

The Use of History and Other Facts in the Reasoning of the High Court of Australia

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The primary purpose of this paper is to consider and analyse the use of facts by the High Court of Australia. 'History' has been used as an example of the use made by the High Court of such facts. This use of history as an example may give rise to some difficulties, not least of definition. As is discussed later, historians do not necessarily treat history as simply a formal record of the past, which itself comprises events that are 'historical facts'.¹

However, there are a number of reasons why history (considered itself as a fact) and historical facts do provide a useful example of the use of facts by the High Court. One reason is simply because they are so often used both by the Court and by counsel appearing before it. This use, at least by counsel, can be explained (in part at least) by the supposed benefit to any argument by referring to history. Historical references and allusions suggest learning. They will often afford some measure of credibility to an argument in need of it.² The past is often assumed to be the source of some previous wisdom presumably no longer present.

Another reason to use history and historical facts as an example is that it is one of the conceits of the legal profession that its members are necessarily good historians. Experience shows that this is not true even of all historians. There is no obvious reason why it should be true of lawyers, in the result that the use of history and historical fact by the High Court, and by those appearing before it, sometimes involves errors (or alleged errors) that will be useful for analysis.

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¹ See the definition in the *New Shorter Oxford English Dictionary* (1993).

² R J Aldisert, *The Judicial Process* (1996) 447: '[A]n aura of authenticity seems to radiate from the lawyer's brief or judge's opinion which recites history extensively'.

Taxonomy

As Justice Gummow commented in *Wik*:

There remains lacking, at least in Australia, any established taxonomy to regulate such uses of history in the formulation of legal norms. Rather, lawyers have 'been bemused by the apparent continuity of their heritage into a way of thinking which inhibits historical understanding'. Even if any such taxonomy were to be devised, it might then be said of it that it was but a rhetorical device devised to render past reality into a form useful to legally principled resolution of present conflicts.³

True it is that the courts have not attempted to classify the uses (and abuses) to which history may be put by a court; nor are there any clear or settled rules as to how history is to be identified in relation to any particular classification. But history is not alone in this. It is merely an example of the more general use of facts by lawyers. In that more general context it is also true that there is no established categorisation of what uses might be made of facts by courts.

A recent example of this deficiency can be seen in the case of *Woods v Multi-Sport Holdings Pty Ltd*.⁴ This case involved a tort claim by a person who had suffered injury whilst playing indoor cricket. The claim was made against the company that owned the facility where the game was played and that organised the competition. It was argued that the owner should have provided safety equipment to the player and/or should have given him warnings against the possibility of damage. The High Court confirmed, by majority, the judgment below that the owner was not liable. McHugh J, in dissent, referred to official reports issued by the Australian Bureau of Statistics and the Australian Institute of Health and Welfare⁵ to show the history of the extent and nature of sporting injuries. It would appear that he discovered those materials from his own researches. In any event, the respondent does not seem to have had an opportunity to comment on them.⁶ Justice McHugh's purpose in referring to the reports was to argue that the standard of care in relation to sporting injuries should rise.⁷ He argued that it was permissible to use the reports for this purpose because the reports were 'legislative facts' and he could take judicial notice of such facts.⁸ On the other hand, Callinan J rejected

³ *Wik Peoples v Queensland* (1996) 187 CLR 1, 182-3.

⁴ (2002) 186 ALR 145.

⁵ *Ibid* 156-7 [62]-[63].

⁶ *Ibid* 184-5 [166], 186 [168].

⁷ *Ibid* 160 [71].

⁸ *Ibid* 157 [63]-[65].

the use of such reports, even if they comprised 'legislative facts', unless the parties had been given the opportunity to comment.⁹

The classification of history, and of facts generally, used by both Justices McHugh and Callinan was a dual classification into 'adjudicative facts' and 'legislative facts'. Relying on *Cross on Evidence*, McHugh J defined these terms as follows:

An adjudicative fact is a fact in issue or a fact relevant to a fact in issue. A legislative fact is 'a fact which helps the court determine the content of law and policy and to exercise its discretion or judgment in determining what course of action to take'.¹⁰

Although the definition may not be directly applicable, this classification has a long history in both the United States¹¹ and in Canada.¹² The classification has been adopted by some Australian commentators.¹³

However, that classification is at the same time probably both too broad and too narrow; it is certainly misleading. The distinction into only two classifications fails to acknowledge the difference between constitutional facts in issue and those facts that are integral to the judicial process of reasoning. This failure means that criticisms of the use of facts in a particular context may be unfocused and unhelpful.

As explained below, there is, at the very least, a three-fold classification in relation to the use of facts in judicial proceedings.¹⁴ The use of history by the High Court provides an example of that three-fold classification. The first classification is the use of history as a fact in issue in the proceedings. The second is its use as a constitutional fact in issue, such as where history is used as an essential fact to determine the validity of an Act or of delegated legislation. The third is the use

⁹ Ibid 184 [165].

¹⁰ Ibid 157 [65].

¹¹ See A Henderson, 'Brandeis Briefs and the Proof of Legislative Facts in Proceedings under the Human Rights Act, 1998' (1998) *Public Law* 563, 564.

¹² See *Danson v AG* (1990) 2 SCR 1086, 1099. Although the same terms are used as in the US it may be that they are given a slightly different meaning in Canada.

¹³ Eg by P Lane, 'Facts in Constitutional Law' (1963) 37 *Australian Law Journal* 108, 108 and by P Carter, 'Judicial Notice: Related and Unrelated Matters' in E Campbell and L Waller (eds), *Well and Truly Tried* (1982) 88, 94; G Mullane, 'Evidence of Social Science Research: Law, Practice, and Options in the Family Court of Australia' (1998) 72 *Australian Law Journal* 434, 441; see also D Byrne and J D Heydon, *Cross on Evidence Australian Edition* (Looseleaf) ¶3010.

