guidelines for the Court’s law-making role... Still, the Court cannot have it both ways. It cannot be activist and leave public education about this activism to somebody else. It cannot openly make ‘policy’ decisions and expect everybody to fall in line because of traditional respect for judges. It cannot change the law generally and expect everybody to wait for it to work through the details years down the track. It cannot write increasingly complex judgments in open-ended language and sound surprised when lawyers become frustrated trying to work out the practical applications for their clients... Finally, since the horse has bolted, everybody should stop agonising over whether the High Court’s activism is right or wrong. Rather, everybody should better inform themselves about today’s legal, political, social questions which the Court is addressing. Reviving Australian society’s interest in those big questions is crucial.”¹⁶

For anyone who remains in doubt about what is happening to Australian law, consider this select sample of recent guidelines:

1. “... in an era when the [High Court] is more inclined to reinterpret settled law, ... there is at least a discernible shift from first-order ‘formal’ reasoning (about fixed legal categories and rules) to second-order ‘substantive’ reasoning (about rationales underlying those categories and rules).”¹⁷
2. “The plain fact is that we are in the midst of a move away from reliance on ‘relatively’ narrow modes of legal reasoning which are ‘apparently’ relatively value free and mainly a matter of logical deduction, to patterns of decision making in which factual, social and political (small ‘p’ of course) judgments become part of the issue of validity.”¹⁸
3. “The record of recent years indicates that... we are developing an Australian common law. In the pursuit of this goal we must necessarily depart, in some respects at least, from the philosophy of legalism or legal formalism which, so it is said, the High Court followed in past years ... The emphasis is on substance instead of form, whether it be the substance of a constitutional provision or the substance of a transaction between parties. ... It is unrealistic to interpret any instrument, whether it be a constitution, a statute, or a contract, by reference to words alone, without any regard to fundamental values.”¹⁹

¹⁴ B Horrigan ‘Towards a Jurisprudence of High Court Overruling’ (1992) 66 *ALJ* 199 at 208.

¹⁵ *Ibid.*

¹⁶ B Horrigan ‘High Court Needs to Explain its Law-Making’ *Business Queensland*, 17 January, 1994, at 7.

¹⁷ Horrigan *supra* n.14 at 199.

¹⁸ J Doyle QC ‘At the Eye of the Storm’ symposium paper, 24 February 1993, at 21, revised in (1993) 23 *UWAL Rev* 15 at 27.

¹⁹ Mason CJ ‘Future Directions in Australian Law’ (1987) 13 *MULR* 149.

4. "No one would suggest nowadays that statutory interpretation is merely an exercise in ascertaining the literal meaning of words. Statutory interpretation calls for reference not only to the context, scope and purpose of a statute but also to antecedent history and policy as well as community values."²⁰

Mason CJ recently highlighted the significant developments underlying the High Court's judicial activism:

"Since Sir Samuel Griffith's time significant changes have taken place which bear directly on the Court's role in developing the common law. First and foremost, there was the elimination of the appeal to the Privy Council which left the Court with the sole responsibility for developing the Australian common law, a responsibility which necessarily entails that English precedents may not be as authoritative as they once were. Almost certainly, a decision such as *Mabo* would have been a matter for the Privy Council in Sir Samuel Griffith's day. [At that time, the High Court would have felt impelled to follow the Privy Council's decision in *Cooper v. Stuart* (1889) 14 App. Cas. 286, which accepted and applied the doctrine of *terra nullius*.] Secondly, the old theory, well accepted in the first quarter of this century, that the courts merely declare the law, has been discarded. Thirdly, the legislatures are increasingly leaving it to the courts to elucidate and develop the principles of judge-made law. Fourthly, Australia, having asserted its autonomy as a member of the community of nations, has acceded to a variety of international conventions by which it has bound itself to ensure that its municipal law conforms to the requirements of those conventions. Fifthly, the rules of international law, particularly when they declare universal fundamental rights, are an important and relevant factor in the development of the common law. And, finally, the elimination of the appeal as of right has meant that the Court's appellate function is very largely directed to the elaboration of the principles of judge-made law and to important questions of statutory interpretation rather than mere application of legal principle. All these considerations have significantly altered the role of the Court in developing the common law."²¹

(b) The High Court's Jurisprudential Performance

In a spirit of constructive criticism, any scorecard of the High Court's jurisprudential performance in the last few years reveals that four key areas deserve more priority than the Court currently affords them:

1. Given the Mason Court's clear preference for second-order reasoning about the rationales and principles underlying the law, most of the Court's judicial and extra-judicial references to permissible "policy" arguments in legal reasoning still rely more on rhetoric than a clearly articulated framework for Australian legal reasoning which equally accommodates rule-based reasoning and non-rule-based reasoning, particularly the scope of permissible non-rule-based reasoning;

2. The Court habitually discusses precedential considerations at a level of analysis which is disproportionately general in comparison with its level of analysis in reinterpreting the substance of settled legal doctrines;

3. Although the Court is undoubtedly familiar with the insights of both analytical jurisprudence and postmodern jurisprudence, its judgments scarcely raise conceptual jurisprudential issues generated by particular cases before the Court, at least in anything more than passing references; and

4. The fervour of the Court's current law-making mode is not matched by an equal fervour for public, professional, and academic education about the dynamics of that role in a way which

²⁰ Mason CJ 'Australian Law For Australia' (1991) *Australian Law News* 14 at 14.

²¹ Mason CJ 'The High Court in Sir Samuel Griffiths Time: Contemporary Parallels and Contrasts' March 1993, NILEPA Samuel Griffith Centenary Conference, Brisbane, at 25-26.

generates informed, two-way public discussion about the boundaries of that role.

All of these criticisms remain consistent with praise for the Court's justified reinterpretations of Australian law.

(c) Impact on Commercial Practice

Given these jurisprudential developments, there are three clear Australian judicial developments affecting commercial practice. First, our traditional two-fold classification of major personal obligations into "tortious" and "contractual" obligations is giving way to a five-fold classification comprising tort, contract, trusts/fiduciary obligations, unjust enrichment/restitution, and trade practices/fair trading obligations. Analysis of clients' problems and the drafting of documents and correspondence must evolve accordingly. Second, the interest of certainty promoted by hard rules of contract is giving way to the interest of justice as promoted by the equitable infusion (or intrusion, depending upon your perspective) of equitable notions of fairness and justice into commercial dealings (eg, covering unconscionability, good faith, misleading or deceptive conduct, undue influence, corporate and trust benefit, fiduciary elements, unjust enrichment, estoppel, etc). The enhanced equitable standards are not completely open-ended, but rather are generalised standards linked to specific legal doctrines which require judgment in their application. It is no longer simply a matter of slotting a transaction within a strict legal category of analysis. "Leading edge" advice for clients takes account of this development. Third, led by the High Court, Australian judicial reasoning has noticeably shifted gears to reach a new level of analysis in the last decade. The best illustration of this shift is the pervasive triumph of "substance" over "form".

At the same time, maintaining a sense of balance about these developments is important. In correspondence between lawyers and arguments before courts, things like fiduciary obligations, constructive trusts, estoppel, unconscionability, and misleading conduct are more easily raised than proved or disproved. Much woolly thinking surrounds their use in legal argument. At the same time, many practitioners are revising their strategies for accommodating these developments. For example, many (but not all) equitable problems can be avoided by:

1. correspondence (eg, avoiding estoppel problems in advance by (a) setting ground rules in correspondence for revisions of agreements; and (b) clearly indicating when no action should be taken until further matters are clarified); or
2. drafting (eg, drafting acknowledgments in guarantees to show that guarantors have received independent legal advice and are not otherwise entitled to raise any equitable or Trade Practices Act defences).

