

Conversations with Justice Paul Finn PhD

by
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First Interview: 23 November 2010

This is the third interview for the Eminent Scholars Archive with an incumbent of the Arthur Goodhart Visiting Professor of Legal Science. Justice Finn is a former Professor of Law and Head of Department at the Australian National University, Canberra, and is currently a Judge of the Federal Court of Australia.

Interviewer: Lesley Dingle, **her questions and topics are in bold type**

Justice Finn's answers are in normal type.

Comments added by LD, *in italics*.

All footnotes added by LD.

1. Judge, you are the third Goodhart Professor I have had the pleasure of interviewing for the Eminent Scholars Archive. We're making a tradition of hearing the views of the Goodhart professor at the start and end of tenure and I'm extremely grateful to you for agreeing to add to our archive. Your career has spanned long and distinguished episodes in academic and judicial spheres in Australia and I hope we can briefly explore both areas in our interview.

Could we start by introducing your role here as the Arthur Goodhart visiting professor in legal science at Cambridge for 2010/2011, and what do you hope to achieve in your time here?

That's not easy to answer, but I suppose the principal thing is to reconnect with an intellectual life that I'd put aside when I became a Judge. A judicial life is a very interesting one, but I think many would tell you it's a quite narrowing and isolating one, particularly intellectually isolating, because a Judge doesn't have to know things systematically. You look down one illuminated hole and you hear that case and then you look down another one, but you never have to see the connectedness of things in a way that somebody in an academic life has the opportunity to do so. Whether they avail of it or not's a different matter, but it's one of the great luxuries of an academic existence.

So, I suppose at a personal level that's I am looking forward to doing. I rather doubt I will stay being a judge till I have to retire or the age of statutory senility hits me, and it's interesting to see whether I actually do have, at least, the elements of an academic career still ahead of me or whether I should realise that it's all behind me.

As far as work's concerned, you have foreshadowed it's a matter you wanted to talk to me about it, so I won't go on about it now, but I would like to do a deal of work on statutes and the common law, which is the major research agenda that I'm setting for myself while I'm here.

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2. What courses are you teaching?

I'm teaching in the LLM programme in commercial equity, I'm doing about twelve lectures in that, about four in intellectual property and two in restitution. In the undergraduate course I'm doing four lectures in the aspects of obligations course.

3. Quite a full teaching schedule.

Turning to your personal circumstances. You started your academic career in Australia, but you do have an association with the faculty here at Cambridge that goes back nearly forty years. What drew you as a law student when you first entered the University of Queensland in the 60s?

Well, I suspect, as is so common with people of my generation, I did law by default, probably a lack of imagination. I knew I couldn't do medicine. I think one trip to the dissecting room would've stopped any further thought of that, and so I just slid into it without any terribly strong desire to be a lawyer.

4. Your parents - did they inspire you? Do you come from a legal background?

Well, my father died when I was very young, he was a lawyer. My mother later remarried, and my stepfather was a lawyer who ended up a Supreme Court judge. It is fair to say though, that while it was assumed I would go to university and I'd had a successful school career, I wasn't being pushed into it. Just the assumption that would happen.

It was never suggested to me that I do law. The strong suggestion my stepfather gave me, and he was one of the first people to do a law degree in my home state of Queensland when they only introduced a full law degree in the late 1930s - he did an arts law degree, was to do an arts degree and majoring in literature. This is what I did and I would have to say that was the most pleasant part of my entire time at university. I can still recall the most pleasant subject. We had a full year subject on American literature, and I just found that absolutely fascinating. I think it's great legacy to me was learning how to read a nation's literature.

5. It sounds like a wonderful time in your life.

Well, it was actually.

6. You were a student at Cambridge, where you came to do your PhD in the 1970s at Gonville & Caius, and when returned for two sabbaticals : Pembroke in 1980 and Trinity in 1995. What is it that continually draws you to Cambridge?

Well, I came to Cambridge by accident. I had never intended to do a PhD. I had an interest in writing a book on the subject that I ultimately wrote on, which was fiduciaries.

I had a friend here who was taught by Len Sealy³, who was Caius, and he told Len that he had a friend was interested in fiduciaries. It was Len who got me to come here. It wasn't a planned decision to come here. My subsequent trips have been very short, and if I were honest about them, I would say that the major motivation to come back was to see old and dear friends. I've always liked Cambridge, don't get me wrong on that, but the particular reason for coming here was more personal than intellectual, if I can put it that way.

³ Leonard Sedgwick Sealy, Emeritus S J Berwin Professor of Corporate Law



7. You won the Yorke Prize here at Cambridge in 1975 for your treatise on equity. Who inspired you in those years at Gonville & Gaius?

Inspired is not a word I would use, because I actually came here with a preconception of what I wanted to do, I think my previous answer indicated that. I owe a real intellectual debt to Len Sealy. If he had continued to do the work that was foreshadowed in his doctoral thesis, I would not have written the book I wrote and it was a very important stepping stone along the way. Len was my supervisor for part of the time, so also was Gareth Jones.

Gareth goaded me to perform. We had wonderfully ferocious encounters and I equally owe a great debt to Gareth. What I wrote cherry picked across a whole lot of different subjects, many of which I knew very little about. What I could not get over was the generosity of so many of the academic staff who would allow me to come and talk to them about their specialisation, but only from a very narrow focus. So, I got an enormous amount of assistance from all sorts of people, from the late Stanley de Smith⁴, to Colin Turpin⁵, to John Collier⁶. It just goes on and on, and people gave generously. For that I was very grateful.

8. Can we turn now to your career in academia and the judiciary? Before joining the Federal Court, you had a distinguished career as an academic in Australia at the University of Queensland from '75 to '76 and then the Australian National University from 1977 to 1995, where you were Professor of Law and Head of Department. In what way did this academic background prepare you for the judiciary?

Prepare me for the judiciary? I never even thought of it that way. I realised when I became an academic that I was forever cutting off one career path and that was to the bench, because it was almost exclusively the domain of people who are at the Bar. There'd been one or two solicitors appointed in Australia, there'd been a couple of academics appointed to inferior courts. Then in the mid- 90s there was some discussion of opening up appointments, but I never conceived that as being something I'd do. Then out of the blue I was asked if I'd be prepared to put my name forward to go to the Federal Court, which I obviously ended up doing. The point was I didn't see what I was doing as an academic was in any way preparing me to be a judge as such, although a lot of the things that interested me I was able to use in cases that I dealt with, but it was simply an intellectual help, rather than a help in judging.

I hadn't been in a courtroom for 25 years when I was appointed. So, at least aspects of learning to be a judge was such that the learning curve was vertical.