¹⁴ It may be that there are other classifications. For example, 'jurisdictional facts' have some of the features of constitutional facts, but may also be different in some respects.

of history as an aspect of legal reasoning; for example, to explain the development of the common law, or the meaning of a statute or a constitution. In the first and second uses of history it is treated as evidence; in the third it is not.

The two-fold classification used by Justices McHugh and Callinan in *Woods v Multi-Sport Holdings Pty Ltd* ultimately led both of their Honours into error. This is discussed below.

History as a Fact in Issue

History (or more particularly, one or more historical facts) may be a fact in issue between the parties to litigation in much the same way as any other fact may be in issue.

One obvious case where this occurs is in relation to native title claims. At least on current authority, in order to succeed in such a claim the claimants have to prove that they have had a continuous connection with the relevant land since settlement and that native title has not been extinguished.¹⁵ This requires the proof of facts relevant to a particular community or locale and various facts relating to land grants and such like. There have now been a number of cases that have concentrated on these issues of history. The *Yorta Yorta Case* is probably the best known in Australia.¹⁶ In Canada the use of history in native title litigation has resulted in a detailed jurisprudence as to what evidence may be used to prove such history and as to what use may be made of it.¹⁷ The same can be expected to occur in Australia, if it has not already done so.¹⁸

The High Court exercises appellate jurisdiction under s 73 of the *Commonwealth Constitution* and original jurisdiction pursuant to ss 75 and 76 of the *Constitution*.¹⁹ In the exercise of either jurisdiction the High Court is rarely concerned with having to make factual findings whether as to history or otherwise.

¹⁵ See *Coe v Commonwealth* (1993) 68 ALJR 110, 119(2)E.

¹⁶ *Members of the Yorta Yorta Aboriginal Community v Victoria & Ors* (2001) 180 ALR 655 (special leave to appeal to the High Court granted).

¹⁷ See eg, *Mitchell v MNR* [2000] 1 SCR 911; *R v Marshall* [1999] 3 SCR 456.

¹⁸ *Members of the Yorta Yorta Aboriginal Community v Victoria & Ors* (2001) 180 ALR 655, 671-2 [55]-[57]. See A Reilly, 'The Ghost of Truganini: Use of Historical Evidence as Proof of Native Title' (2000) 28 *Federal Law Review* 453. The author does not distinguish between the various uses to which history might be put.

¹⁹ It may also have jurisdiction under the Territories power (s 122) and jurisdiction under the external affairs power (s 51(xxix) in relation to appeals from Nauru).

The law is clear that the High Court's appellate jurisdiction involves an appeal *strictu sensu*, being an appeal on the facts and law that were before the court appealed from.²⁰ On an appeal the High Court cannot receive fresh evidence and, on the face of it, is limited to the facts that were before the court appealed from.²¹

In its original jurisdiction the High Court could, but rarely does, make factual determinations. Where issues of disputed fact arise the Court would usually remit the proceedings to another appropriate court for that court to deal with the factual issues.²² Apart from the specialised jurisdiction when the High Court sits as a Court of Disputed Returns, it will rarely, if ever, be involved in determining factual issues. This means that proceedings instituted in original jurisdiction will only be heard at first instance by the High Court if the facts are not in dispute or if they have been agreed.²³

Consequently, whilst the High Court may have to deal with appeals and other cases where evidence of history has been given in the courts below, the High Court will not usually itself have to determine the correctness or otherwise of the evidence. There are two qualifications. The first involves constitutional facts, which are discussed below. The second involves historical facts of which the Court can take judicial notice.

Although there is little direct authority on point, there seems to be a general acceptance that a court can take judicial notice of 'general', authoritatively settled historical facts and can refer to respected historical works for this purpose.²⁴ The principle is expressly reflected in the statute law of some States.²⁵ This principle in relation to history is

²⁰ *CDJ v VAJ* (1998) 197 CLR 172, 202; *Eastman v The Queen* (2000) 203 CLR 1, 11-3, 23-6, 32-5; *Allesch v Mauriz* (2000) 173 ALR 648, 653-4 [23].

²¹ *Mickelberg v The Queen* (1989) 167 CLR 259; *Eastman v The Queen* *ibid*.

²² *Judiciary Act 1903* (Cth) s 44. The purpose of the remittal power is to relieve the High Court from determining factual issues: *State Bank of New South Wales v Commonwealth Savings Bank* (1984) 154 CLR 579, 586; *Ravenor Overseas Inc v Readhead* (1998) 152 ALR 416, 417 [5]. See generally Australian Law Reform Commission ('ALRC'), *The Judicial Power of the Commonwealth*, Report 92 (2001) 239 ff.

²³ See F Jones, 'High Court Procedure Under the Judiciary Act' (1994) 68 *Australian Law Journal* 442 for a discussion of the procedural aspects of cases brought in the High Court's original jurisdiction.

²⁴ See Byrne and Heydon, above n 13, ¶3040; G Roberts, *Evidence: Proof and Practice* (1998) 141-2; *Phipson on Evidence* (15th ed, 2000) 911; *Wignmore on Evidence* (3rd ed, 1940) § 2580.