Professor Finn has crystallised and illuminated the infusion of equitable standards affecting commercial certainty:

"There is an evident change in the standards of conduct which the law is exacting from persons in their voluntary or consensual dealings with others. Putting the matter in a very general way for the moment, I suggest it can rightly be said that we are witnessing a partial shift (though of marked consequence) in the ideology which is informing much legal doctrine. *Associated with this is an emerging tendency to formulate some range of doctrines, not in terms of distinct, limited and discrete rules of behaviour, but as generalised standards of conduct which in a controlled way are instance-specific in their application.*"²²

(d) Lessons

What lessons do these jurisprudential developments hold for academic and client-based research and reasoning? First, all lawyers - students, academics, and practitioners - must quickly

22 P Finn 'Commerce, the Common Law, and Morality' (1989) 17 *MULR* 87); emphasis added. The italicized passage highlights how the enhancement of equitable doctrines requires legal reasoning to be taken to a new level of analysis. It is another illustration of Australian legal reasoning reaching a new plateau.

grasp the implications of these new guidelines for Australian legal reasoning. They inevitably affect our understanding of law in theory and law in practice. In short, for some time now the High Court has been signalling a shift in gears of legal analysis. Using the conceptual framework of the dichotomy between "form" and "substance" - which embraces, for example, unifying concepts like unconscionability, estoppel, unjust enrichment, waiver, and proximity, as well as the intermingling of law and equity - the High Court is signalling a move away from simply slotting legal transactions into strict "black letter law" categories of analysis. At the conceptual level, the High Court's preference for second-order reasoning about the principles and rationales underlying the settled law illustrates the modern search for symmetry in law, manifested in the search for unifying concepts, on one hand, and closer links between common law and equity, on the other:

"The concept of unconscionable conduct, along with the recognition of unjust enrichment which is partly a derivative of unconscionable conduct, has been the source of the recent rejuvenation of equity. Moreover, in the reshaping of branches of the law which straddle both common law and equity which has resulted in greater unity of principle, we have discovered that equity and the common law share much in common ... (T)he interaction between common law and equity has resulted in dynamic development of legal principle, resulting in greater symmetry."²³

At the practical level of commercial practice, this means that it is harder to create drafting solutions which are legally foolproof, and that it is dangerous to evaluate legal rights in transactions with a preconceived bias towards strict contractual rights.

At the same time, the resistance of some lawyers to the High Court's reinterpretation of Australian law should be understood but also gently neutralised, for the choice to believe in the myth of the predominance of legal certainty is no longer open to them:

"As we endeavour to express principles which are attuned to the attainment of justice in a range of particular cases, we are compelled to express those principles in broad terms. Criticism of that approach often stems from a preference for a more rigid rule-based system of justice. That preference, not infrequently voiced by judges and practitioners, is generally associated with the belief, in my view erroneous, that rigid rules promote clarity and certainty in the law."²⁴

Second, there really is nothing novel or strange about this modern style of judicial reasoning. Many of these developments are differences of degree rather than kind. Anyone who suggests the contrary fundamentally misconceives the real nature of Dixonian strict legalism:

"If, as Dixon CJ once affirmed, the correctness of a judicial decision is simply a function of its conformity with 'ascertained legal principles' applied 'according to a standard of reasoning which is not personal to the judges themselves', what is being illuminated is a sweeping distinction between legally permissible reasoning and legally impermissible reasoning. But that simple distinction provides no criteria for identifying the range of legally permissible arguments available to judges... Mason CJ's call... for a change in judicial approach is not, however, a complete renunciation of Dixonian strict legalism. Rather, Mason CJ... suggests that reliance on what Dixon CJ called 'a system of fixed concepts, logical categories and prescribed principles of reasoning' need not preclude reasoning by reference to 'considerations of justice or social utility' (ie, need not preclude judicial reference to practical consequences, consensus community values, the substance of transactions and instruments, and the overall purposes of statutory (especially constitutional) provisions and the values underlying them) when the decision is not clearly settled by [rule-based] standards. Dixon CJ characterises as legally impermissible not the

²³ Mason CJ *supra* n.10 at 238-239.

²⁴ *Ibid.* at 255-256.

abandonment per se of ‘a long accepted legal principle’ but such abandonment ‘in the name of justice or of social necessity or of social convenience’.”²⁵

These developments are not simply matters of academic interest, because judges are increasingly influenced by non-rule-based considerations. Recently, one judge candidly admitted the tension between rule-based and non-rule-based reasoning for Australian judges:

“Judges have traditionally been loath to discuss matters of political economy and moral philosophy. Their inherent complexities and a fear of politicising the judiciary are, it seems, the reasons for this, not any current acceptance of legal realism or legal positivism ... Sir Anthony Mason has called upon judges to identify and disclose ‘fundamental values’, or ‘policy values’ to the extent they are relevant to decisions and stressed they should be community values and not those personal to the judge ... Having regard to the importance of theory in contract law, it seems increasingly desirable to identify and openly to acknowledge the moral philosophy underpinning classical contract law. It will be recalled that Sir Owen Dixon in his oft-cited address ‘Concerning Judicial Method’ stressed, inter alia, the ‘deeper ... philosophical’ conceptions of justice, consideration of which he did not appear to regard as contrary to ‘strict and complete legalism’ ... Questions of ‘pragmatism’, and of ‘form’ and ‘substance’ also arise. It is this contributor’s view that courts should enter the difficult and daunting area of philosophy to decide ‘hard cases’.”²⁶

In particular, note Angel J’s similar acknowledgement that strict legalism does not preclude reference to abstract conceptions of justice and fairness underlying the settled law. What it precludes is judicial reference to “policy” in what I have termed its pejorative sense.²⁷

Third, these matters go to the heart of the distinction between permissible references to “policy” and impermissible references to “policy”. This shows why many criticisms of the High Court fail. It is pointless criticising the High Court for being idiosyncratic and doing legally impermissible things if what the Court is doing is legally permissible but you simply disagree with its approach and its results. In the same way, it is pointless criticising the High Court for making “policy” decisions without a comprehensible outline of legally permissible reference points for judges.²⁸ At the same time, High Court justices do not advance matters by their question-begging references to policy in their judicial and extra-judicial comments, eg:

“And, though the courts should look at policy arguments with due circumspection, it would be absurd to suggest that the courts cannot adjust or modify equitable principle on policy grounds where to do so is appropriate.”²⁹

(e) “Policy” Arguments

As foreshadowed above, judges and lawyers often refer to the permissibility or impermissibility of using “policy” arguments in different contexts, without stating what they mean with any precision. “Policy” is an open-ended term whose meaning shifts according to context. It can mean different things to judges and politicians. However, fully skilled lawyers must understand when reference to “policy” in its various forms is legally permissible and legally impermissible.³⁰

25 B Horrigan ‘Taking the High Court’s Jurisprudence Seriously’ (1990) 20 *QLSJ* 143 at 145-146. Angel J’s comments below illuminate the same point about strict legalism.

26 Angel J ‘Some Reflections on Privity, Consideration, Estoppel and Good Faith’ (1992) 66 *ALJ* 484 at 484-485.

27 Horrigan *supra* n.25 at 147-148.

28 Here, I am deliberately glossing over one of the most important questions for theories of adjudication. Clearly, what count as “legal” standards might not contain everything to which judges can and should refer: see B Horrigan ‘Taking the High Court’s Jurisprudence Seriously’ (1990) 20 *QLSJ* 143 at 145. This is another point where the debate about “policy” arguments in judicial reasoning bites.

