Dangerous Dicta?

The use of decisions of the courts of foreign jurisdictions in submissions before Australian appellate courts

By Belinda Baker

> The Court's discussion of these foreign views … is therefore meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans'.

Introduction

In the United States, the citation of the decisions of foreign courts has from time to time attracted vociferous criticism. In 2005, references to foreign and international law by judges of the United States Supreme Court in invalidating the death penalty for juveniles and in striking down laws prohibiting same sex sodomy led to a public outcry. The *New Yorker* featured an article which described Justice Kennedy as 'the most dangerous man in America' because of his citations of foreign law. Legislation was even introduced into the United States Congress which attempted to make it an impeachable offence to cite foreign law in support of a constitutional decision.

Within the United States Supreme Court at that time, the debate was intense, with Scalia J criticising the majority's use of foreign decisions as not only 'meaningless dicta' but 'dangerous dicta', arguing that the court 'should not impose foreign moods, fads or fashions on Americans.' In *Roper v Simmons*, which concerned the constitutionality of the death penalty for juveniles, Scalia J again forcefully expressed his dissent to the majority's references to decisions of foreign courts,

stating 'the basic premise of the court's argument – that American law should conform to the laws of the rest of the world – should be rejected out of hand.'

Fortunately, the use of foreign decisions by Australian courts has not attracted the same controversy. Ever since federation, Australian courts have looked to the courts of foreign jurisdictions for guidance in the determination of novel legal questions. As a colony of Britain, it was necessary for Australian courts to look to the decisions of the courts of the United Kingdom in resolving Australian disputes. Indeed, the decisions of the Privy Council were binding on Australian courts for almost a century after federation, and it was only after appeals to the Privy Council were abolished that the decisions of that body could be considered to be a decision of a 'foreign' jurisdiction in any real sense.

Yet it is not just the decisions of courts of the United Kingdom that Australian courts have historically looked to for guidance when addressing difficult or novel questions of law. Prior to the abolition of Privy Council appeals, the Australian legal system was 'institutionally tied' into an international judicial system supervised by the Privy Council in London. This connection instilled into Australian lawyers a generally comfortable attitude towards the use of foreign decisions. In addition, as various provisions of the Australian Constitution had been modelled on provisions of the US Constitution, it was natural for Australian courts to look to US decisions for guidance as to the interpretation of those provisions.

Indeed, in *D'Emden v Pedder*, the newly constituted High Court described American constitutional decisions as 'not an infallible guide, but as a most welcome aid and assistance.' Similarly, in *Davison v Vickery's Motors*, Isaacs J stated that the judgment of any tribunal in which the common law was 'administered by judges of high attainments, great learning and wide experience' should carry 'great weight'.

In other words, from the earliest days of federation, Australian judges recognised that the difficult questions that arose for determination before them had often been previously considered by judges in other (particularly common law) jurisdictions, and that the logic and wisdom of those judges could be of assistance in developing Australian law, even where those decisions were not binding.

Of course, different views have been ex-

pressed at different times by Australian judges about the weight to be given to foreign law in respect of particular legal questions. For example, in the *Engineers Case*, in overturning the American inspired doctrine of intergovernmental immunities, the majority held that 'American authorities, however illustrious the tribunals may be, are not a secure basis on which to build fundamentally with respect to our own Constitution [but] on secondary and subsidiary matters they may … afford considerable light and assistance.'

In short, debate about the use of foreign law in Australia has never triggered the antipathy seen in the United States. Indeed, while the past century has seen a marked decline by Australian courts in the citation of the decisions of courts of the United Kingdom, Australian superior courts continue to obtain guidance from those decisions as well as the decisions of other foreign courts, particularly those in the United States, Canada, Hong Kong and New Zealand.

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Accepting that foreign law may be used, and is frequently used, by Australian judges to assist in the determination of novel and difficult questions of Australian law, the question then arises as to how counsel may best assist Australian courts to do so.

This article will first address when it can be useful to cite foreign jurisdictions and second, how to approach the decisions of foreign courts. Finally, this article will provide some guidance and tips as to the most effective ways of researching the decisions of foreign jurisdictions.

When can it be useful to cite the decisions of foreign courts?

> I'm in favour of good ideas … wherever you can get them. (The then Supreme Court nominee, Elena Kagan, responding to a US Senator's inquiry as to whether judges should ever look to foreign law in constitutional or statutory interpretation.)

Citing foreign decisions will be most useful when counsel is addressing a novel issue, or where counsel is endeavouring to persuade the court (particularly the High Court) to develop the law in a new direction or to depart from an existing line of case law. It is in these kinds of areas in which courts will be most assisted (and will be most willing) to turn to the decisions of foreign courts for guidance.