²⁵ *Evidence Act 1929* (SA) s 64; *Evidence Act 1906* (WA) s 72; *Evidence Act 1910* (Tas) s 67.

itself an aspect of a more general common law principle that a court can take judicial notice of uncontroversial facts that are capable of being established by accepted sources.²⁶ As Justice Dixon put it in *Australian Communist Party v Commonwealth*:²⁷

Just as courts may use the general facts of history as ascertained or ascertainable from the accepted writings of serious historians ... , and employ the common knowledge of educated men upon many matters and for verification refer to standard works of literature and the like ... , so we may rely upon a knowledge of the general nature and development of the accepted tenets or doctrines of communism as a political philosophy ascertained or verified, not from the polemics on the subject, but from serious studies and inquiries and historical narratives.²⁸

Taking judicial notice of history as a fact in issue is necessarily restrained and constrained by the exigencies of the adversarial process. Histories relating to specific and local events (eg, the history of a specific hotel) cannot be referred to; nor can works that are not 'standard works';²⁹ nor can histories that are necessarily analytical or conjectural, such as analyses of why certain things happened or how people behaved (indeed, opinion evidence may not be able to be given on these matters).³⁰

Perhaps more importantly for this purpose, there is no obvious reason why a court, if it proposes to take judicial notice of a fact in issue, should not afford procedural fairness to the parties by seeking their comments before doing so. This is confirmed by such authority as there is on the topic.³¹

²⁶ This broader principle is reflected in s 144 of the *Evidence Act 1995* (Cth):

(1) Proof is not required about knowledge that is not reasonably open to question and is ...

(b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.

(2) The judge may acquire knowledge of that kind in any way the judge thinks fit.

See also *Rendell v Paul* (1979) 22 SASR 459, 465-6.

²⁷ (1951) 83 CLR 1, 196.

²⁸ However, as that case was one involving constitutional validity the Court had even wider capacity to inquire into historical facts: see below.

²⁹ *Ritz Hotel v Charles of the Ritz* (1987) 14 NSWLR 107, 112-3.

³⁰ *Bellevue Crescent Pty Ltd v Marland Holdings Pty Ltd* (1998) 43 NSWLR 364, 371.

³¹ See *Cananett v Chambers* [1968] SASR 97, 101; *Gordon Jenkins v Coleman* (1989) 87 ALR 477, 484-8; *R v GP* (1997) 93 A Crim R 351, 366-7; P Jamieson, 'Court Proceedings, Adversarial Process and the Role of the Judicial Assistant' (1999) 9(2) *Journal of Judicial Administration* 81, 83-5.

Within these constraints there is no obvious reason why the High Court could not take judicial notice of authoritatively settled facts as facts in issue, certainly where it is exercising original jurisdiction and perhaps also where it is exercising appellate jurisdiction.³²

Referring back to *Woods v Multi-Sport Holdings Pty Ltd*, in that case McHugh J made specific reference to the judicial notice of facts in issue as if that were relevant to the use he was making of the reports in that case.³³ It was not. If it had been then the use of the records should have been referred to the parties for comment. But in that case McHugh J was not using the records to discover a fact in issue. They were being used as part of the policy reason for a rise in the standard of care in cases involving sporting injuries. They were used as an aspect of his Honour's legal reasoning. This is a different category, which raises quite different issues.

Constitutional Facts

Some of the constraints that apply to the judicial notice of history as a fact in issue do not appear to apply when history is a 'constitutional fact'. For this purpose, a constitutional fact is a fact in issue that is directly relevant to the validity or operability of a law.³⁴

Factual findings have a different significance when they directly affect the question of validity or the operation of some law. This can be readily seen in some of the road maintenance cases. For example, in the case of *Armstrong v State of Victoria (No 2)*³⁵ the High Court had held valid a road maintenance charge levied in New South Wales. Upon the evidence presented in that case, the Court held that the charge was a reasonable charge imposed by the State to recompense it for the damage to the road caused by the interstate trader, that being the relevant test at that time for validity under s 92 of the *Commonwealth Constitution*. Following this decision, the Victorian Government introduced a tax in the same form and amount as the New

³² At least on the basis that as the court appealed from could have ascertained the relevant fact for itself it was in error in not doing so. However, see below n 44.

³³ (2002) 186 ALR 145 [66]-[70].

³⁴ A constitutional fact includes the factual pre-conditions to the operation of a law. An example is where a statute commences into operation by proclamation. Usually the existence or otherwise of a proclamation is a matter requiring proof (see *R v Harm* (1975) 13 SASR 84), but not where it is a proclamation bringing an Act into force: *Stokes v Samuels* (1973) 5 SASR 18, 25.

³⁵ (1957) 99 CLR 28.

South Wales tax. In *Commonwealth Freighters Pty Ltd v Sneddon*³⁶ the defendant argued that the Victorian tax was not a reasonable charge, notwithstanding that there was no obvious difference between the situation in the two States. In effect the defendant wished to re-argue the decision in *Armstrong* on the basis of new or different evidence. It was plain that the High Court would not permit it. As Menzies J explained:

... I am not ready to accept the notion that when this court has decided that a statute is valid in a case where the decision was based upon or was influenced by a finding of fact anyone can contest the validity of the statute again on the footing that unless the same facts are proved in the subsequent proceedings the earlier decision is not to be treated as having binding authority in the later case. Any decision that a statute is constitutional or unconstitutional, however it may have been reached, is necessarily one of law and is, in the absence of special circumstances, of binding authority.³⁷

Put another way, the determination of constitutional facts is a central concern of the exercise of the judicial power of the Commonwealth³⁸ and the High Court has ultimate constitutional responsibility for the determination of those constitutional facts.³⁹

The necessary corollary of the binding nature of these determinations of constitutional facts is that, where the constitutional validity or operability of a law depends upon issues of fact, the High Court must ascertain those facts as best it can.⁴⁰ This was explained by Justice Brennan in *Gerhardy v Brown*:

³⁶ (1959) 102 CLR 280.