9. Your experience as a Judge - can you say what this brings to your role as a Goodhart professor?

I think it brings a number of things, the principal of which is the way I have always had a practical bent in the law that's interested me, I've always regarded law as an applied discipline. I do not regard myself as a theorist and I've always written with an eye not to practice in the narrow sense of being in a courtroom, but written with a sense of the practical things of life, and being a judge has accentuated that. It has also brought me to understand

⁴ Stanley Alexander De Smith (1922-1974). Downing Professor of the Laws of England (1970-74). Fellow of Fitzwilliam College. Fellow of British Academy. Editor of *Cambridge Law Journal* (1973-74).

⁵ Colin Turpin, 1928- . Emeritus Reader in Public Law

⁶ John Collier, Fellow of Trinity Hall, international lawyer. Co-author with Vaughan Lowe of *The Settlement of Disputes in International Law*, 2000, OUP



how to read cases, how context means everything and not to treat every judicial utterance with a reverend hush, that many things are done on the run. You can't take too much out of a lot of what you read. Equally when a judge appears to do something that's a little unusual, a little aberrant, it may be because he was never given time to think about it. But equally you get cases where it can properly be said that facts have their own coercive force and that the judge may be skating on thin ice, but he has to decide a particular way, because all the justice of the case is that way. Usually in those cases they create great fodder for academics, but rarely do they get appealed, because the losing party does not want to get clobbered in the appellate court as well. So, it brings a cast of mind as much as anything else. I'm sitting through lectures here. Occasionally the temptation is to interrupt and ask a question and then I realise that, "No, I can't, there's a pedagogical process going on about it and that my take on some of the cases might be quite different, but I probably would have taught [*that way*] if I were teaching without this experience".

10. You've been a Judge on the Federal Court since 1995. Can you briefly tell me what the different roles are that the High Court and the Federal Court play in the Australian legal system?

The High Court⁷ is the ultimate court of appeal for all Australian courts. It is the ultimate interpreter of the Australian Constitution. In the latter respect, it's like the Supreme Court of United States or the Supreme Court of Canada. The Federal Court⁸ was only created in 1976, although it's a court the Constitution allows to be created and our jurisdiction is to be found within the Constitution itself. So, to make an unilluminating comment, but it's better than trying to explain it detail, we deal with all federal matters, anything that arises under the Constitution, under the laws of the Commonwealth, disputes between the States and we have a very large pendant jurisdiction, if I can call it that way, where we deal with Common Law matters that fall within federal jurisdiction, because they can be tied to a statute or whatever.

The one thing we don't have is criminal jurisdiction - that's a slight inaccuracy, we were given a very small criminal jurisdiction at the end of last year - but we're not a criminal court and will never be regarded as that. We are both a trial court and an appellate court and all of us sit as trial judges and as appeal judges. I've found that to be a very rewarding mix, because if you're just a trial judge you can inveigh against the appellate judges who don't understand the problems of trial judges. Well, I think we have a far better understanding doing what we do.

11. And your most important adjudications to date?

I don't know how I'd register important. If you ask me the ones that I regard as the most significant, I can give you three, I think. The first was a case I did in 1996, which was a case involving a tender for the software to develop an air traffic control system for the country. The plaintiff of the case was the Hughes Aircraft Corporation and as a result of the decision I gave in that case, I revolutionised tendering in the public sector in Australia and

⁷ <http://www.hcourt.gov.au/>

⁸ <http://www.fedcourt.gov.au/>



quite a lot of other issues, which I won't go into for this purpose⁹. It was a great case to do for a lot of reasons, not the least of which, I think was [*because I was*] probably the most intellectually qualified person they could have found to do it, simply because they were all issues about the structure and practice of government that I had worked on prior to becoming a judge. That decision has been cited in judicial decisions in this country, in Canada and New Zealand. It is a widely known decision. I'm not saying no other judge would have come to the same conclusion. I'm certain they would, but it was just a wonderful case to have done.

I was the resident judge in Canberra for a long time and I got a lot of cases involving the public service and the obligations of public servants and the relationship of public servants to their departments, their heads and the like. They produced wonderful issues that have just never been the subject of judicial decision outside United States and I suppose it's fair to say I made some contribution to an understanding of the structure of our public sector from those cases.

The third area was, curiously enough, the last judgment I delivered before I left Australia, which was the native title case - a sea claim to all of Torres Strait¹⁰. It was the other bookend to the very important decision of *Mabo* in Australia where native title rights were first recognised¹¹. That also arose in Torres Strait and involved land, and my case involved the sea. The end product of the decision was to recognise that the Torres Strait islanders were a single society, which is not how they'd been treated and to give them necessarily non-exclusive rights in a very large area between the Barrier Reef and the Arafura Sea. Again it was wonderful just to have a case where you can study a peoples and study them effectively from their first encounter with Europeans, which was Torres in 1606, till today. It actually was a wonderful case to do. My friends on the Court speak with considerable envy. It was purely accidental that I got it, but was still a wonderful case to do.

Curiously enough if I can just digress slightly, it brings out an unusual connection with Cambridge. In 1898 a man called Haddon took a Cambridge expedition out to Torres Strait¹². The effective purpose of it was Haddon believed with the advent of white settlement, an older society was rapidly disappearing and he wanted to chronicle it and so he took a group of people out there whom some would say represented the birth of modern English

⁹ *Hughes Aircraft Systems International v Airservices Australia*. No. ACT G86 of 1995, 30 June 1997. See: <http://www.austlii.edu.au/au/cases/cth/FCA/1997/558.html> See also: <http://www.ags.gov.au/publications/agspubs/legalpubs/legalbriefings/br33.htm>

¹⁰ *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claims Group v State of Queensland (No. 2)* [2010] FCA 643. See: <http://www.austlii.edu.au/au/cases/cth/FCA/2010/321.html>
See also report in *Australian* newspaper: <http://www.theaustralian.com.au/news/nation/court-ruling-hands-native-title-win-to-torres-strait-islanders/story-e6frg6nf-1225887210652>
Australian Human Rights Commission: http://www.hreoc.gov.au/about/media/media_releases/2010/65_10.html

¹¹ *Mabo and Others V. Queensland (No. 2)* [1992] HCA 23; (1992) 175 CLR 1 F.C. 92/014. See: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1992/23.html?stem=0&synonyms=0&query=mabo>

¹² Alfred Cort Haddon (1855-1940), anthropologist. Professor of Zoology, Royal College of Science, Dublin, 1880-1901, Reader in Ethnology, Cambridge, 1909-26 Christ's College Cambridge. See: http://www.ukwhoswho.com/view/article/oupww/whowaswho/U210590/HADDON_Alfred_Cort?index=1&results=QuicksearchResults&query=0



anthropology. In particular Rivers who was famous, I think, subsequently for his genealogical method¹³.