29 Mason CJ *supra* n.10 at 243-244.

30 For a further discussion of the different meanings of “policy” and their implications for legal reasoning, see: B Horrigan ‘Taking the High Court’s Jurisprudence Seriously’ (1990) 20 *QLSJ* 143 at 147-149. Similarly, the simplistic notion that High Court justices simply transform their own values into legal results cannot fully explain the complex judicial obligation to decide according to law: see B Horrigan ‘Towards a Jurisprudence of High Court Overruling’ (1992) 66 *ALJ* 199 at 205-208.

Again, debate about the proper and improper uses of "policy" in Australian judicial reasoning is still in its infancy. Australian law needs:

"... a conceptual framework for adjudication which affords criteria capable of distinguishing legally permissible reasoning from legally impermissible reasoning. If, as Dixon CJ once affirmed, the correctness of a legal decision is simply a function of its conformity with 'ascertained legal principles' applied 'according to a standard of reasoning which is not personal to the judges themselves', what is being illuminated is a sweeping distinction between legally permissible reasoning and legally impermissible reasoning. But that simple distinction provides no criteria for identifying the range of legally permissible arguments available to judges.

That the latter matter has largely been overlooked in Australian jurisprudence can be shown by a sample of Australian references to judicial reasoning. Many such references expressly distinguish legally permissible reasoning from legally impermissible reasoning, but do so by juxtaposing extreme types of the two forms of reasoning being distinguished. Thus there have been references to (i) "literalist" or "legalistic" reasoning versus 'policy orientated' reasoning; (ii) 'strict and complete legalism' versus 'resort to slogans or to political catch-cries or to vague and imprecise expressions of political philosophy'; (iii) what the Constitution 'does provide' versus what it 'might best provide'; (iv) 'applying objective legal principles and rules ... without regard to personal predilection versus non-impartial judging 'in the face of conflicting social values, political policies and ideological views'; (v) drawing upon 'deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice' versus 'arbitrary or fanciful ... personal standards or theories of justice and convenience which the judge sets up'; and (vi) 'a system of fixed concepts, logical categories and prescribed principles of reasoning' (including 'reasoning by reference to considerations of justice and social utility') versus overthrowing 'well settled doctrine in order to reach the result ... [considered] just in the particular case', based on 'the personal predilections and values of the individual judge'."³¹

References to "policy" in Australian judicial reasoning must now be understood in two senses - a pejorative sense and a non-pejorative sense:

"The call to emphasise 'values' and 'substance' in Australian judicial reasoning accompanies recent Australian judicial recognition of 'the greater relevance in present jurisprudence of notions of abstract justice' ... When community interests or values are properly referred to by judges, they are not arbitrarily electing to pursue a course (viz. to benefit the community in some way) at the expense of the real entitlements of the litigants according to law. Rather, they are using a legally permissible standard (here including community interests or values) to rank alternative solutions left open by the positive law. The key point is that reference to such a standard need not amount to an application of 'policy' in its pejorative sense.

To explain: the law excludes certain types of justifications from the set of legally permissible justifications for judicial decisions. Foremost amongst these excluded justifications are those founded on what I shall term 'policy'. 'Policy' has multiple meanings in judicial and jurisprudential discourse, but 'policy' in a special, pejorative sense is relevant here. Central to most references to 'policy' in this pejorative sense are these notions: (i) aggregate (or otherwise line up) all relevant community interests or preferences; (ii) consider the interests or preferences of the litigants only as part of the sum total of community interests or preferences; and (iii) apply the result favouring the sum total of community interests or preferences, regardless of 'the law'."³²

³¹ Horrigan *supra* n.25 at 145.

³² *Ibid* at 146-147.

All lawyers should accept once and for all that we cannot explain what is legally permissible and impermissible in judicial reasoning purely as a matter of role or range of arguments available for decision-making. Clearly, although there are role differences and more obvious differences in the *process* of reasoning undertaken by legislatures and courts, there is some overlap in the range of arguments available to both, notwithstanding that the same argument might form part of a different process of reasoning. In short, legislatures can consider some “policy” arguments of a kind which judges should not consider, and yet both legislatures and judges can consider other “policy” arguments but within the constraints of a different process of decision-making.

At a broader level, all Australian lawyers must learn to explore the theoretical and practical dimensions of the pervasive distinction between “form” and “substance” in modern Australian law. Here, revising the traditional doctrine of strict legalism means accepting that a rule-based approach to fixed legal standards and categories of analysis still leaves room for judicial reasoning about abstract notions of fairness and justice. For example, Toohey J. recently flagged “a revival of natural law jurisprudence - that for law to be law it must conform with fundamental principles of justice”.³³

Finally, Australian lawyers must at least contemplate the extent (if any) to which postmodern jurisprudence reveals weaknesses in analytical jurisprudence, but without discarding analytical jurisprudence’s substantial insights. In particular, postmodern jurisprudence has much to say about law as an exercise in interpretation and as a social instrument which is not revealed by much of analytical jurisprudence’s preoccupation with the distinction between “legal” and “non-legal” standards. At the same time, we must beware the trap of believing that the competition between all jurisprudential theories must result in the demonstrated truth of one theory and the demonstrated falsity of other theories.

(f) Crystal Analogy

An analogy promotes understanding of the difference between constructive and non-constructive approaches to jurisprudence. Non-constructive approaches to jurisprudence are exclusive, in the sense that the competition between jurisprudential theories is always seen as a “zero-sum” battle from which only one victor can emerge triumphant. Conversely, constructive approaches to jurisprudence are inclusive, in the sense that somebody who holds a crystal to the light at different angles can appreciate the different perspective of each angle. In other words, different jurisprudential theories often have different starting points or areas of concern, and their usefulness from given perspectives is not always neutralised by other theories with different starting points or concerns across the spectrum of jurisprudence. A constructive approach to jurisprudence assumes that every jurisprudential theory offers an insight which is valuable for its own sake if it adds at least something - even a different perspective - to our collective store of knowledge. Obviously, some competing jurisprudential theories are wholly or partially inconsistent. However, that is not always the case. We must avoid throwing out the jurisprudential baby with the bath water.

Applied Jurisprudence

“To be sure, there are lawyers, judges, and even law professors who tell us that they have no legal philosophy. In law, as in other things, we shall find that the only difference between a person ‘without a philosophy’ and someone with a philosophy is that the latter knows what his philosophy is” - Filmer Northrop

If applied jurisprudence really unifies legal theory and legal practice, a good test of its value would be its capacity to supply a conceptual framework for understanding a traditional “black letter” law topic. So, by way of illustration, consider the extent to which Hohfeldian analyses of rights illuminate Australian law’s underlying rationale for a receiver’s capacity to repudiate pre-

³³ Toohey J, quoted in (1992) 27 *Australian Law News* 7 at 9.

receivership contracts. Once grasped, the Hohfeldian conceptual framework easily rationalises what, at first glance, looks like a series of conflicting comments in the leading cases on pre-receivership contracts. Nobody should pretend that applied jurisprudence is easy, so we must progress in a step-by-step way.³⁴

(a) Rights, Remedies and Pre-Receivership Contracts

The correlation between rights and remedies is starkly illuminated when the protection of pre-receivership contractual rights is in issue. Just as much confusion surrounds loose judicial and academic references to "policy", so too does much analysis of receivers and pre-receivership contracts loosely discuss the concept of "rights". Much of the imprecise "rights"-talk surrounding this topic has focused on whether or not a receiver and manager³⁵ has a unilateral power - within limits - to repudiate pre-receivership contracts. Judicial references to a receiver being "entitled" to repudiate or adopt contracts, being able to do that "with virtual impunity", and being in a "better" position than the company in relation to pre-receivership contracts do not supply an explanation which sufficiently explains the matrix of rights involving mortgagees, receivers appointed by mortgagees, the company in receivership, and third party contractors. In an economic climate where receivership is increasingly used as a remedy, and in a legal climate where the propensity to challenge receivers' activities might serve as a catalyst for more stringent judicial review of the appointment and actions of receivers, future litigation concerning pre-receivership contracts properly will turn on the dual relation between the respective interests at stake and the legal means of enforcing those interests.