³⁷ *Ibid* 301.

³⁸ *Sue v Hill* (1999) 199 CLR 462, 484 [38].

³⁹ *The Queen v Federal Court of Australia; ex p WA National Football League* (1979) 143 CLR 190, 203, 228. Consequently, it may be doubted whether either statutory or even common law rules of evidence could prevent the Court from a full inquiry into the existence or otherwise of a constitutional fact (see *AG (Cth) v Tse Chu-Fai* (1998) 193 CLR 128, 149 [54]) at least where that fact went to constitutional validity.

⁴⁰ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 222; *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280, 292; *Breen v Sneddon* (1961) 106 CLR 406, 411; *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 302, 306-7, 317, contrast 328; J Holmes, 'Evidence in Constitutional Cases' (1949) 23 *Australian Law Journal* 235; Lane, above n 13; P Brazil, 'The Ascertainment of Facts in Australian Constitutional Cases' (1970) 4 *Federal Law Review* 65; S Kenny, 'Constitutional Fact Ascertainment' (1990) 1 *Public Law Review* 134, 149-62; L Zines, *The High Court and the Constitution* (4th ed, 1997) 471-82; J Edelstein, 'The Prasad Affidavits: Proof of Facts in Revolutionary Legitimacy Cases' (2002) 24 *Sydney Law Review* 57, 58-74, contrast 80-7.

There is a distinction between a judicial finding of fact in issue between parties upon which a law operates to establish or deny a right or liability and a judicial determination of the validity or scope of a law when its validity or scope turns on a matter of fact. When a court, in ascertaining the validity or scope of a law, considers matters of fact, it is not bound to reach its decision in the same way as it does when it tries an issue of fact between the parties. The validity and scope of a law cannot be made to depend on the scope of private litigation. The legislative will is not surrendered into the hands of the litigants ... The court may, of course, invite and receive assistance from the parties to ascertain the statutory facts, but it is free also to inform itself from other sources. Perhaps those sources should be public and authoritative, and perhaps the parties should be at liberty to supplement or controvert any factual material on which the court may propose to rely, but these matters of procedure can await consideration on another day. The court must ascertain the statutory facts 'as best it can' and it is difficult and undesirable to impose an a priori restraint on the performance of that duty.⁴¹

The High Court in this case was considering an appeal from a judgment on a case stated. Nevertheless, the Court was prepared to receive and consider factual material that was not before the Supreme Court (in that case an official report dealing with the relationship of the relevant Aboriginal peoples with the land vested in them by statute).

There seems to be no constitutional reason why the Court, when acting in original jurisdiction, needs to be limited only to the constitutional facts as proven or agreed by the parties. Subject to any applicable statute, to the common law and to the minimum constitutional requirements of the judicial function (such as procedural fairness), so long as there is a relevant 'matter', there seems no constitutional reason why the Court should not inform itself as to constitutional facts in such manner as it thinks fit. This is not to suggest that contested constitutional issues arise very often,⁴² or that the High Court will necessarily resolve any conflict itself when one arises.⁴³

⁴¹ (1985) 159 CLR 70, 141-2, see also 87-8 and see *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* (1975) 134 CLR 559, 622; *South Australia v Tanner* (1989) 166 CLR 161, 179; *Levy v Victoria* (1997) 189 CLR 579, 598-9.

⁴² *Levy v Victoria* (1997) 189 CLR 579, 598. The High Court has shown greater restraint in its use of constitutional facts than has, for example, the US Supreme Court: see Kenny, above n 40.

⁴³ *The Queen v Federal Court of Australia; ex p WA National Football League* (1979) 143 CLR 190, 207.

The issue is more problematical when the Court is exercising appellate jurisdiction. As already discussed, in appellate jurisdiction the Court is limited to the facts and law before the court appealed from. This is a constitutional requirement arising from the nature of the 'appeal' jurisdiction conferred by s 73 of the *Constitution*. How then can the Court inform itself of constitutional facts that were not before the court appealed from?⁴⁴ Yet it has done so, as *Gerhardy v Brown* clearly shows. The answer can only lie in the overriding responsibility of the Court to enforce the *Constitution*. This overriding responsibility is probably to be explained as an aspect of the Court's constitutional role as the 'keystone of the federal arch' as reflected in ss 75(iii), (iv) and (v)⁴⁵ and 76(i)⁴⁶ of the *Commonwealth Constitution*. Consequently, even though exercising appellate jurisdiction, the role and function of the Court in its original jurisdiction has the necessary effect that the Court can receive evidence of constitutional facts.

Given the constitutional basis for the High Court's powers in relation to constitutional facts, those powers cannot be limited by statute, including for this purpose s 144 of the *Evidence Act 1995* (Cth),⁴⁷ even assuming that this provision may limit the powers of other federal courts to deal with constitutional facts.⁴⁸

Where a constitutional fact does arise for determination it is usually dealt with by 'the stating of a case, by resort to information publicly available or, possibly, by the tendering of evidence'.⁴⁹ In the final resort the Court can seek to discover the constitutional fact through its own inquiries.

⁴⁴ Kirby J in *Eastman v The Queen* (2000) 203 CLR 1, 76 [232] and Callinan J in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 186 ALR 145, 186 [168]. Both seem to assume that the rule against the receipt of further evidence on appeal extends to constitutional facts.

⁴⁵ *The Queen v Federal Court of Australia; ex p WA National Football League* (1979) 143 CLR 190, 228.

⁴⁶ See generally ALRC, above n 22, 258-9.