For example, in the *Mabo* appeal, Ron Castan QC made effective use of decisions of appellate courts of Canada, the United States as well as more traditional United Kingdom authorities in persuading the High Court to recognise, for the first time, the existence of native title in Australia. Many of those decisions were in turn cited by the majority justices as supporting their conclusion that the appellant's submissions should be accepted.

Similar use of foreign authority was also made by Sir Maurice Byers QC in *Kable v Director of Public Prosecutions* in submitting that an implication should be drawn from the Constitution that prohibits State legislatures from conferring functions on State courts which are incompatible with the exercise of federal judicial power. In his Honour's concurring judgment, Gummow J drew upon a number of these authorities, in particular adopting the language of the United States Supreme Court in *Mistretta v United States*, which held that the reputation of federal courts 'may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.'

It is not just in the High Court that reference to the decisions of foreign jurisdictions may be of assistance. Novel or difficult questions will typically first arise in intermediate appellate courts, and, like the High Court, those courts may be assisted by the reasoning of courts of foreign jurisdictions. For example, in *Cesan v The Queen*, Basten JA, in dissent, referred to the principle enunciated by the United States Supreme Court, that trial by jury was a trial of an issue by jurors 'under the direction and superintendence of the court', in finding that a trial presided over by a sleeping judge was not a lawful trial. (Those authorities of the United States Supreme Court were in turn, referred to by French CJ and Gummow J in each of their Honour's concurring judgments allowing the appeal against the appellant's conviction.)

In both the High Court and intermediate courts of appeal, reference to the decisions of foreign courts will be of most assistance where there is commonality in the history of the jurisprudence in question. For example, the interpretation of provisions of the *Constitution* which were drawn from the United States *Constitution* (such as s 80) will often be assisted by reference to decisions of United States courts concerning the right to trial by jury. Similarly, decisions relating to the interpretation of provisions of international treaties, such as the *Convention relating to the Status of Refugees*, will frequently be assisted by the analysis of decisions of the courts of jurisdictions which are also signatories to the relevant Convention.

At times, consideration by a foreign court of a particular dispute may also provide guidance. For example, in holding that defamation proceedings against Google should not have been summarily dismissed, the High Court referred to similar litigation against Google in which summary dismissal applications had been refused by various courts in New Zealand and Hong Kong.

Even where there are textual differences between the Australian and foreign laws, an examination of the decisions of foreign court may nonetheless be of assistance. (Provided, as outlined below, that the differences are constantly borne in mind, and expressly acknowledged in counsel's submissions). For example, in *Air New Zealand v ACCC*, Nettle J observed that 'despite differences between competition law in the United States, Europe and Australia, the area of a geographic market is essentially an economic concept and therefore logically to be determined according to similar considerations in each jurisdiction.'

In each instance, the decision of a foreign court will be most effectively used where the foreign court decision confirms an interpretation or principle which is reached through the application of orthodox legal reasoning.

Finally, it should also be borne in mind that assistance may be gained from an analysis of the decisions of foreign jurisdictions, even if counsel determines that it is not necessary or appropriate to cite the decision in his or her written or oral submissions. The following exchange between Stephen Breyer, Associate Justice of the United States Supreme Court, and an unknown congressman illustrates the point:

In both the High Court and intermediate courts of appeal, reference to the decisions of foreign courts will be of most assistance where there is commonality in the history of the jurisprudence in question.

> Justice Breyer: If I have a difficult case and a human being called a judge, though of a different country, has had to consider a similar problem, why should I not read what the judge has said? It will not bind me, but I may learn something.
> Congressman: Fine. You are right. Read it. Just don't cite it in your opinion.

The way in which the foreign judge frames the questions for determination, the analogies

used by the foreign judge, the foreign judge's inductive or deductive logic, his or her identification of unforeseen consequences and even the foreign judge's turn of phrase may each provide invaluable assistance to counsel in framing the submissions to be advanced.

It is essential that counsel understand where the foreign court's decision fits into its jurisprudential landscape. This requires an understanding of the history and broader context of the jurisdiction that is being cited.

Approaching the decisions of foreign courts

> American case law is a trackless jungle in which only the most intrepid and discerning Australian lawyer should venture. It is possible to find American authority to support almost any conceivable proposition of law.

As a decision of a foreign court is not precedent, there is little utility in simply recording that a foreign court reached the result contended for, or worse, listing *every* decision of *every* court in the world that has reached that particular finding. The persuasive use of foreign authority requires counsel to understand and analyse *why* the foreign court reached the finding that it did. As Isaacs J held in *Davison*, 'short of emanation from a single source, every potion should be at least tasted and appraised before being swallowed.'

The analysis of why a foreign court has reached a particular finding will assist the court in determining whether the foreign decision is persuasive in our local context. However, the task of determining why the foreign court has reached a particular finding in a given case is not straightforward.