(b) "Rights" versus "Remedies" - An Overview

In the case of pre-receivership contracts, recent cases clarify the special link between rights and remedies, including reference to the wider question of what justice requires as a balance between the respective interests of receivers, mortgagees, mortgagors and third party contractors - all within fairness' constraint of respect for precedent in treating like cases alike. Key decisions in this area³⁶ present a coherent set of principles prescribing different balances between those interests in different circumstances. Any "rights"-talk whose focus is the receiver's presumed unilateral power of repudiation fails to acknowledge that the competition between the respective "abstract" rights of the receiver and third party contractor produces one "concrete" right which is given effect to as the prevailing legal entitlement.³⁷

Lawyers striving for an interpretation reconciling the different cases on pre-receivership contracts will confront two conceptual obstacles. First, much of the judicial rhetoric focuses upon whether or not the receiver has a power to repudiate in particular circumstances, without due recognition of the dual relation between the capacity of the receiver and the nature of the contract. Second, some of the passages in the key decisions are ostensibly inconsistent, at least when abstracted from their context. Consider:

1. "I therefore hold that the receiver, within the limitations which I have stated is in a *better position than the company, qua current contracts*, and that, in the present case, the receiver, in doing what he has done and is purporting to do ... is not doing anything which

34 The following discussion is based upon extracts from B Horrigan 'Supervening Effect of Receivership Upon Corporate Trading Contracts', QLS CLE Securities Intensive IV, 17 November 1990, and is reprinted with kind permission of the QLS CLE Department.

35 Hereinafter "receiver".

36 eg, *Airlines Airspares Limited v. Handley Page Limited* [1970] Ch. 193; *Schering Pty Ltd v. Forrest Pharmaceutical Co Pty Ltd* [1982] 1 NSWLR 286; *Re Diesels & Components Pty Ltd* [1985] 2 QdR 456; and *Cater-King Pty Ltd v. Westpac Banking Corporation* [1990] WAR 225. Although the Queensland Full Court's unreported 1992 decision in *Lake Eerie Pty Ltd v. Flair Realty Pty Ltd* (11 February 1992) is an important case in this area because of its guidelines on the hierarchy of rights prevailing between mortgagees, mortgagors, receivers, and third party contractors, it is discounted for the purpose of this simpler exercise in Hohfeldian analysis.

37 On the distinction between "abstract" and "concrete" rights, see Dworkin *Law's Empire* Fontana Press London 1986 at 293.

the plaintiffs *are entitled to prevent* by this motion.”³⁸

2.”In my view the law does not permit a receiver of a company to avoid onerous contracts. He is in law, when acting within the scope of his authority, the agent for the company and *he can do no more in relation to contractual obligations than the company can itself.*”³⁹

3.”*The receiver therefore can, with virtual impunity, repudiate pre-receivership contracts.* I say ‘with virtual impunity’ because [there are limits] ... Subject to those limits, whatever they may be, a receiver acting for a creditor secured by a charge on corporate assets may strip the assets leaving only the liabilities with the company. The lemon may be squeezed dry.”⁴⁰

4.”A receiver and manager is not personally bound by a pre-receivership contract which has not been adopted by him, save in the circumstances referred to by McPherson J in *Diesels & Components Pty Ltd* ... To refer to a receiver as being ‘entitled’ to repudiate certain contracts but not others, is, I consider, a misnomer. *The true position, in my opinion, is that a receiver is not “entitled” to repudiate any contract.* The real distinction between the two kinds of contracts referred to is as to the *nature of the relief available* to the plaintiff and not as to any ‘entitlement’ on the part of the receiver.”⁴¹

Our search is for propositions which, “though contrived and controlled in scope, are in the end instance-specific”.⁴² Professor O’Donovan has referred to swings in the judicial pendulum in the major cases and the need to place them in context:

“One of the perceived advantages of receivership is that the receiver and manager can rationalise the business commitments of the mortgagor company, electing whether to honour or disregard pre-receivership contracts. This assumption has been challenged in a trilogy of cases which reflect some interesting swings of the judicial pendulum. The first case, *Airlines Airspares Limited v. Handley Page Limited*, was a decision in favour of a receiver and manager. In the second case, *Schering Pty Ltd v. Forrest Pharmaceutical Co Pty Ltd*, a receiver and manager was restrained by injunction from acting in defiance of a negative stipulation in a pre-receivership contract. In the final case, *Re Diesels & Components Pty Ltd (Receivers and Managers Appointed)* a customs agent was allowed to assert a pre-receivership contractual lien against a receiver and manager. Unless these cases are placed in their proper perspective, lenders may lose faith in the efficacy of receivership as a means of recovering a secured debt⁴³ ... The general principle is that a receiver and manager can disregard pre-receivership contracts with impunity where his failure to honour the contract will have no detrimental effect upon the company’s goodwill or future trading prospects ... This general principle admits a well-recognised exception: the receiver and manager takes possession of the assets charged subject to all prior equities”.⁴⁴

The “swings of the judicial pendulum” may be in results alone. Each case contributes to a coherent set of general propositions amplifying the “subject to pre-existing equities” qualification. Our enterprise is to frame the scope of a “concrete” legal entitlement to repudiate in a given case, by reference to justice’s concern for the balance of respective competing “abstract” rights. That enterprise predominantly turns upon applying a limited set of general propositions -

38 *Airlines Airspares v. Handley Page* *supra* n.36 per Graham J at 199; emphasis added.

39 *Schering v. Forrest Pharmaceutical* *supra* n.36 per Helsham CJ in Equity at 291; emphasis added.

40 *Re Diesels & Components* *supra* n.36 per McPherson J at 459; emphasis added.

41 *Cater-King Pty Ltd v. Westpac Banking Corporation* *supra* n.36 per Master White at 229; emphasis added.

42 Cf. Finn *supra* n.22 at 98. Admittedly, Finn’s context is a different one.

43 ‘Effect of the appointment of a receiver and manager’ in *Insolvency Law and Practice: The Cutting Edge* (Banking and Finance Seminar, September 1990) at 9.

44 J O’Donovan ‘The Duties and Liabilities of Receivers: Too Many Masters?’ (Banking and Finance Seminar, 17 August 1989) at 26. The “subject to all prior equities” qualification needs further elaboration, but at least serves as a touchstone for the different circumstances in which a third party contractor’s rights will prevail.

including propositions amplifying the general “subject to pre-existing equities” qualification - to prescribed circumstances.

(c) Crystallisation and Appointment

A receiver has two courses available regarding pre-receivership contracts. First, the receiver may “adopt” (ie, refrain from repudiating⁴⁵) pre-receivership contracts (as distinct from entering into fresh contracts). Second, the receiver may, within certain limitations, repudiate pre-receivership contracts. The mere appointment of a receiver (or even the entering into possession by a mortgagee) does not determine all existing trading/commercial contracts; the legal persona of the contracting company remains intact, albeit controlled by another person.⁴⁶ Of course, a contract will often prescribe automatic termination upon appointment of a receiver, or confer an option upon the other party to terminate upon such an appointment.