The Haddon expedition resulted in six reports. So, it produced a huge body of anthropological evidence that I had to deal with in this case. When I came to Cambridge, lo and behold I found not only is there a large Haddon collection in the museum of archaeology and anthropology, but a film had been made by Haddon that only had four one minute clips, but he had a motion camera for the last two weeks of his time on Murray Island [*LD = Mer Island*] before the expedition finished and that's been turned into a 40 minute film, which was I think shown to the anthropologists here only a week ago and I'm actually going to give a seminar on Torres Strait to the Anthropological Research Association.

12. Did you arrange to do the seminar before you came?

No, I didn't. I had intended to get in touch with the anthropologists when I got here. I had a contact who's the curator of the museum here and I had seen her since I came, and then just simply it became known what I'd done and so I was contacted and asked if I'd give a seminar on Torres Strait, which I'm more than happy to do obviously.

13. Since becoming a judge you've continued writing in journals and books. Has it been difficult to balance academic comment or criticism of government and judgments with your role as a judge?

I'd have to break that into periods. The first couple of years after I was appointed, I think I was given some licence to at least use up the ideas I had, so that there was a critical edge in writings I produced in 1995, 1996, which very quickly disappeared. I then necessarily assumed what many would say is a proper function of the Judge if the Judge cares to write and that is to be quite discreet and I think, by and large, I was, notwithstanding if I did write I'd try and write on more general themes, which could not necessarily get me into difficulty in any subsequent case with any court. I suppose the only exception to that was when I wrote on systemic things, which I've done more recently and the main thing I've written about in that respect would be on the state of Australian contract law, which is not being critical of any court. It's been critical of the state of the law itself, but otherwise I think I've learned to be silent.

14. Your mention of Australian contract law brings us now to your legal interests and over the years you've expressed strong views on various legal and governmental matters relating specifically to Australia and perhaps we can briefly explore some of these categories that I've identified from a cursory survey of your writings. First of all what stands out is Fiduciary Obligations or principle. Your treatise, which became your first book *Fiduciary Obligations* in 1977¹⁴ won you the Yorke Prize. There have been some very complimentary reviews on it that focus on equity, fairness and curtailing the abusive power and these, Judge, seem to have been the cornerstones of your legal

¹³ William Halse Rivers Rivers, (1864- 1922), an anthropologist, neurologist, ethnologist and psychiatrist. President, Section for Anthropology, British Association, 1911. Best known for his work with shell-shocked soldiers during World War I. Rivers' most famous patient was the poet Siegfried Sassoon. See: http://www.ukwhoswho.com/view/article/oupww/whowaswho/U202239/RIVERS_William_Halse_R.?index=1&results=QuicksearchResults&query=0

¹⁴ Sydney, The Law Book Co. Ltd, 229 pp



interests, both as an academic and in your writing since you became a Judge, so perhaps we can start with this topic. What initially drew you to it?

To Fiduciary Obligations. Law as taught in the 1960s was taught as a science, as rules, almost as a value free system and that didn't strike me as terribly satisfactory. I was taught by a wonderful Welshman Tony Lee¹⁵ in my equity course and the only thing that I thought I'd study that really interested me in the equity course was fiduciaries, because its morality was transparent and nothing had been written on it. I didn't realise Len Sealy was just about to publish two articles and that's where that interest started.

I've always thought of law as being about small "p" politics, not as a science at all, and it necessarily must be, because its subject matter is human relations and social organisation. If that's the case then you can't get away from its morality, its ideology and that may well explain why the themes you said that interest me do interest me, and I've always regarded in, say, in the case of courts, obviously their primary function is dispute resolution and that should never be lost sight of, but in the law I think that one of their fundamental tasks is to control the exercise of power in society, particularly the abuse of power. And you know I have written articles that almost have that in their title. So you're very accurate in how you characterise what my interests have been.

15. Professor Youdan¹⁶ makes the point that there were several excellent Australian books in the 1970s on equity¹⁷. In retrospect why do you think this was?

There's a very simple explanation for that. In England the Judicature Acts were passed in 1873, 1875, which brought the administration of equity, i.e. the Chancery Courts and the Common Law courts into the same court. The Judicature Acts were copied in all of the Australian states except one, New South Wales, the oldest state and it was only in the early 1970s that they enacted it. So, you still had a Chancery Court and a Common Law court, you still had chancery pleadings, common law pleadings. So the old 1860's edition of Bullen & Leake¹⁸ was still in heavy use in New South Wales right through the 20th century. You can only understand Australian equity by understanding New South Wales. Where[as] people in the United States had long since forgotten about the division and in England they were moving towards fusing it and the Australian intellectual mind, because New South Wales obviously was a dominant state in the country, kept it separate and therefore there were separate books on equity. If you look at England the last book that professed to be an equity textbook as such was the second edition of Ashburner in 1932¹⁹, so it's just an historical accident. But the end product is a large number of equity books.

¹⁵ W. A. (Tony) Lee, Honorary Professor, Reader in Law, University Of Queensland 1973-1989. Commissioner for Law Reform, Queensland, 1990 - 1996. Trustee, Viertel Foundation, 2002-2005. Co-author with Professor H A J Ford of *Principles of the Law of Trusts*.

¹⁶ Timothy G Youdan, Faculty of Law, University of Western Ontario

¹⁷ 1980, book review, *University Western Ontario Law Review*, 18, 554-556.

¹⁸ Latest edition, 2007. *Bullen & Leake & Jacob's Precedents of Pleadings* 16th ed. Edited by: William Blair, Lord Brennan, Lord Justice Robin Jacob, Hon Mr Justice Brian Langstaff. Sweet & Maxwell. P. D. Finn, "Fiduciary Obligations"

¹⁹ *Ashburner's Principles of Equity*. 2nd ed / by Denis Browne. 1933, Butterworth & Co. London .



16. I wondered about that. Another reviewer Professor Lee says that this was a book for every lawyer, a practical work very relevant to many of today’s commercial practices²⁰. Do you think that this early practical streak in your writing and thinking was a sign of what ultimately led you to the role in becoming a practitioner of legal theory, a Judge?

I think I indicated to you before, I never thought I would become a judge, but I’ve always thought of law as an applied discipline and so my focus has always been on what I perceived to be problems in the world around me that the law should address even if they weren’t perceived to be problems at the time. So, funnily enough, after I finished my PhD, the first two articles I wrote both stemmed from the luxury of having been a PhD student in Cambridge. I should explain that in a minute, and I will, but one was on electoral corruption and malpractice²¹ and a major part of that was about electoral funding and the other was on the criminal offence of official misconduct. Now, if you only look at the world about you today here they’re alive and well. In fact your Court of Criminal Appeal earlier this year referred to my 1978 article²² as part of their decision.