⁴⁷ See above n 26.

⁴⁸ Mullane, above n 13, 443-4.

⁴⁹ *Levy v Victoria* (1997) 189 CLR 579, 598. See Edelstein, above n 40, 65-75, contrast 75ff re burden of proof. Perhaps the most noteworthy attempt to 'tender' evidence was by Tasmania in *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314. That was a case that proceeded by way of case stated in original jurisdiction. The Tasmanian Solicitor General attempted to tender a transparent, sealed plastic box containing sea water and an abalone, apparently in an attempt to show that abalone were fixed and did not move. Faced with the prospect of closely watching the abalone for a lengthy period the Court suggested that the exhibit would not assist it and the attempted tender was not pursued.

Of course, the evidence of constitutional facts could comprise history or historical facts. For example, in *Clark King & Co Pty Ltd v Australian Wheat Board*,⁵⁰ material was handed up to the Court that identified, amongst other things, the history of the regulation of the wheat market and its economic consequences and effects. The material was referred to by both Barwick CJ⁵¹ and Stephen J⁵² – a use that was subsequently confirmed by the High Court in *Uerbergang v Australian Wheat Board*.⁵³ Admittedly, this case was reasonably exceptional. It is not usual for history or historical facts to be relevant constitutional facts in relation to constitutional validity. But, if they are, then the Court can inform itself as it thinks fit concerning those facts.

The flexibility that the High Court has in considering and determining constitutional facts imposes upon the Court a most significant responsibility. As Dr John Williams has pointed out:

Courts are more than the mere chroniclers of historical events; they also provide authorised accounts of history. History is transformed when it becomes part of judicial deliberation. Courts pass judgment on history and in so doing radically change history ... History, like other evidence, becomes a fact and, within the legal context, a fact that is rigid.⁵⁴

The determination of a constitutional fact has the effect that the relevant fact becomes law, and constitutional law at that. At the very least this would suggest that the High Court should exercise considerable caution before making such a determination.

Returning again to *Woods v Multi-Sport Holdings Pty Ltd*, it will be recalled that there were two bases upon which Callinan J criticised the use by McHugh J of the previous reports of sports injuries. The first basis was that the parties had not been given the opportunity to comment on the reports; the second was that they were of no use in any event.⁵⁵ If the relevant facts could be described as ‘constitutional facts’ then the first criticism might well have some validity. As with

⁵⁰ (1978) 140 CLR 120.

⁵¹ Ibid 160-2.

⁵² Ibid 174-7.

⁵³ (1980) 145 CLR 266. Similar, but more extensive material was handed up by the parties and the interveners in *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182, which dealt with marketing schemes under the new test for s 92. For example, South Australia (intervening) handed up various official and academic reports dealing with the organisation and economic effect of the barley marketing schemes.

⁵⁴ J Williams, ‘Constitutional Intention: The Limits of Originalism’ in N Naffine, R Owens and J Williams (eds), *Intention in Law and Philosophy* (2001) 321, 334.

⁵⁵ (2002) 186 ALR 145, 183-6 [163]-[168] and 184-6 [165]-[169] respectively.

judicial notice of other facts in issue, there seems no reason why the usual rules of procedural fairness should not apply to the ascertainment of constitutional facts.⁵⁶ True it may be that the Court has a constitutional responsibility to determine constitutional facts for itself, but this does not mean that the parties should not be given the opportunity to comment. Ultimately, constitutional facts remain facts in issue. However, in reality the report was not a 'constitutional fact' and McHugh J did not rely upon it as such. He was using the report as a step in his reasoning that the common law should be developed in a particular direction.⁵⁷ This is the third classification identified above. It is in this context that the matter needed to be considered.

The Use of History in Legal Reasoning

The most frequent judicial use of what might be described as 'general history' is where it is used as a step in a process of reasoning to explain or identify what the common law is or what a statute or constitution means.

Obviously legal history has a role in explaining the development of the common law. As Justice Gummow has commented, 'When a court ascertains the nature of the law to be applied in a case through an examination of a stream of judicial precedent, in a sense it plays the role of historian and goes to the "primary sources"'.⁵⁸ The case of *Trident General Insurance Co Ltd v McNiece Bros* provides a good example.⁵⁹ The question in that case was whether a third party could sue on an indemnity contained in an insurance contract. The High Court held that the third party could do so, this being a change in the common law as previously understood. In doing so the Justices analysed the development of the previous common law rules, identified the criticisms of those rules and then (by majority) determined, for policy reasons, to depart from them.⁶⁰ Although there might well be debate about whether the departure from previous authority was appropriate in that case, there was nothing strange or remarkable about

⁵⁶ Indeed, it may be a constitutional requirement, see E Campbell, 'Rules of Evidence and the Constitution' (2000) 26 *Monash Law Review* 312, 320.

⁵⁷ (2002) 186 ALR 145, 160 [71]; see also Kirby J, 170 [111].

⁵⁸ In W Gummow, *Change and Continuity - Statute, Equity and Federalism* (1999) 82.

⁵⁹ (1988) 165 CLR 107.