Given the consistent theme in all of the major cases that the capacity to repudiate pre-receivership contracts is subject to pre-existing equities, questions of priority beyond the strict focus of “receiver versus third party contractor” can be relevant. If a charge is fixed over certain property and a company purports to enter into a contract disposing of that property, then the argument that the chargee has a better interest than the third party contractor is relevant to the consideration of respective equities and subsequent relief. Similar arguments arise if the charge is floating and the company is only permitted to deal with or dispose of property in the ordinary course of business and it enters into a contract outside that ordinary course of business. This interaction between the original charge, restraints upon later dispositions of property by the company, and the interest purportedly given to the third party contractor shows why the legal entitlement is not inevitably ascertained only by reference to the position of the third party contractor vis-a-vis the company.

At common law, if the receiver takes no steps to repudiate a pre-receivership contract and allows continued performance of the contract for a time (as distinct from entering a new contract or otherwise creating an estoppel against any later purported abandonment) by fulfilling existing orders using the name and powers of the company, such mere continuance does not itself preclude later repudiation by the receiver.⁴⁷

If the receiver keeps a pre-receivership contract on foot:

1. mere ratification of the pre-receivership contract does not create a novation of that contract, create a new contract and thereby give rise to personal liability of the receiver/manager⁴⁸;
2. the third party contractor cannot terminate or justifiably allege breach of contract just because there is a change of identity of management in that the receiver controls the company's affairs⁴⁹;
3. the third party contractor may be able to use a contractual provision to gain a position of priority (relative to unsecured creditors) via a set-off or contractual lien⁵⁰;

45 See *Re Diesels & Components supra*. n.36 at 459. Judicial references to “adoption” do not always clarify whether the term is being used in a “strong” or “weak” sense. The strong sense of “adoption” is something akin to novation, whereby the receiver acts in such a way as to become liable on the pre-receivership contract - in effect, displacing the company as a party to the contract. “Adoption” in the weak sense refers to a decision merely to keep an existing contract on foot: cf, G Weaver and C Craigie, *The Law Relating to Banker and Customer in Australia* Law Book Sydney 1990 at para. [22.660].

46 *Parsons v. Sovereign Bank of Canada* [1913] AC 160 at 167-168.

47 *Ibid*; *Rangatira Pty Ltd v. Viola Hallam Ltd* [1957] NZLR 1188; *British Investments & Developments Co Pty Ltd* [1979] ACLC 32,100; and P Blanchard ‘The Contracts of a Company in Receivership’ (1989) 13 NZLR 237 at 247. The High Court's decision in *Waltons Stores (Interstate) Ltd v. Maher* (1988) 62 ALJR 110 may introduce estoppel as a supervening agent upon the concept of interim continuance. Now, also see *Corporations Law*, s419 and s419A.

48 *Parsons v. Sovereign Bank of Canada supra*. n.46 at 167-168; *Lawson v. Hosemaster Machine Co.* [1967] 2 All ER 944 at 950.

49 *Parsons v Sovereign Bank of Canada supra* n. 46 at 167.

50 *George Barker (Transport) Limited v. Eynon* [1974] 1 All ER 900; *Re Diesels & Components supra*. n.36; and cf, Blanchard at 243.

4. the receiver cannot adopt the benefits under the contract while simultaneously renouncing the other contracting party's rights, and similarly the receiver cannot pick and choose from amongst the benefits⁵¹; and

5. a receiver cannot expect the third party contractor to perform its contractual obligations unless the receiver is prepared to cause the company to perform its obligations (eg. to cause the company to tender the outstanding purchase price in exchange for a transfer of land purchased in the pre-receivership contract).⁵²

(d) Nature of Receiver's Capacity to Repudiate

Notwithstanding the different results in the relevant cases, the overriding theme that emerges is as follows. A receiver cannot justifiably repudiate any pre-receivership contract to which equitable relief will attach by allowing an injunction or specific performance in circumstances where damages are an inadequate remedy, and a receiver claiming the benefit of assets equitably assigned to the debenture holder takes that benefit subject to its correlative liabilities (including pre-receivership contractual liens).⁵³

(e) Hohfeld on "Rights"

Phrasing the fundamental rationale of the pre-receivership contract cases by reference to the distinction and interplay between "rights" and "remedies" is not simple word-playing. It at least clarifies why some of the arguments raised in *Cater-King* were misguided. As a supplement to Master White's penetrating analysis of the legal entitlements really at stake, it is useful to undertake a "broad brush" clarification of those entitlements by reference to a somewhat more theoretical analysis. The most appropriate jurisprudential basis for such an analysis is Hohfeld's theory of rights. Hohfeld attempted an analysis of rights accommodating a wide range of legal "rights" and their cognates.⁵⁴ Hohfeld asserted that "rights"-talk centred upon four "rights": (a) "claim-right", (b) "liberty"/"privilege", (c) "power", and (d) "immunity". Accordingly, assertion of a Hohfeldian right relied upon a three-term relation between a person, an act-description and

51 Cf, Blanchard *supra* n.47 at 243. Of course, the company may have received funds for a service not provided as at the date of appointment, or alternatively may have received goods for which payment has not been made at the date of appointment, and in those circumstances the creditor is left simply with an unsecured claim. But those situations are distinct from the situation where the receiver is unable to obtain from the third party contractor any more than the company has already received without also fulfilling the company's correlative contractual obligations in relation to that further (or only) benefit (eg. effecting a transfer of land in exchange for the balance of the purchase price).

52 *Ibid* at 243-244. The most appropriate context under items 4 and 5 is that of "single transaction" contracts. Complexities arise when the adoption of the benefits of an existing contract also raises questions of exposure for pre-existing liabilities like defective workmanship and product liability. That is why the best practical course often is to re-negotiate existing contracts upon appointment, specifically precluding or else compromising such pre-existing liabilities.

53 *Airlines Airspares supra* n.36; *George Barker v. Eynon supra* n.50; *Schering supra* n.36; *Freevale Ltd v. Metrostore (Holdings) Ltd* [1984] 1 Ch. 199; *Re Diesels & Components supra* n.36; and *Cater-King supra* n.36. This formulation puts to one side questions of set-off, such as setting off pre-receivership debts against post-receivership claims. The prior equity may operate as a supervening agent upon the chargee's right to realise the company's assets in discharge of the secured debt (as in *Re Diesels and Components*, where the custom agent had a right to retain possession of the goods until payment of all moneys due to the agent), or alternatively, it may justify a remedy precluding repudiation by the company in receivership (as it did in *Schering*, where it formed the basis of a right to apply for an injunction restraining a breach of a negative stipulation in the exclusive supply and distribution (franchise) arrangement with the company).

54 Here, I shall embrace Hohfeld's analysis only to the extent that it clarifies practical problems concerning receivers, pre-receivership contracts and third party contractors. Some misguided lawyers pretend that the gulf between law in theory (ie, jurisprudence) and law in practice is such that the former does not helpfully illuminate the latter. That illusory gulf is similar to the illusory gulf sometimes presented between "commercial" decisions and "legal" decisions, where the decision-maker purports to rationalise the adoption of a legally unjustified course of action for commercial reasons. Just as the law provides the framework within which commercial decisions are made, jurisprudence provides the framework within which practical legal analysis properly proceeds.

another person.⁵⁵ Suitably modified, the applicable Hohfeldian relations produce the following relevant propositions:

1. A receiver has a legal liberty (relative to a third party contractor) to repudiate the pre-receivership contract, if and only if the third party contractor has no claim-right that the receiver should not repudiate it⁵⁶; and

2. A third party contractor has a legal immunity (relative to the effect of a receiver's purported repudiation of a pre-receivership contract), if and only if the receiver has no power to change the third party contractor's legal position by such a repudiation.