The starting point for consideration of this issue will, of course, be with the foreign court's reasons. Those reasons may be directly applicable to the issue in contention in the proceedings. On the other hand, the reasons may indicate that the concern that has driven the foreign court to the particular finding is one which is not relevant, or which must be treated with caution in the Australian context. For example, American cases concerning the right to free speech must be approached with particular caution in the Australian context, where there is no constitutional 'right' to free speech.

However, at times, a significant matter which is driving a particular result may not be apparent from the reasons of the foreign court. For example, the American Bill of Rights infuses many aspects of American law which may not be anticipated by Australian lawyers. In particular, the right to due process contained in the Fifth Amendment is overlaid not just upon the American criminal law, but also American tort law, contract law and property law. This influence of the Bill of Rights will not always be expressly stated in the reasons of an American court. Those matters may have been addressed by previous decisions, or may be an unstated premise of the decision.

For this reason, it is essential that counsel understand where the foreign court's decision fits into its jurisprudential landscape. This requires an understanding of the history and broader context of the jurisdiction that is being cited. It is necessary to read not just isolated decisions of the foreign court, but the decisions which are cited by those decisions, as well as textbooks and commentary of the jurisdiction in question.

While the reasons of the foreign court are fundamental to determining its persuasive value, the status of the court being cited should also not be overlooked. Decisions of appellate courts in the United Kingdom, the United States of America, Canada, New Zealand and Hong Kong will obviously carry more weight than authorities of less established jurisdictions. Similarly, the decisions of respected jurists, such as Holmes J, Cardozo J and Learned Hand J of the United States, and McLachlin CJ of the Canadian Supreme Court, will also carry more weight than the decisions of lesser known judicial officers.

Of course, counsel must also understand where the foreign decision lies in the hierarchy of the foreign nation's judicial system. Counsel would not cite a District Court decision in support of a proposition that had been disapproved by the Court of Appeal. Similarly, counsel should not cite a decision of the Provincial Court of Manitoba if the Canadian Supreme Court has spoken authoritatively on the question. But, short of emanation from a supreme source, every potion should at least be tasted and appraised before being swallowed.

Again, American decisions must be treated with particular caution in this respect. While Sir Anthony Mason's description of American case law as a 'trackless jungle in which only the most intrepid and discerning Australian lawyer should venture', may be somewhat strongly expressed, the American jurisprudential system differs from that in Australia in important respects. These differences must be borne in mind when citing the decision of any American court.

For example, in contrast to the Australian High Court, which is the final court of appeal for both federal and State questions, the Supreme Court of the United States is *only* the final court of appeal for federal questions. As a result, the United States Supreme Court will defer to a State Supreme Court on State questions, such as the proper construction of a State statute. The absence of effective review by the United States Supreme Court of the decisions of State courts also has the effect that the common law in the United States has developed independently in each of its 50 jurisdictions.

Finally, counsel should not cite any decision of a foreign court before first comprehensively researching Australian authorities addressing the issue, including decisions of intermediate appellate State and Territory courts. The decisions of foreign courts may be persuasive, but they cannot supplant the decisions of other intermediate appellate Australian courts, which must be followed by intermediate courts unless the court considers that the decision in question is 'plainly wrong'.

How to research foreign law

> Referring to [foreign decisions] means extra work, even though a majority of our Court does so only occasionally. But we believe it is worthwhile, for doing so sometimes opens our eyes.

For the reasons outlined above, the decisions of foreign courts may be of great assistance to the advocate, but those decisions must be carefully approached. More than a quick Google search is required before making reference to a decision of a foreign court.

Sir Anthony Mason's description of American case law as a 'trackless jungle in which only the most intrepid and discerning Australian lawyer should venture',

There are a number of websites which may be of assistance in researching not only foreign law, but also in gaining an understanding of the jurisdiction and context of the decision that is being cited. Some websites include:

> *Harvard Law School Library's Free Legal Research Resources on Foreign and International Law* – contains links to online search tools and databases. It has a particularly good coverage of US law (under the link for Federal Law and government documents): https://guides.library.harvard.edu/c.php?g=310432&p=2072003#s-lg-page-section-2071999.
>
> *Yale Law School's 'Country Research Guide'*, which contains a country-by-country guide with connections to the

best research guides and databases for each country: https://library.law.yale.edu/research/guides/all-countries.

New York University's 'GlobaLex', which also contains a country-by-country guide to legal research, including commentary addressing the structure of each nation's political and judicial system, and points of jurisprudential difference for various subject matters: http://www.nyulawglobal.org/Globalex/#.

The Library of Congress' 'Guide to Law Online', which contains an annotated guide to sources of information on government and law available online. It includes selected links to useful and reliable sites for legal information: http://www.loc.gov/law/help/guide.php.