When I said the luxury, I referred to the luxury of being here. I spent about the first year of the three years I was here just indulging myself and one of the things I got really quite interested in was parliamentary law and electoral law and that explains aspects of a lot of the things I’ve written subsequently. But as I say, my focus has always been on things which I regard as of contemporary moment, whether or not they are perceived at any particular time to be of substance, but I always thought, just take a trivial example, corruption in elections of whatever form it takes, is a matter necessarily of public concern and that’s why I wrote about it.

17. Trying to define “fiduciary” in Professor Youdan’s book²³ exposes the exercise as perhaps a myth and you cite Sir Anthony Mason’s quotable quote “a concept in search of a principle”. Can this not perhaps be seen as a problem of semantics?

You asked me before about persons who inspired me. I think if I could identify one person in my career who had an undoubted influence, which I should acknowledge, it’s Sir Anthony Mason²⁴, he was a great judge on our court, on the High Court, a great Chief Justice and I’ll mention him later on I suspect. He, I think, has inspired me to think more than anything else.

There is a fiduciary industry now, I’m eternally grateful I don’t have to participate in it much, but I think a lot of the law does suffer from overmuch classification without terribly much understanding of what’s underlying it and I think the real issues that the fiduciary debates have shown up is what we’re concerned with is setting appropriate standards of conduct and taking a principle... people in particular... engaging in particular activities or

²⁰ 1978, book review, P. D. Finn, “Fiduciary Obligations”, *University of Queensland Law Journal*, 10, 278-281.

²¹ Finn, 1976/77. Electoral corruption and malpractice. *Federal Law Review*, 8, 194-

²² Finn, 1978. Official misconduct. *Criminal Law Journal*, 2, 307-

²³ 1989, Finn, “The fiduciary principle”, In Youdan T. G. (Ed), *Equity, Fiduciaries and Trusts*, Toronto, Carswell, 438 pp.

²⁴ Sir Anthony Frank Mason, AC, KBE, QC (1925-1995), 9th Chief Justice of the High Court of Australia (1987-95), on bench of the High Court (1972-95). Chancellor, University of New South Wales, 1994-99. Goodhart Professor 1996-97.



being particular types of functionaries in society and making available for wrongdoing in those relationships and activities appropriate remedies. I think we tend to straightjacket ourselves too much by categorization - that we draw lines where it's a seamless web.

I think the principle that Sir Anthony was talking about is easy enough to discern, the application of it is anything but easy. So, is it a problem of semantics? In one way you could say it is, because the moment you attach the label, consequences occur, but in another I think it's a... it's just a simply a product of the rigidity of classification.

18. Your solution to make the law more responsive was to expand or liberalise the remedies available under unconscionability and good/ bad faith categories. Has this happened since 1989 and have you, as a Judge, had the opportunity to put such into effect?

Well, undoubtedly it has happened. I can only speak of Australia in this respect and most of what I say about Australia you could apply to New Zealand and to Canada, although I wouldn't say one necessarily influences the other. The developments occurred in all three. It's very hard to understand what animates Australian law without understanding a little bit about our Trade Practices Act²⁵. It's got a number of very generally worded provisions, which cover an awful lot of the territory of what falls within contract or equity and it has remedial provisions, which give very wide discretions to the judges. So it hovers in the background and once you're accustomed to administering law in a system in which you deal, say in the commercial area, you will have pleaded both contract, equity and the Trade Practices Act, you do get cross-fertilisation and particularly in remedy. Equally the courts have very much more accepted discretion in remedy in equity cases and I've equally seen the function of equitable remedy do what is practically just. And that means you are moulding remedy to suit the circumstances of a particular case. So, it's happened. To tell a judge not to is to go back to the old linear view of remedies that there's a particular remedy for a particular wrong is quite unappealing. Australian law is subject to great criticism by, particularly, people in Oxford and they were led initially by the late Professor Birks²⁶ who regarded discretionary remedialism or remedial discretion, it doesn't matter how they call it now, as some great evil. It would be astonishing to a judge in my part of the world to be told that it is.

19. You've had an abiding interest in the history of Australian Common Law and its reshaping, and your other book has been on Australian legal history - *Law and Government in Colonial Australia* . Here again a theme that runs through it is fairness and the way the state treats its citizens and how they could obtain redress against the government. How could you summarise the current state of play in Australia?

Could I backtrack slightly on that? Just to put it in its setting. I think you need to know the history of Australian government to understand the role of government in Australian society to understand many of our preoccupations. The same would be true of any of the new settler societies. The story about I'm about to tell will be slightly different in Canada from what it was in South Africa or earlier what it was in United States, but starting, say, at the beginning of the 19th century, you end up in a country that's got no civil

²⁵ 1974, http://www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/

²⁶ Peter Brian Herrenden Birks, (1941-2004) Regius Professor of Civil Law, All Souls College, Oxford (1989-2004).



institutions of any sort, and a pretty hostile environment, the government becomes a provider. So, from the very beginning things within older societies that are provided by private enterprise, by charities, by local governments, have to be provided by the central government and just to take a trivial example, railways, schools, hospitals. So, it produces a relationship between the citizen and the state, that is quite different from what was the then relationship between the citizen and the state in Britain. That creates some interesting developments. A state becomes the provider. Equally it becomes the land salesman. So, people are buying and selling - buying land from the state. They've got contracts with the state, the state's committing torts. Under English law the king can do no wrong, you apply that rule in a society where the government is a principal actor, i.e. the king, and you've got great injustices being done.

So from very early on you started to get claims against the government legislation passed. The initial one was promoted by a non-lawyer. He just wanted to be able to sue the government in land dealings. Our history has been very different from that of England and the United States. We abolished crown immunity from suit comprehensively starting in 1865. In England it was only done in an incomplete way in 1948 and in the United States in 1947. The idea that government should be able to be sued is still very much part of how we do things.

20. I recall in one of your writings you make the point that even the Cape Colony had a similarly progressive attitude.

It did, and I think probably for much the same reasons. The Canadians having started a bit earlier were not as progressive, but the reason government was forced into the role it had was while Australia had massive amounts of private investment in the 19th century, they were investing in sheep, wheat and gold: the private investors. They weren't going to set up schools and build roads and the like.