⁶⁰ *Ibid* 113-24, 163-72, contrast 128-9, 141-4, 155-61.

the use made by both the majority and the minority Justices of legal history to support their respective positions.⁶¹

In the second of the Storrs Lectures, delivered at Yale University in 1921, Benjamin Cardozo described the manner in which history is used in the development of the common law and, more specifically, in judicial reasoning. As he pointed out, some aspects of the law can only be explained by history. He gave the law of real property as one example and the law of consideration as another. Many of the rules and principles touching those topics can sensibly be explained only by the history that produced them, rather than from any preference they might have in terms of logic or policy. Of course, this does not mean that the law is necessarily tied to the past.⁶² As Cardozo put it ‘... history, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future’.⁶³

In Australia⁶⁴ there has also been a general acceptance of the use of history in the interpretation of statutes, although in the past there have been limitations on the use that could be made of certain materials, particularly the records of Parliamentary debates. It is clear that a court may refer to general historical materials in order to ascertain the object of legislation and, in particular, the mischief to which it is directed.⁶⁵ This now includes Parliamentary materials.⁶⁶ The case of *James Hardie & Co Pty Ltd v Seltsam Pty Ltd*⁶⁷ provides a good example. This case involved the interpretation of s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW). This paragraph

⁶¹ See J Sheahan, ‘Use and Misuse of Legal History: Case Studies from the Law of Contract, Tort and Restitution’ (1998) 16 *Australian Bar Review* 280.

⁶² As Holmes J put it, ‘We must beware of the pitfall of antiquarianism, and must remember that for our purpose our only interest in the past is for the light that it throws upon the present’, cited in *ibid*.

⁶³ B Cardozo, *The Nature of the Judicial Process* (1921) 53; see also V Windeyer, ‘History in Law and Law in History’ (1973) 11 *Alberta Law Review* 123.

⁶⁴ In the US there is an active debate, led by Associate Justice Scalia of the US Supreme Court, as to whether it is permissible to go outside of the text at all, whether by using historical or other material: see A Scalia *A Matter of Interpretation* (1997). This may be seen as a reaction to what many might consider as an excessive use of historical materials in US Courts: see Stephen J in *Dugan v Mirror Newspapers* (1978) 142 CLR 583, 600-1.

⁶⁵ *Holme v Guy* (1877) 5 Ch D 901, 905.

⁶⁶ See eg, *Acts Interpretation Act 1901* (Cth) s 15AB. It is noted that this merely reflects the current common law rule in Australia, which may be wider than the relevant statutory provisions: see *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 99; *Owen v South Australia* (1996) 66 SASR 251, 255-6.

⁶⁷ (1998) 196 CLR 53.

provides for contribution between tortfeasors who are liable in respect of the same damage. The question was whether a consent judgment given against one of the tortfeasors meant that another was not liable for the same damage for the purpose of the section. The High Court held that the consent judgment did have this effect. In doing so the Court looked at the pre-existing common law, at the relevant UK Law Reform Commission Report on which the initial UK legislation was based, at subsequent judicial decisions related to the legislation and at subsequent amendments to the legislation in the UK and elsewhere.⁶⁸ Of course, there is nothing peculiar or strange about the use of history and other factual material in this way.

History is also used to identify the relevant mischief in constitutional interpretation. The case of *Cole v Whitfield*⁶⁹ provides a good illustration. In this case the High Court was asked to reconsider its interpretation of s 92 of the *Commonwealth Constitution*, which provides that interstate trade, commerce and intercourse 'should be absolutely free'. In the course of about 140 cases the High Court had reached the position that the section afforded an individual right to a person engaged in interstate trade, commerce or intercourse to ignore any law that would interfere with the constitutional freedom unless the law could be seen as a reasonable regulation of that trade, commerce or intercourse. The Court ultimately rejected that line of authority and instead interpreted the words 'absolutely free' in light of the colonial meaning of the phrase 'free trade' at the time of federation. Consequently, they held that s 92 prevented the imposition of protectionist burdens. In doing so, the Court referred to: the political and economic history that identified and discussed the problem of protectionist burdens and preferences between the colonies pre-federation and the various unsuccessful attempts made to resolve that problem; to the history of the federation movement and the role of the protection issue on that movement; and to the Convention debates, which confirmed the central importance of internal free trade as an objective of the federation, reflected in the terms of what became s 92. As the Court remarked:

Reference to the history of s.92 may be made, not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of the language used, the subject to which that

⁶⁸ Ibid 57–68, 75–86, 94.

⁶⁹ (1988) 165 CLR 360.

language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.⁷⁰

Some have criticised the use of history by the Court in *Cole v Whitfield*, arguing that it involved a movement towards ‘originalism’ in constitutional interpretation.⁷¹ This criticism cannot fairly be laid at the door of *Cole v Whitfield*. ‘Originalism’, of one sort or another, has always been a generally accepted approach of the High Court to constitutional interpretation.⁷² The use of historical materials to identify the mischief to which provisions of the *Constitution* are directed has a long history.⁷³ Until relatively recently the Convention debates were not referred to for the same reasons that Parliamentary debates were not.⁷⁴ On the other hand, secondary sources,⁷⁵ such as Quick and Garran’s book *The Annotated Constitution of the Australian Commonwealth*,⁷⁶ had been referred to in preference to source material. However, just as with parliamentary debates, this rule was

⁷⁰ Ibid 385.

⁷¹ See eg, P Schoff, ‘The High Court and History: It Still Hasn’t Found(ed) What It’s Looking For’ (1994) 5 *Public Law Review* 253.