Using this analysis to place the respective interests in their proper relation promotes clearer analysis, especially given judicial discussion of a receiver/manager being "entitled" to repudiate or adopt contracts, being able to do that "with virtual impunity", and being in a "better" position than the company in relation to pre-receivership contracts. Abstracted from their "instance-specific" contexts, such comments offer a loose analysis of rights. They do not reveal the relation here between "abstract" rights and "concrete" legal entitlements. At least for repudiation, the primary focal point is the third party contractor's claim-right and its attendant protection rather than any unilateral "power" (or, more accurately, *liberty in the absence of any correlative claim-right*) to repudiate.

This modified Hohfeldian analysis shows that when we say that a receiver is "entitled" to repudiate "with impunity" (or some such inexact phrase, which itself is incapable of pointing the way to a decision because of its generality and inexactitude), we more accurately mean: immunity from having a third party contractor's claim-right enforced against a company in receivership to prevent the receiver taking action that interferes with that claim-right. *Airlines Airspares*, *Schering*, *Diesels* and *Cater-King* are all consistent with that underlying rationale, rather than being a procession of cases some of which deny or limit the receiver's power to repudiate contracts and some of which do not.

In short, the Hohfeldian scheme of rights shows that the remedy for third party contractors turns on the availability of equitable relief to protect those contractual rights, rather than the receiver's powers. If the contract is of a kind whose breach results in a claim for damages rather than an action for specific performance or an injunction, the receiver cannot be restrained from repudiating the contract in the sense that the only remedy for the third party contractor is to bring an action against the company in receivership for breach of contract. In this way, the Hohfeldian analysis enhances our understanding of why the nature of the contract is the real focal point and why the question of receivers' powers is an illusory focal point.

This exercise in Hohfeldian analysis illustrates the value of applied jurisprudence in explaining the connection between legal theory and legal practice. The next step is to reinforce our understanding of applied jurisprudence by examining its application to a vastly different area of law, and to illustrate how joining the enterprise of becoming a fully skilled lawyer reinforces the lessons of applied jurisprudence by helping lawyers to understand all of the dimensions on

55 On this general summary of Hohfeld's analysis, see J Finnis *Natural Law and Natural Rights* Clarendon Press Oxford 1980 at 199. Finnis identifies the following Hohfeldian relations (where A and B signify persons and # describes some act):

1. A has a *claim-right* that B should #, if and only if B has a *duty* to A to #.
2. B has a *liberty* (relative to A) to #, if and only if A has *no-claim-right* that B should not #.
- 2.' B has a *liberty* (relative to A) not to #, if and only if A has *no-claim-right* that B should #.
3. A has a *power* (relative to B) to #, if and only if B has a *liability* to have his legal position changed by A's #ing.
4. B has an *immunity* (relative to A's #ing), if and only if A has no power (ie, a *disability*) to change B's legal position by #ing.

56 Here, the relevant claim-right includes a right to a particular kind of remedy to enforce a certain contractual right. The important concept is that A's claim-right has as its correlative B's duty, such that A's right to equitable enforcement entails B's duty not to repudiate, and B's liberty (which is a freedom from duty) has as its correlative the absence or negation of the corresponding claim-right: see Finnis *supra* n.55 at 200.

which many legal developments are important. Here, Australian native title law serves as a paradigm.

***Mabo* and the Native Title Act**

“The role of courts is to open issues by raising hard questions, not to close issues by providing easy answers” - Judge David Bazelon

(a) *Mabo* and Applied Jurisprudence

Mabo v. Queensland (No. 2) (“*Mabo*”)⁵⁷ is the perfect modern example of the need for fully skilled lawyers. *Mabo* has jurisprudential, political, economic, and cultural implications. Lawyers schooled in the philosophy of strict legalism struggle to comprehend the non-rule-based arguments in *Mabo*. Lawyers predominantly concerned with the law in its social context sometimes under-emphasise the importance of *Mabo*’s practical implications for mining, tourism, property development, and general investment. Lawyers who narrowly permit themselves to become mere technicians in service of their clients’ commercial interests sometimes inadequately appreciate native title’s new priority in Australian law and society. The list could go on. Fundamentally, the important point is that those who join the enterprise of becoming fully skilled lawyers are in the best position to grasp fully all of the dimensions on which *Mabo* is important.

Jurisprudentially, *Mabo* contains fundamental lessons for the Australian doctrine of precedent and the infusion of non-rule-based standards in Australian legal reasoning, and for the increasing importance of individual rights in Australian law. As a matter of substantive law (or “black letter” law), the “land management” aspects of *Mabo* contain fundamental implications for Australian property law. Practically, *Mabo* and subsequent Australian native title legislation⁵⁸ raise fundamental issues about security of title, criteria for valid native title claims, compensation, and procedural steps for accommodating surviving native title rights under future government grants of interests to explore, mine, or otherwise develop land. Subsidiary practical measures for those preparing native title claims include:

1. applying guidelines on proper pleadings from recent cases on native title claims;
2. evidential aspects of proving native title, particularly evidence of a sufficient, ongoing connection with the relevant land;
3. tactical use of the *Native Title Act*’s “negotiation/arbitration/compensation” regime for future government grants of title; and
4. negotiation options.

Subsidiary practical concerns for investors and their financiers concerning existing or proposed investment projects include the timing and appropriateness of:

1. pre-litigation anthropological audits;
2. title audits;
3. Overview of Operations comments;
4. Notes to Accounts (ie, contingent liabilities, material impact on value of non-current assets, etc);
5. Directors’ Report comments;
6. board agenda items and internal monitoring of potential claims;
7. legal advice on risk management options;
8. prospectus disclosure obligations;

⁵⁷ (1992) 175 CLR 1.

⁵⁸ Here, “Australian native title legislation” is a shorthand reference to the Native Title Act 1993 (Cth) and any complementary State/Territory legislation (eg Native Title (Queensland) Act 1993 (Qld)). At the time of writing, not every Australian State or Territory has passed legislation which matches the Commonwealth scheme, and some States (eg Western Australia) have passed legislation which might conflict with the Commonwealth scheme in whole or in part.

9. general disclosure obligations under the Corporations Law and the Australian Stock Exchange Listing Requirements;
10. "due diligence" procedures, including the appropriateness and timing of asset revaluations;
11. qualifications in public documents, valuations, financiers' opinions, contingent liability assessments, etc;
12. adequate notice provisions in contracts and security documents; and
13. step-by-step action plans for complying with the "negotiation/arbitration/ compensation" statutory regime for native title claims.

To the extent that the *Native Title Act* solves questions about security of title and compensation without cost to an existing or proposed investment, concern about such obligations is considerably reduced. In other words, such concerns have less force if any invalidity is cured by the *Native Title Act*, any remaining native title is extinguished, and any compensation is primarily a governmental responsibility. Adequately covering all three levels - jurisprudence, substantive law, and practice - requires different legal methodological skills, including case searches and analysis, on one hand, and statutory interpretation of Australian native title legislation and State/Territory "land management" legislation, on the other.