Sorry, that's just a fair way from answering your original question, what is the current state of play? What I'm saying really is, it's been all of a piece with us from start, whereas the real changes have occurred in England and the United States, where they've gone from an old system. I sum it up often by the observation that Australia was born to statutes, that's the major source of law in our country, whereas English lawyers still think of the Common Law.

21. It's a very quotable quote.

Yes.

22. In one of your papers you write about Australianisation of the Common Law²⁷. Is this part of the ongoing conflict of the interests of state versus the rights of the citizens?

Only in a very indirect way. What you need to understand is that Privy Council appeals from Australian courts were only finally abolished in the mid 1980s. They were abolished from the High Court somewhat earlier. When the Australian community voted on whether we should federate, this is back to the turn of the 20th century, the constitution they voted on abolished Privy Council appeals. The ultimate court of appeal would be the High Court of Australia. That was reintroduced as a price of the British government permitting federation to go ahead. As a law student in the 1960s it struck me as preposterous that a distant tribunal, i.e. sitting in London, should tell Australia what its law of trespass should be and in 1964 it did just that. I probably was a republican by then anyway, but that cemented

²⁷ Finn, 1992. Statutes and the Common Law. *University of Western Australia Law Review*, 22, 7-30.



my republicanism. Oliver Wendell Holmes²⁸ described the Common Law as the history of a country's development, slow grown. Well, you could not say of the Common Law in Australia that it was the history of the country's development, slow grown. It was the history of English development slow grown.

With the abolition of Privy Council appeals, and this was the time when Sir Anthony Mason was Chief Justice, he regularly in speeches would talk of adapting Australian law to Australia's circumstances, needs and values. And when I talk of the Australianisation of it, it was exactly that. We were going to be responsible for whatever mess we made with our own law, but it would be our law.

That curiously enough started the process that many in the legal profession reacted against and still react against and one of the things I think that reaction reflects is that they never had to think about their own law. That's what Mason exhorted us to do, and his was a particularly creative period on the court, which came to a grinding halt in the mid 90s and the government indicated it wanted large "C" Conservative judges on the High Court. It's fair to say that it's set out to do that. I think the Mason period will be seen as just a great flowering in the future.

23. Very interesting. This leads us to another of your interests, which is native title. It distinguishes problems confronted by the Common Law in England from those in Australia. Would you say, Judge, that these problems have to be resolved within the Common Law, or do you foresee in Australia a parallel set of rules for such matters?

Again I need to backtrack. I earlier referred to the decision of *Mabo* in 1992, where for the first time native title was recognised. Up until then the legal orthodoxy was Australia, so far as indigenous people were concerned, was *terra nullius* - there were no prior inhabitants who had anything that looked like a society. I mean, that was just a nonsense and the High Court recognised that. Recognising native title produced very considerable uncertainty within Australian society. There was a lot of scaremongering when that occurred - do you own your backyard in the middle of Sydney? That necessarily produced a response, and the response was a legislative one. The dimension of the problems was far too big for the courts to settle. Even now under our Native Title Act the Federal Court has over 500 native title cases sitting there waiting to be solved and that'll take years to get through. The way it's been solved is not that the laws of the Aborigines and the Torres Strait Islanders are Australian law, but that the Common Law recognises them for certain purposes.

So, there is in effect a two tiered system in operation without actually their law running parallel with the Common Law. I referred earlier to the Torres Strait case. I had to determine whether at the point when sovereignty was exercised over a particular part of Australia, in this case it was in 1871, whether there existed a society that acknowledged and observed traditional laws and customs. Then having answered that "yes", do they still acknowledge and observe those traditional laws and customs? - "yes", and did they possess interest in land and water under those laws and customs? - "yes".

So, you do have two systems, the question simply is one of Common Law recognition and of course there is the prospect of statutes overriding in any event. Now, that doesn't quite answer your question, [*but*] it informs your question in relation to native title of whether indigenous law in some way is being absorbed into the Common Law system. It clearly isn't. It still stands apart and to what extent it's acknowledged depends upon the purpose for which

²⁸ Oliver Wendell Holmes, Jr. (1841-1935). Associate Justice of the Supreme Court of the United States (1902-32).



you're asking that question. The issue has, for example, arisen in the criminal law in relation to sanctions imposed by the Aborigines on their own - should you take into account in a criminal case the fact that when the convicted Aborigine goes back to his community he'll be speared in the leg. Is that something you take account of? If judges have said, "Yes" there would be newspaper outcries about this.

24. You've been involved in at least two other adjudications recently on native title, I've just marked these here.... so these are fairly recent cases.

Well, I had three. I sat on a native title claim on an Appeal - the Larrakia People²⁹ claimed native title in an area around Darwin and it was found that they didn't, because they could not show that they continued to observe traditional laws and customs³⁰. I think that is a very regrettable aspect of the requirement imposed by Australian law. The problem the Larrakia People suffered was that as a consequence of the Japanese bombing of Darwin in the Second World War, they were dispersed all over the place and lost their connect-ness to their laws. One would hope that one day the federal government will amend our legislation to solve their problem.

Another full court appeal, *Bodney and Bennell*³¹ was a native title claim from an area that started up near Geraldton and finished near Esperance in the southwest of Western Australia - a huge area, but this [*appeal*] just involved a claim to the Perth metropolitan area. They were successful at trial. I sat on the Appeal and for technical reasons and the way the trial was conducted, the Appeal had to be allowed. I would have to say at a personal level I was the Presiding Judge³², so I could have delivered the judgment by video link, but I didn't. I thought I should go to Perth and it was one of the distinct down moments of being a Judge with these people who had won a trial. The courtroom, a large room was just full to the rafters with Aboriginal people and to go in and dash their hopes. It was not one of the more pleasant activities I've engaged in.

My personal view of our native title laws is that the scales are too heavily weighed against the Aborigines. The Torres Strait Islanders have been lucky, because they're up there on their own, you can't deny their presence. With the Aborigines it's a much more complex problem. One can only hope the statute will get amended one of these days.

25. That brings us to the Australian government structure, the position of the citizen and the relationship of the government to the Common Law. You've been critical of aspects of the historical relationship between the governed and the governors in Australia and perhaps we can look at a few of the issues that you've raised. In your legal history book, you discussed state socialism and Benthamite utilitarianism helping

²⁹ See Wikipedia entry: <http://en.wikipedia.org/wiki/Larrakia>
Larrakia Radio site: <http://sites.google.com/a/radiolarrakia.org/www2/larrakia>

³⁰ *Gumana v Northern Territory* (2007) 239 ALR 272.