⁷² See eg, *R v Barger ex parte McKay* (1908) 6 CLR 41, 68; *AG (NSW) v Brewery Employees Union of NSW* (1908) 6 CLR 469, 512, 518, 529, 534-5, 610-1; *Ex parte Professional Engineers’ Association* (1959) 107 CLR 208, 267; *Lansell v Lansell* (1964) 110 CLR 353, 363, 366-7, 369, 370; *King v Jones* (1973) 128 CLR 221, 229, 246, 260-1, 268-9, 270-1; *AG (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, 578, 597-8, 614-5. See generally J Goldsworthy, ‘Originalism in Constitutional Interpretation’ (1997) 25 *Federal Law Review* 1; J Kirk, ‘Constitutional Interpretation and a Theory of Evolutionary Originalism’ (1999) 27 *Federal Law Review* 323; J Goldsworthy, ‘Interpreting the Constitution’ (2000) 24 *Melbourne University Law Review* 677. In recent times the majority of the Court has eschewed reliance upon any theory of interpretation, but have nevertheless made it clear that history has a role in constitutional interpretation: see *SGH v Commissioner of Taxation* [2002] HCA 18 [40]-[44]

⁷³ See eg, *R v Macfarlane ex parte O’Flanagan and O’Kelly* (1923) 32 CLR 518; *R v Pearson ex parte Sipka* (1983) 152 CLR 254, 261, 277-8.

⁷⁴ See J A Thompson, ‘Constitutional Interpretation: History and the High Court: A Bibliographical Survey’ (1982) 5 *University of New South Wales Law Journal* 309; P Brazil, ‘Legislative History, Statutes and Constitution’ (1961) 4 *University of Queensland Law Journal* 1; M Coper, ‘The Place of History in Constitutional Interpretation’ and H Burmester, ‘The Convention Debates and the Interpretation of the Constitution’ both in G Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1986); C McCamish, ‘The Use of Historical Materials in Interpreting the Commonwealth Constitution’ (1996) 70 *Australian Law Journal* 638, 641-2.

⁷⁵ See Thompson, *ibid* 317 fn 27.

⁷⁶ (1901).

breaking down prior to the decision in *Cole v Whitfield*.⁷⁷ Consequently, it is wrong to identify *Cole v Whitfield* as the source of 'originalism' in the High Court, notwithstanding that it is a very clear example of the use of history for the purpose of identifying the meaning of constitutional terms.

There are some, most notably Justice Kirby, who dispute the appropriateness of using history at all in constitutional interpretation. They argue that the use of history to identify the mischief to which a constitutional provision is directed is a 'fiction'.⁷⁸ Instead, they argue that the *Constitution* should always be interpreted in its current meaning.⁷⁹ This debate involves a fundamental disagreement as to the nature of a constitution and its interpretation.

There are also some who argue that the question whether the *Constitution* should be interpreted in its 'original meaning' is not meaningful, simply because history is always indeterminate.⁸⁰ On the other hand, it might be said that such an argument confuses ends with means.

These debates are beyond the compass of this paper. It is sufficient for present purposes to note that a majority of the Justices of the High Court are prepared, on occasion, to use history in order to interpret the *Constitution*.

But, just because history can be used, does not mean that the Court will always find an historical analysis to be useful. A good example where it did not is the *Boilermakers Case*.⁸¹ It is clear enough that the

⁷⁷ H Burmester, 'The Convention Debates and the Interpretation of the Constitution' in Craven (ed) *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1986) 25, 34-5.

⁷⁸ *Brownlee v R* (2001) 180 ALR 301, 334 [127]; see *SGH v Commissioner of Taxation* [2002] HCA 18 [77]-[78]; M Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship' (2000) 24 *Melbourne University Law Review* 1.

⁷⁹ See eg, *Brownlee v R* (2001) 180 ALR 301, 332-8 [122]-[138]; Gummow, above n 58, 87-8; see also B Selway, 'Horizontal and Vertical Assumptions within the Commonwealth Constitution' (2001) 12 *Public Law Review* 113, 129-31.

⁸⁰ See S Sherry, 'The Indeterminacy of Historical Evidence' (1996) 19(2) *Harvard Journal of Law and Public Policy* 437; and see also examples given in Gummow, *ibid* 83-6. Alternatively, it can be argued that because the historical evidence is indeterminate, any of the various approaches to constitutional interpretation has validity: Williams, above n 54, 336-41.

⁸¹ *R v Kirby ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. A similar point can be made about *NSW v Commonwealth* (1915) 20 CLR 54, where it was held that the Interstate Commission could not exercise judicial power, notwithstanding the apparently clear and unambiguous words of s 101 of the *Commonwealth Constitution*.

Commonwealth Constitution is predicated upon a separation of judicial power from legislative and executive power. What is not so clear is the effect of that separation upon particular legislative powers. In the *Boilermakers Case* the High Court was asked to determine whether the Industrial Court established under the industrial arbitration power (s 51(xxxv)), but not under or in conformity with Chapter III of the *Constitution*, could exercise both conciliation and judicial powers. The history of the development of the *Constitution* shows that the first draft of the *Constitution* by Inglis Clark was based largely on the US *Constitution*. Not surprisingly, that draft reflected the strict separation of powers that is contained within that *Constitution*. However, that separation and its consequences were effectively ignored at the 1897/1898 Conventions. The insertion of the arbitration power into the draft *Constitution* is a case in point. There is little doubt that it was intended that the Arbitration Tribunal that Kingston proposed to the Convention was to exercise both judicial and executive power. The colonial history from New Zealand, South Australia and elsewhere shows that the arbitration role was intended to be exercised by a court usually comprised of a sitting judge who would exercise conciliation, arbitration and enforcement powers. There is absolutely no mention in the debates as to whether such a Tribunal would be inconsistent with Chapter III. The minority in the *Boilermakers Case* drew attention to the clear intention of the delegates and to the drafting history in concluding that the arbitration power was intended to be an exception to the separation of powers principle.⁸² On the other hand, the majority relied entirely upon the text of the *Constitution* (together with learned commentators such as Inglis Clark) to conclude that the arbitration power was subject to the separation of powers principle.⁸³ They did not mention the history of colonial industrial arbitration.