In view of the ongoing legal, political, and public fascination with *Mabo*'s implications, consider Mason CJ's recent extra-judicial comment on *Mabo*:

"To put *Mabo* in perspective, I should say that in its decision the Court has done no more than the courts have done in the United States, Canada and New Zealand. Generally speaking, the recognition of rights in the Aboriginal people of Australia with respect to land is akin to the recognition of indigenous title on the part of the indigenous inhabitants of the three countries that I've mentioned. What's more, the rejection of the doctrine of terra nullius is entirely consistent with the rejection of that doctrine by the International Court in the Western Sahara case. So, far from being an adventure on the part of the High Court, the decision reflects what's happened in the great common law jurisdictions of the worlds and in the International Court, except that in the case of Australia it's happened later than it's happened elsewhere... There's one further point I should make. These days a wider range of important or interesting issues are coming before the courts - in particular the High Court - for determination. I think that in some circumstances governments and legislatures prefer to leave the determination of a controversial question to the courts rather than leave the question to be decided by the political process."⁵⁹

Writing before the passage of the *Native Title Act* 1993 (Cth), I highlighted both the jurisprudential aspects of *Mabo* and its crucial theoretical and practical implications:

"In June 1992, Australia's High Court overturned 200 years of assumed property law to decide that aboriginal native title interests in Australia land survived British settlement. Native title interests remain (sometimes concurrently with other government or business interests in the land) unless they are extinguished by appropriate executive or legislative action ... Properly analysed and applied, the High Court's guidelines go a long way towards answering most "security of title" concerns. Unfortunately, the difference between public perception and legal reality makes little difference to investment confidence. The only pathways forward are litigation, negotiation, or legislation ... No case since the Tasmanian Dams decision in the early 1980s inspires such mixed responses of reason and passion. No case since Federation offers such a mix of legal, political, cultural, and economic implications. No case since Federation offers such an opportunity for the Australian community to reveal collectively its commitment to principled treatment of competing interests; namely, giving effect to legitimate native title interests, on one hand, and preserving substantial investment in property rights, on the other. ... *Mabo* is a triumph

59 Mason CJ, interview *supra* n.9 at 23.

for justice over certainty ... [Nevertheless] (t)he Mabo decision by the High Court in June 1992 bears only passing resemblance to some media and political discussions of the decision and its implications for resource security. Shallow attempts to criticise the High Court for usurping Parliament's role or entering into the political arena must fail because they do not adequately explain the complex obligation of judges to decide according to law. Neither of the broad distinctions between legislative and judicial roles, on one hand, and legislative and judicial forms of reasoning, on the other, fully explain what is happening in cases like Mabo, where the boundaries between those divisions are inevitably blurred."⁶⁰

In Brennan J's leading judgment in *Mabo*, the competing jurisprudential considerations are aptly outlined:

"In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency ... It is not possible, a priori, to distinguish between cases that express a skeletal principle and those which do not, but no case can command unquestioning adherence if the will it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system."⁶¹

Here, the tension between rule-based standards and non-rule-based standards in legal reasoning is neatly illustrated. As Brennan J. highlights, "(i)f a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied". Ultimately, the High Court decided that the doctrine of terra nullius seriously offended those "contemporary values" and that its abandonment would not "fracture the skeleton of principle which gives the body of our law its shape and internal consistency". To reiterate Ronald Dworkin's message about adopting "the internal, participants' point of view" in legal reasoning, those who are quick to criticise the High Court for its recent decisions must equally join the Court's enterprise of grasping "the argumentative character of our legal practice by joining that practice and struggling with the issues of soundness and truth participants face".⁶²

(b) Moving Target

The debate surrounding proper recognition of both native title rights and investment has remained a moving target in the last eighteen months. The *Native Title Act* 1993 (Cth) and complementary State/Territory legislation reduce some (but not all) uncertainty about security of title, while also codifying and enhancing native title rights.

In a nutshell, the *Native Title Act* 1993 (Cth), which commenced operation on 1 January 1994, has the following effect:

1. **Validation:** All existing titles as at 31 December, 1993 *that need to be validated* are validated. Existing titles which are independently valid will not require the validation provisions of the *Native Title Act* 1993 (Cth). Any native title extinguished or impaired by validation is converted into a claim for compensation, payable by the government making the grant of title which extinguished the native title. So, rights under existing titles are secure, even if some native title rights still survive concurrently over the same land. Existing freehold grants and leasehold grants which confer exclusive use and occupation (ie, "category A past acts") remain the clearest examples of titles which are completely inconsistent with ongoing native title and therefore

60 B Horrigan 'Implications of the Mabo decision: What Mabo does and does not mean for Government, business, and Aborigines' (1993) 8 *APLB* 21 at 21, 24, and 35.

61 *Supra* n.57 at 29-30.

62 R Dworkin *Law's Empire* Fontana Press London 1986 at 14.

extinguish it.

2. **Compensation:** For existing titles, any compensation will be paid by the government whose action extinguished or impaired native title.

3. **New Titles:** Anybody who takes a new title after 1 January 1994 (eg, present exploration title holders who apply to convert their existing interest into a mining lease after 1 January, 1994) is now on notice to consider the interests of legitimate native title claimants. Under the new "negotiation" regime, that means consideration in terms of notice, opportunities to be heard, negotiation rights, and compensation if native title still survives.

4. **Native Title:** For all new titles, surviving native title is treated substantially like freehold. So, governments can grant interests which affect native title if they can do the same to a freehold owner. Surviving native title is not extinguished by validated mining leases or new mining leases, and revives when they end. Rights under new exploration and mining titles will take priority during the term of the grant.

5. **Negotiation Time-Frames:** Legitimate native title claimants have rights of negotiation for new titles but no absolute right of veto. The time frames for exploration titles are: (a) negotiation - four (4) months; and (b) arbitration - four (4) months. The time frames for mining titles are: (a) negotiation - six (6) months; and (b) arbitration - six (6) months. There is a "fast-track" process (eg, for sub-surface exploration with minimal ground disturbance), and also a government "override" to permit development in the state or national interest. The negotiation procedures apply at both exploration and mining stages.

6. **Renewals:** Renewals under existing mining leases have some protection⁶³, with greater protection for renewals of pastoral leases.⁶⁴

In summary, the *Native Title Act* 1993 (Cth) is designed to do three things:

1. guarantee security of title for pre-1 January 1994 titles by validating them if they need validation, and make governments pay compensation for any extinguishment or impairment of native title in the past or in the future;
2. outline a procedure for all post-1 January 1994 titles, so that legitimate native title interests are properly considered if those interests still survive today; and
3. ensure that rights under post-1 January 1994 titles are secure provided that the *Native Title Act* 1993 (Cth) procedures are followed if they need to be followed.

(c) Two-Pronged Test for Native Title

All native title claimants face severe obstacles. Under the two-pronged test established under both *Mabo* and the *Native Title Act* 1993 (Cth), they must prove that:

1. since British settlement occurred 200 years ago, nothing has happened by way of legislation or other government action which has already extinguished native title in relation to the relevant land; and
2. they still maintain an ongoing connection with the relevant land, most easily evidenced by ongoing occupation and use of the land for traditional aboriginal activities such as hunting and fishing, community living, and ceremonial worship.

It is a tough test for Aboriginal claimants to meet, and that is why many claims are unlikely to succeed.

(d) Qualifications

Although the *Native Title Act* 1993 (Cth) is probably intended to cover the field on all native title issues, its scope and constitutional validity are currently being tested in court, including Western Australia's constitutional challenge to the Act and other hearings on the scope of governmental fiduciary obligations towards surviving native title holders, the capacity of Queensland pastoral leases to extinguish native title, and other matters.

⁶³ *Native Title Act* 1993 (Cth), s25 and s228(4).

⁶⁴ *Ibid* s235(7).

Although Queensland passed complementary legislation to support the *Native Title Act 1993* (Cth) in December 1993, the Queensland Government is delaying final amendment and implementation of Queensland's native title processes under the *Native Title (Queensland) Act 1993* (Qld) until three outstanding questions are settled with the Commonwealth Government:

1. compensation sharing arrangements between the Commonwealth and State Governments;
2. possible exemption of exploration titles from the “negotiation/arbitration/compensation” regime set up under the *Native Title Act 1993* (Cth); and
3. approval of State bodies for determining native title questions.

Aboriginal questions can also arise under the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld), which can make existing leasehold interests subject to special measures to preserve “sacred sites” or other sites of aboriginal or symbolic importance. This factor often becomes important when heritage considerations are assessed before a new grant is made, often as part of an environmental impact statement (E15).