³¹ *Bodney v Bennell* (2008) 167 FCR 84, See : <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCAFC/2008/63.html?stem=0&synonyms=0&query=bodney>
See also Native National Title Tribunal site: http://www.nntt.gov.au/News-and-Communications/Newsletters/Native-title-Hot-Spots-archive/Pages/Bodney_v_Bennell.aspx
Transcript at: <http://www.nntt.gov.au/News-and-Communications/Newsletters/Native-title-Hot-Spots-archive/Documents/Hot%20Spots%2027/Bodney%20v%20Bennell.pdf>

³² Along with Sundberg and Mansfield JJ.



to shape the evolution of the early Australian government and you have alluded to this earlier in our interview. Do you think that these terms or their legacy has been necessary?

State socialism I think was an absolutely wonderful development. It actually made people think about their place in society and the responsibility of the state for people in society. Now, I would not claim for one moment that Australia was the great innovator, and in many of the things we get the credit for innovation, New Zealand did it first. Comprehensive pension schemes, women's voting, basic wage in employment law - it all happened very early on in Australia, the late 19th century into very early 20th century. So much so was this a pervasive doctrine, that you would get European politicians coming out and observing and writing about it. There's a wonderful book written by a Frenchman called Metin³³ which is entitled *Socialism Without Doctrine* [LD= *English translation by Ward, 1977*], and that's exactly what mystified them that a people who supposedly bring British virtues of individualism, and they create a socialised society, because it suits their needs.

So, to answer your question was it a bad thing or a good thing, I think it was an unbelievably good thing for its time. Things have changed clearly over time and we go through all the fads and fashions of deregulation and that are commonplace around the world now, but it was a very interesting part of Australia's past, which quite fascinated me when I read about it. I should comment, when I did that book on Law and Government, Australian history was never taught at school, it was in many respects too sensitive. So here am I, in my late 30s, realising in critical respects, I don't know much about my own country's history, so I thought the best way to learn it was to teach myself and the best way to teach myself was to write a book and that accounts for that book.

26. Is history taught these days?

Oh yes. I think a lot of the events were too close. The First World War was in many respects, in my view, a great catastrophe for Australia, and that all of the good things that came out of the colonial period I think fell apart. The symbol of that was the first AIF³⁴ in the First World War, which was a complete volunteer force and remained a volunteer force. The government on two occasions tried to introduce conscription and both times the Australian community by a very narrow majority voted against it, but it pitted Irish against English, Catholic against Protestant, labour against capital. Differences that in the past could be papered over became running sores and that a lot of our...

27. I had no idea, I'd always thought of it as a pretty homogenous society.

Oh no, I think it was only in the 60s and 70s that much of that disappeared and I think that... no, I won't go anymore about that. Clearly the teaching of history now is regarded as

³³ Albert Émile Métin, (1871-1918), French political figure. Wrote: *Le socialisme sans doctrines : la question agraire et la question ouvrière en Australie et Nouvelle-Zélande*, Paris : Felix Alcan, 1901, 281pp. Translated by Russell Ward 1977: *Socialism Without Doctrine*, Alternative Publishing Co-operative.
see: http://fr.wikipedia.org/wiki/Albert_M%C3%A9tin

³⁴ Australian Imperial Force. From wiki site: The First Australian Imperial Force (1st AIF) was the main expeditionary force of the Australian Army during World War I. It was formed from August 15, 1914, following Britain's declaration of war on Germany. Generally known at the time as the AIF, it is today referred to as the 1st AIF to distinguish from the 2nd AIF which was raised during World War II. The 1st AIF included the Australian Flying Corps, which was later renamed the Royal Australian Air Force.
http://en.wikipedia.org/wiki/First_Australian_Imperial_Force



important and the last federal government actually was making it a compulsory aspect of education in primary and secondary schools.

28. You've been very critical of government secrecy, which curtails criticism of government³⁵ and I was wondering whether there was a Freedom of Information Act in Australia.

Oh yes, we've got a Freedom of Information Act. In fact we're just introducing a new one in the commonwealth, which is actually going to create an obligation to disseminate information rather than simply rely upon members of the public to come and ask the right question to get the answer that they're looking for, which is one of the real downsides with Freedom of Information.

I was involved in one of the major Royal Commissions in Australia in the early 1990s into very significant government misconduct in Western Australia³⁶. I think that was probably the most interesting thing professionally I'd ever done, because you have to look at a system of government as a whole from beginning with your electoral law and, at the end, the Archives Act and everything that fits in between - how you would structure and practice government. We recommended all sorts of things to help improve it, the system of government in Western Australia, but the one thing I quickly became aware of is it that Freedom of Information legislation, and for that matter administrative law generally, play a very small part in effectively regulating the operations of government. Far more important are things like the Auditor General, particularly if they can do efficiency and effective audits, parliamentary committees who can extract information from public officials. My concern with governmental secrecy is more a concern with curtailing instruments like the Audit Office and parliamentary committees - in effect, creating zones of secrecy, which are clearly immune from FOI, but in which very important information is kept from the community.

Sir Anthony Mason has given two of the major judgments on official secrecy, and in one of them he attacked the very prevalent practice of government hiding behind commercial secrecy. "Oh it's commercial in confidence; we are dealing with this company; we can't tell you that" - and yet it's taxpayers' money that's being expended and it seems to me to be preposterous that they can hide things from the community in that fashion. So, it's that dimension of secrecy, which actually involves a large part of government that I was concerned about, much more so than FOI.

29. Sir Anthony Mason, again, wrote that "sovereign power resides in the people"³⁷. It's almost a revolutionary call, what does it mean, Judge, and how can it be effected in practical terms?

³⁵ For example in Finn & Smith, K. J. 1992. The citizen, the government and "reasonable expectations". *Australian Law Journal*, 66, 139-151.

³⁶ From wiki: http://en.wikipedia.org/wiki/WA_Inc

WA Inc was a political scandal in Western Australia. In the 1980s, the state government engaged in major business dealings with prominent businessmen, including Alan Bond, Laurie Connell and Warren Anderson. The outcome was a loss of public money, estimated at a minimum of \$600 million. The premier for most of that time was Brian Burke. A royal commission (the *Royal Commission into Commercial Activities of Government and Other Matters*) was established in 1990 by Premier Carmen Lawrence to examine the dealings. It was headed by Geoffrey Kennedy and joined by Sir Ronald Wilson and Peter Brinsden. Professor Paul Finn was a consultant.

³⁷ In: *Australian Capital Television Pty Ltd v Commonwealth of Australia (No. 2)* (1992) 108 ALR 577 at 593.