University of Melbourne - Approaching Foreign and Comparative Legal Research - a beginners guide for approaching legal research in a new jurisdiction (unfortunately, a large part of the site is only available to Melbourne university staff and students): https://unimelb.libguides.com/approachingforeignresearch.

In order to understand the history and broader context of how the subject matter is dealt with in the jurisdiction being cited, it will also be helpful to review reputable textbooks of the jurisdiction in question. Such texts will assist counsel in locating relevant authority, as well as providing essential background information about the context and history of that authority. The Bar Library holds a number of textbooks from other jurisdictions. Texts which are not available in the Bar Library may be obtained from other libraries (including the Law Courts library) on interlibrary loan for a small fee.

Once the context of the jurisprudence is located, electronic databases may be used to find authority that is directly on point, and to determine whether the authority is still 'good law'.

There are various electronic databases for this task, some of which are available free of charge and some which require a paid subscription.

Some of the free electronic resources include:

Worldlii - provides a single search for databases on the following legal information institutes: AustLII (Australia); BAILII (Britain); CanLII (Canada); HKLII (Hong Kong); LII (USA – administered by Cornell); NzLII (New Zealand); and PacLII. It includes citation history and full text searchable decisions: www.worldlii.org.

PACER - Public Access to Court Electronic Records (PACER) is an electronic public access service that allows users to obtain case and docket information online from US federal appellate, district, and bankruptcy courts: https://www.pacer.gov.

The High Court of Australia Overseas Bulletin – includes summaries of decisions of the Supreme Court of the United Kingdom, the Supreme Court of Canada, the Supreme Court of the United States, the Constitutional Court of South Africa, the Supreme Court of New Zealand and the Hong Kong Court of Final Appeal: www.hcourt.gov.au/library/overseas-decisions-bulletin.

Some of the subscription only databases include:

When researching foreign law, it is always worthwhile to attend the Bar Library in person. The librarians at the Bar Library are invaluable in assisting counsel in the research of decisions of foreign jurisdictions.

Lexis Advance - contains primary and secondary materials of Singapore, Canada, New Zealand, India and Malaysia, including Halsbury's laws of Singapore, Halsbury's laws of Canada, Laws of Hong Kong and Laws of New Zealand and LinxPLus (New Zealand), QuickCite (Canada) and Canadian Digest.

WestlawInternational - contains an extensive collection of US materials including the Restatements of the Law, American Jurisprudence, Corpus Juris Secundum) and international content from Canada, Hong Kong, Korea, United Kingdom, European Union including United Kingdom (e.g., Archbold: Criminal Pleading, Evidence and Practice, Palmer's Company Law, Woodfall's Landlord and Tenant) and Canadian (eg Waters' Law of Trusts in Canada, Brown, Supreme Court of Canada Practice) treatises.

BestCase library - Westlaw Next Canada - contains a large collection of Canadian case law sources.

LexisLibrary UK - primarily focuses on the United Kingdom jurisdictions, and contains Halsbury's Laws of England, Halsbury's Statutes of England, Atkin's Court Forms and many major treatises (Duncan & Neill on Defamation, Williams on Wills).

Heinonline - a fully searchable comprehensive collection of US and International law journals. Other collections include US Supreme Court Reports and library of sources, US Code and Federal Regulations, Canadian Supreme Court Reports and Statutes, International Treaties.

The free databases are of assistance in preliminary searches, particularly to determine whether there is any useful discussion of a legal issue in authorities of a specified jurisdiction. However, those databases are not exhaustive, and it is necessary to utilise the subscription-only databases for a comprehensive review of the authorities of a specified jurisdiction.

While many chambers hold Westlaw and/or LexisNexis subscriptions, most chambers do not subscribe to the more expensive international extensions of those databases. Fortunately, the Bar Library subscribes to each of the above databases. These databases are accessible on any of the computers in the Bar Library. In addition, Heinonline is available from the Bar Library's webpage, using counsel's Bar Association login details.

When researching foreign law, it is always worthwhile to attend the Bar Library in person. The librarians at the Bar Library are invaluable in assisting counsel in the research of decisions of foreign jurisdictions.

A final suggestion

It will be apparent from the above that the research of foreign law can be both labour intensive and costly, particularly when counsel is researching a jurisdiction with which he or she is unfamiliar.

However, the discriminating use of junior counsel, particularly a reader, will often be beneficial from both a time and cost saving perspective. As well as the savings in hourly rates, many junior barristers of the New South Wales bar are experienced in researching case law of foreign jurisdictions (some with post-graduate qualifications from universities in jurisdictions such as the United Kingdom, the United States and Canada). Utilising junior barristers and readers can ensure that the client has the benefit of the assistance to be gained by the judicious citation of decisions of foreign jurisdictions, whilst minimising the cost of doing so.