It is not yet settled whether the Queensland Government will introduce back-door methods of passing on compensation costs fully or partially to applicants for titles granted after 1 January 1994. That outcome probably rests on current negotiations between the Commonwealth and State Government about compensation-sharing arrangements.

(e) Latest Guidelines

The latest guidelines on native title claims come from the full Federal Court's consideration of the interaction between Northern Territory land rights legislation and common law native title in *Pareroultja v. Tickner*⁶⁵, Mason CJ's decision to strike out a statement of claim and grant leave to file an amended claim in *Coe v. Commonwealth*⁶⁶, and the first post-*Native Title Act 1993* (Cth) case on native title claims and the new National Native Title Tribunal process by Drummond J in *The Wik Peoples v. Queensland*.⁶⁷

In *Coe*, Mason CJ confirmed the following key points⁶⁸:

1. *Mabo* “is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia”;
2. *Mabo*'s principles “apply to the Australian mainland”;
3. *Mabo* does not support a general fiduciary duty between governments and native title holders, but narrower fiduciary duties might possibly arise in some circumstances;
4. Leases can present a “formidable obstacle” for native title claims;
5. Native title holders bear the onus of proving that native title still exists, rather than governments or landholders bearing the onus of proving extinguishment; and
6. The two-pronged test for native title clearly applies:
“... the plaintiff must establish the conditions according to which native title subsists [and] (t)hose conditions include (a) that the title has not been extinguished by inconsistent Crown grant and (b) that it has not been extinguished by the Aboriginal occupiers ceasing to have a requisite physical connection with the land in question”.

In the *Wik* case, Drummond J considered what should happen to a native title claim commenced in court before the passage of the *Native Title Act 1993* (Cth). Basically, Drummond J considered the extent to which the court proceedings should be adjourned to enable an application to the new National Native Title Tribunal for a determination of native title questions.

⁶⁵ (1993) 117 ALR 206.

⁶⁶ (1994) 118 ALR 193.

⁶⁷ (1994) 120 ALR 465.

⁶⁸ *Coe supra* n.66 at 200, 203, 204, and 205-206. In accordance with Mason CJ's decision, the statement of claim has been amended, which emphasises the point that the evidential issues surrounding native title claims inevitably mean that only legally fanciful claims (eg, Aboriginal sovereignty, and genocide) can easily be dealt with in a summary way.

Importantly, Drummond J considered that the original court proceedings ran the risk of producing a result which was only personally binding on the parties to the action, whereas appropriate determinations of native title under the *Native Title Act* 1993 (Cth) regime probably “have the character of judgments in rem ... affecting the status of the lands and [are] not mere determinations of rights with respect to those lands recognised by the general law as arising out of private arrangements between citizens”.⁶⁹

In *Pareroultja*, the Federal Court conceded that *Mabo* (No. 2) contains many general propositions whose scope requires both elaboration and refinement in subsequent cases:

“... *Mabo* (No. 2) is authority for the proposition that the common law of Australia recognises a form of native title which, except where it has been extinguished, reflects the entitlement of the indigenous inhabitants in accordance with their laws or customs to their traditional land which is preserved as native title ... The nature of native title must be ascertained by reference to the traditional laws and customs of the indigenous inhabitants of the land ... However, the extent to which native title over land may co-exist with leasehold tenure is not a question fully explored in *Mabo* (No. 2). Much may depend on the nature and extent of the leasehold estate (eg a monthly tenancy or lease for 99 years) and inconsistency, if any, between native title and the lessor’s reversionary interest.”⁷⁰

Two key points emerge from *Pareroultja*. First, common law native title is not extinguished by grants of land over which there is native title to land trusts under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (NT). Such grants can exist concurrently with ongoing native title rights, with those rights being exercised in accordance with the processes established under the Northern Territory land rights legislation. Second, in the event of any inconsistency between the Northern Territory Act and the *Racial Discrimination Act* 1975 (Cth), the Northern Territory Act would constitute a “special measure” within the meaning of the *Racial Discrimination Act* 1975 (Cth).

Nevertheless, legal and practical guidelines on native title are still in their infancy. Even so-called “ambit” claims are unlikely to be struck out completely until some test cases establish some basic guidelines. The Queensland government’s publicly stated intention to strike out existing *Mabo* claims is more likely to be successful with “easy” targets like claims for Aboriginal sovereignty than with “hard” targets like non-extinguishment of native title, where evidential matters are crucial.

(f) Outstanding Issues

Commercially, outstanding issues under the *Native Title Act* 1993 (Cth) include:

1. The interaction between existing *Mabo* claims and the *Native Title Act* 1993 (Cth), particularly given the alternative grounds of invalidity asserted in the Wik and Birri Gubbi claims in Queensland;
2. The scope and constitutional validity of the *Native Title Act* 1993 (Cth);
3. The gaps caused by the *Native Title Act*’s limited application to existing titles which need validation, particularly uncertainty surrounding renewals of existing titles (eg, mining leases) which are independently valid;
4. The “double jeopardy” problem for miners, who must confront the “negotiation/ arbitration/compensation” procedures under the *Native Title Act* 1993 (Cth) at both the exploration and mining stages; and
5. The delaying impact of such procedures upon project development and investment.⁷¹

Conclusion

⁶⁹ *Wik supra* n.67 at 16-17.

⁷⁰ *Pareroultja supra* n.65 at 213-214, per Lockhart J (with O’Loughlin and Whitlam JJ agreeing).

⁷¹ Highlighting these commercial concerns for the business community does not preclude equally important outstanding issues for Aboriginal groups, such as adequate access to resources to pursue claims which deserve a hearing and to test the scope of the *Native Title Act* 1993 (Cth).

“Man’s mind, once stretched by a new idea, never goes back to its original dimensions”
- Oliver Wendell Holmes

Ultimately, all of this means returning to some fundamental truths. Applied jurisprudence aims to unify theory and practice. It is a worthy enterprise for academic and client-based research whose focus is a full understanding of the theory and practice of Australian law. The pervasive distinction between “form” and “substance” in judicial reasoning supplies a pivotal reference point for analysing the High Court’s discernible shift away from first-order “formal” reasoning about fixed legal categories and rules, and towards second-order “substantive” reasoning about abstract rationales of fairness and justice underlying those categories and rules. Fundamentally, this means exploring the meaning and scope of “policy” considerations in Australian judicial reasoning. Accordingly, Australian legal analysis and research must evolve to accommodate judicial analysis at increasingly deeper levels of abstraction about fundamental issues of fairness and justice. This enterprise demands the training and attention of fully skilled lawyers.

Fully skilled lawyers commence their growth towards that enterprise at university, and it remains a worthy objective for academics and practitioners alike. Indeed, it is an ongoing enterprise throughout everybody’s legal career. Developing law faculties need people with balanced experience of academia and practice, people with a critical perspective of the theory and practice of law, and people who understand and can effectively communicate the conceptual framework underlying all law subjects. Applied jurisprudence supplies that conceptual framework. Any law faculty which is both justly proud of its links with the legal profession and eager to improve the jurisprudential content of its courses recognises the value of this integrated approach to law.

Fully skilled lawyers are in the best position to make legal contributions to society, not least because by training and inclination they combine a search for deeper insights into legal theory with a search for deeper insights into law’s impact upon society generally and lawyers’ clients in particular. Joining the enterprise of becoming a fully skilled lawyer is simply a matter of recognising the different components of legal education, and ensuring that each of those components receives balanced attention. It is wrong for any academic to be wholly unconcerned about how law works in the real world. It is wrong for any practitioner to be wholly unconcerned about jurisprudence or the social impact of law. It is wrong for any lawyer to settle for anything less than becoming a fully skilled lawyer.