I have mentioned earlier the abolition of Privy Council appeals. We have lived with the historical fact that Australia was created under an act of the British Parliament, but you cannot simply go on categorising a society as one in which “well we all owe existence to Britain”. It doesn’t have terribly much explanatory force when it was referenda conducted within Australia that resulted in federation and largely on terms that were agreed by the then Australian community. In one sense, if you ask yourself the question for whom the system of government exists, you can only say it exists within the Australian community. It is theirs and should be exercised for their benefit, as it is from the community ultimately that in modern senses the government derives its powers.

Having said that, there’ve been marvellous books written by E. S. Morgan³⁸ an American historian and one of them was entitled *Inventing the People*³⁹ and the idea of popular sovereignty is very much an 18th century idea. Elements of it you’ll find in Locke⁴⁰ where he talks about government as a trust, but the Americans had to find a way of legitimating their own system of government and so they went for popular sovereignty. It is in very large respect a fiction, and that’s what Morgan points out, but it does show, in my view, what is the purpose and end of government, and that is to serve the community for which they exist. It’s got very little resonance in English law, because it almost sounds treasonable to talk about it, but I think the lawyers who still take a formalistic view of where our constitutional documents come from and read from that a description of our system, are simply living a myth today. It was once an historical reality, but it is no longer.

30. Which brings me to the whole question of Australian statutory bodies, your fourth arm of government. This seems to have been an impediment to accountability and has fostered suspicion of government institutions. Since 1994, when you wrote your paper on public trust⁴¹, have things improved much?

I think there’s a pendulum there. Our history again is very different from England. In the mid 19th century England had a large system of statutory boards at the level of the central government. That was all collapsed into ministerial departments with the rise of the idea of ministerial responsibility - that the individual minister would be responsible, so you’d have a pyramid structure. Australia did exactly the opposite, in part reflecting all of these different activities government had to engage in. Political parties appeared much later in Australia than Britain and the principle of individual ministerial responsibility never much was practised in Australia and I still don’t think it is now to any great extent, short of personal and improper conduct. Because you didn’t have political parties, and because you had huge amounts of patronage, the system developed of setting up statutory boards to get them away from ministerial influence.

Now, that may have, in one sense, reduced accountability, but in another sense it gave them a reasonable chance of, for example, putting down a straight railway line rather than linking up the properties of all your mates as you went along. There’s always been that tension between keeping important activities away from ministerial influence - and by

³⁸ Edmund Sears Morgan, (1916-) Emeritus Professor of History at Yale University (1955-86).

³⁹ *Inventing the People: The Rise of Popular Sovereignty in England and America*, 1988, W. W. Norton & Company

⁴⁰ John Locke (1632- 1704), English philosopher and physician, one of the Enlightenment thinkers.

⁴¹ Finn, 1994. Public trust and public accountability. *Griffith Law Review*, 3, 224-



influence I'm obviously suggesting manipulation - and having them accountable. I think where the change is becoming more apparent is, as the role of the Auditor General in auditing these bodies rises, as parliamentary committees take a greater interest in them, as the reporting to parliament obligations improve, the vice of them is not as great. If there is a perceived vice it's often because the activity today is seen as one that government should not be engaged in. This is part of the whole outsourcing privatisation process that's gone on in many countries. In Britain British Steel was just a ping pong ball for decades. So, that I suppose my answer at the end of the day is their fashion waxes and wanes and how effective accountability is depends upon levels of political commitment more than anything else.

I've mentioned parliamentary committees. One of the great virtues I've thought of the Australian political system, and in one sense the American system, is the upper house in Australia is rarely controlled by the government. So you have a polyglot group in it of opposition, small parties and government and it gives a vitality to the committee system - they don't just rubberstamp government bills, government activities etc. I've always seen proportional representation in our upper house as a critically important part of what makes our system work, because amongst other things, it helps the committee system work in its examination of how the public sector conducts its affairs.

31. You've said that you consider the jurisprudence of statutes and their interpretation as *the* great issue in contemporary Australian law⁴². Could you elaborate on the significance of this remark? You alluded to it earlier as something you were looking into while you were here.

Yes. I said Australia was born to statutes. I don't think it'd be unfair to say that well over 90% of the law that is applied by judges and practised by practitioners is statute. Universities don't teach statutes much. They teach a lot of statutory subjects, but they don't teach the statute phenomenon. The principles of interpretation of statutes are as important, as they are not taught, but they are interesting in their own right. They are Common Law and what the courts do with that body of Common Law is profoundly important.

To give you a very simple example of what you do with those might be profoundly important. For a hundred years the Queensland and Commonwealth Government have regulated fishing and fisheries through Torres Strait, and that's set up commercial fishing regimes and licensing schemes and all sorts of things. The question arose in Torres Strait whether this legislation extinguished native title. The islanders said it didn't, the Commonwealth and the State government said it did. There's a rule of construction of statutes that's been adopted in Australia that if government is going to take away fundamental rights and fundamental interests it must speak with unmistakable clarity and I held that, notwithstanding all of this regulatory legislation, it was not necessarily inconsistent with the subsistence of native title. If government wanted to get rid of native title, they well and truly had to spell it out. That's a rule of constructions adopted in United States in the First Nation's cases in the United States and also in Canada. It's how you manipulate your principles of interpretation to, in effect, make government come out and accept responsibility for interferences in areas which they shouldn't be able to interfere with in a *sotto voce* way.

I regard that as fundamentally important and it's not being taught. It's the judges in Australia who are beginning to insist that universities teach statutes. I should go back to my

⁴² Finn, 2001. The Common Law in the world: the Australian experience. *Centro di studi e ricerche di diritto comparato e straniero. Saggi, Conferenze e Seminari* 43, 1-10. Università degli Studi di Roma "La Sapienza", Rome.



Torres Strait example. I mentioned that to a group of public lawyers here [*in England*] who thought nothing comparable like that would happen in England - and statutes are not taught here either. Now, I accept probably the Common Law, or certain areas of it, are less marred by statute than they are in other common law countries. There's been very little intervention in mainstream contract law. You still hear complaints about the state of the common law and in criminal law. Well it's just statute everywhere in Australia.

32. Interpretation of statutes is a component of the LLB curriculum in South Africa, which is of course a mixed system. So, I'm very interested in what you say.

It's the whole statute phenomenon, it's not just interpretation of them. It's how and when should you use the statutes analogically. I mean, they are important vehicles of public policy. In the United States there was a huge literature on the analogical use of statutes. It starts with Roscoe Pound⁴³ and most of the major judicial figures. One of the early Goodhart professors Roger Traynor⁴⁴ who was Chief Justice of California has written a major article on the analogical use of statutes. That process has continued, so Calabresi⁴⁵ who again is another Goodhart person who's got a famous textbook on the Common Law and the age of statutes. The Americans are well and truly alive to this. So, I think that probably gets somewhere near an explanation of why I might have an interest in it.

One matter I didn't mention in all of that is the impact of international law, international instruments. It's another aspect of the same thing. What you are talking about is texts and how it impacts on your Common Law, how it impacts on your statute law. It seems to me that to ignore statute and all of the things that influence it, is to ignore now a major part of your legal system. We spend so much time interpreting them and yet what do judges know about how statutes are put together - the drafting techniques?

Just before I came here, I was reading a note in the latest *Yale Law Journal* on the question of manuals that are used by the parliamentary drafters in the Congress and an instruction, [*in*] one of them is always use verbs in the present tense. So, that's a drafting matter, a drafting convention, but when the court comes along to construe the statute and asks itself when is the statute to speak from? Do you just rely on the present tense to say it only goes forward, when you know that the reason it speaks the present tense, is not because it's distinguishing between the past and the present as such, it's just a drafting convention. The whole thing [*is*] just a huge *terra incognita* for most of us.

33. You mentioned international commercial law and this is another one of your interests. In recent years you've played a very important role in helping formulate the principles that have emerged from the UNIDROIT negotiations. Apropos, drawing up these principles, how easy is it for people from free market and communist countries to draw these up?

Well, I think you have to understand how UNIDROIT operates. This is preparing a [*set of*] principles for international commercial contract. It is not an organisation which has

⁴³ Nathan Roscoe Pound (1870-1964), Dean of Harvard Law School (1916-36.)

⁴⁴ Roger John Traynor 1900-1983), Goodhart Professor 1974-5, Jesus College. Chief Justice of Supreme Court of California (1964-70)

⁴⁵ Guido Calabresi, Sterling Professor Emeritus of Law, Yale, United States Circuit Judge from 1994. Goodhart Professor 1980-81, St John's College. *A Common Law for the Age of Statutes*, 1982, Harvard University Press, 319pp.



representatives of governments sitting down and negotiating government positions. This group is just fifteen scholars, most of whom are academics who are comparative lawyers, not all of them, and they're dotted from all over the world, and quite experienced in international commercial arbitration. It is conducted as essentially an intellectual dialogue with a practical object in mind of producing an instrument that'll be attractive to the international commercial communities, laying out norms that can be understood all over the world. Obviously there are areas where it is very hard to communicate, this can be between the Islamic world and the Common Law world, or the Islamic world and the Civil Law world. My experience is it has not been a problem with the former communist states and the non-communist states. We've got representatives from the Russia and China. I think we all realise that because it's about international commerce we're all in the same boat somewhere along the line. The premise is you're dealing with somebody from another country and you want a system that's mutually intelligible. Now, it's been made a lot easier, I think, because both Russia and China have modernised their contract law. They started that process back in the 90s and they've drawn heavily on instruments like Uniform Commercial Code, the restatement of contracts from the Common Law side of it, as well as Civilian Law.

The real difficulty, and it's a difficulty I think all of us have, is trying to shed the thinking of your own system and the language of your own system and the concepts of your own system, to come up with something that's workable and intelligible. I make that comment designedly. When we were discussing one subject, it was about assignment of contracts, which is not a concept that the Common Law understands - novation is the nearest the Common Law does - we were talking for two hours and it looked as though we were going along swimmingly. It had all been presented by a Belgian and he used one phrase and one of the common lawyers said "That phrase you used, what did you mean?" and he explained it and for two hours we'd been camels in the night. That's the sort of problem that I have found to be far more significant than the problem of where a particular scholar comes from, because a particular scholar, unlike the representative of a government, comes with a large amount of goodwill to produce a common product. Curiously it was one of the representatives from one of the former communist countries, I'm not identifying him, who was most insistent that we have in the principles what we in the Common Law world would call a provision dealing with estoppel. I was quite mystified by this and I asked him afterwards "Why?" and he says "these instruments also have an educational function and we have to bring home to the businessmen in our world that you can't say one thing, get someone else to rely upon it and then resile from it with impunity". So, that takes you some distance from what informed your question, which I think presupposes that the people who are participating in the events are far more wedded to their government's position than my experience at least in this enterprise is in fact the case.

34. Something that fascinated me. You wrote that there has been a jaundiced response from Australian academics to ideas of good faith in commercial contracts⁴⁶. Why do you think this is?

For a while it was a matter of complete mystery to me. I mentioned earlier this flowering period in our law when Sir Anthony Mason was Chief Justice and then a hardening of the arteries from the mid 90s. I tend to the view that maybe it's just the baby boomers working their way out of the system, but today the academy is far more conservative than the academy that I've known.

⁴⁶ Finn 2007. The Unidroit Principles. *Federal Court of Australia Conference*.



35. Were you of this mind when you were an academic?

I would've thought not judging by what I wrote. No, it is extraordinary that the idea that one should be hostile to having a rule of your contract law that obliged the parties to act in good faith and to deal fairly with each other. It's clearly not part of English contract law, it is for the moment part of our contract law. The academics are against it, although there are exceptions. It would not surprise me if our High Court finally said No [*to good faith*], although the composition of the High Court's changing, somewhat.

36. I think you mentioned as well that the Australian High Court, the House of Lords and the New Zealand Supreme Court have upheld what you call the "old orthodoxy"⁴⁷.

I did. I was talking there about principles of contract interpretation and the duty of good faith and fair dealing, but mainly interpretation. I've done quite a number of very long term contract cases and they are what I would call relational cases. I mean, if you've got a long term lease it doesn't bring you into a working relationship with your landlord. Many types of long term contracts do and they're very close. What's important in them is the relationship, not the terms of the contract, and our contract law is largely ill-suited in its insistence upon the terms. The objectivity - you have to interpret as at the moment the contract is entered into etc etc, - it just doesn't accommodate how people do act. It's like, for want of a better or a worse description, that these are just *de facto* relationships that go on for a period of time. The relationship's very important. Equally the unpreparedness to contemplate duties of fair dealing in these sorts of relationship is again mysterious to me - that the courts are sticking to a very rigid form of English contract law. Now, England has always made a virtue of certainty, harsh rules. I do wonder how long it will be able to maintain that as the centre of gravity of economic power moves east. I wonder whether the English will be able to keep it up, but whether the English can or can't, I don't see it is at all suitable to Australian circumstances.

37. Well, Judge, I'm mindful of the time and of your prior lunch date. So, reluctantly I think we might end at this point. All I can do is reiterate my sincere thanks and gratitude for such an outstanding interview, which will be a very valuable addition to our archive. Thank you so much.

Thank you.

⁴⁷ Finn 2008. *The Unidroit Principle: an Australian Perspective*, p. 4.