The approach in the *Boilermakers Case* can be contrasted with the approach of the High Court in *Re Tracey, ex parte Ryan*,⁸⁴ where the Court held that the defence power was an exception to the separation of powers principle, largely in reliance upon the history of defence force tribunals.⁸⁵ Why history is relevant in one case but not another was not made clear. One possibility, of course, is that the *Boilermakers*

⁸² Ibid 300-3, 319-21, 344-6.

⁸³ Ibid 274-88.

⁸⁴ (1989) 166 CLR 518.

⁸⁵ Ibid 540-4, 554-64, 572-4, 581-3, 598-9.

Case was wrongly decided.⁸⁶ Another is that the historical material in the *Boilermakers Case* was not sufficiently compelling to require the Court to adopt an interpretation different from that indicated by the text and structure of the *Constitution*. In *Tracey* it was. This would accord with the usual principle of statutory interpretation that it is unnecessary to identify the mischief if the text is clear and unambiguous,⁸⁷ although there must be at least a suspicion that the Court in these cases was also using history in order to determine if the text was clear and unambiguous.⁸⁸

Referring again to *Cole v Whitfield*, the relevant history in this case was derived from primary sources, such as official Government reports⁸⁹ and Official Reports of the Convention Debates,⁹⁰ together with various secondary sources.⁹¹ Almost all of that material was handed up to the Court as part of the submission of one of the interveners. However, there is no doubt that the Court could have identified that material for itself and used it as it thought fit.

When a Justice of the High Court uses history to explain or to develop the common law, or to interpret a statute or the *Constitution*, the history forms an essential aspect of the Judge's reasoning. When used in this way, history is not a fact in issue.⁹² It is not 'evidence'.⁹³ Indeed, as it is not a fact in issue, there would be no basis upon which a witness could be called in relation to it.⁹⁴ It does not need to be

⁸⁶ See eg, *R v Joske ex parte Australian Building Construction Employees and Builders Labourers Federation* (1974) 130 CLR 87, 90, 102.

⁸⁷ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 142, 149-50; *ACTV v Commonwealth* (1992) 177 CLR 106, 137.

⁸⁸ See eg, the comment by M Gleeson in 'Book Review' (2001) 7 *The New Federalist* 78, 79-80.

⁸⁹ Eg, *Report of the Privy Council Committee for Trade and Plantations, British Parliamentary Papers* (1849): *Cole v Whitfield* (1988) 165 CLR 360, 385-6; *The First Report of the Victorian Board of Inquiry* (1894): *Cole v Whitfield* at 386.

⁹⁰ Eg, *Cole v Whitfield*, *ibid* 387-92.

⁹¹ Eg, Quick and Garran, above n 76: *Cole v Whitfield*, *ibid* 386; G Patterson, *The Tariff in the Australian Colonies, 1856-1900* (1968): *Cole v Whitfield* at 386 and J A La Nauze, 'A Little Bit of Lawyers' Language: The History of "Absolutely Free" 1890-1900' in A W Martin (ed), *Essays in Australian Federation* (1969): *Cole v Whitfield* at 387.

⁹² E Campbell, 'Lawyers' Uses of History' (1968) 6 *University of Queensland Law Journal* 1, 2-3.

⁹³ See Mullane, above n 13, 441. However, his Honour treated the proposition as applicable to all 'legislative facts' including 'constitutional facts'. It is not true of constitutional facts. They are, by definition, facts in issue - they are necessarily evidence.

⁹⁴ *Victims Compensation Fund Corp v Nguyen* (2001) 52 NSWLR 213, 220 [40].

proved. Nor are the parties entitled to a 'fair hearing' in relation to it, although they may be entitled to be informed if the Judge proposes to consider a topic that has not been raised with the parties. If any objection is to be made to the use of the material it is because the material does not actually support the conclusion reached by the Judge, eg, because the material is equivocal, or because it is irrelevant or because there is other, better material that leads to a different conclusion and so forth. But these objections are not objections to a finding of fact; they are objections to the methodology of reasoning used by the Judge.

As the relevant history is used as an aspect of the reasoning of the Judge, he or she can inform him or herself as to that history in any way that he or she thinks fit. There are innumerable examples where one or other members of the Court have done so. For example, in *Re Residential Tenancies Tribunal (NSW) ex parte Defence Housing Authority*, Gummow J argued that the legal conclusion that a Commonwealth authority was bound by a State Act was supported by the history of the use of statutory authorities in Australia.⁹⁵ In doing so his Honour referred to various cases and to secondary sources (particularly the writings of Professor Finn (as he then was)) to identify the relevant history. This was not an issue that had been addressed in submissions in that case, although it had been touched upon in submissions in a previous case.⁹⁶ The secondary sources referred to by Gummow J in the *Defence Housing Authority Case* were not cited in the previous case. Presumably, his Honour identified them from his own researches. In *Woods v Multi-Sport Holdings Pty Ltd*, Kirby J referred to the development of the law of negligence in response to greater community awareness. In this regard, he specifically commented on the duty of cigarette manufacturers to warn smokers of the danger, in light of the known risks to health, from tobacco.⁹⁷ This was not an issue in the case. Presumably, his Honour relied upon his own knowledge of those dangers in reaching that conclusion. And in *Australian Broadcasting Corporation v Lenah Game Meats*, Justice Callinan referred to various books, reports and papers dealing with the operation of the publishing industry and of the public service.⁹⁸ His

⁹⁵ (1997) 190 CLR 410, 470-2.

⁹⁶ *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253.

⁹⁷ *Woods v Multi-Sport Holdings Pty Ltd* (2002) 186 ALR 145, 175 [128].

⁹⁸ (2001) 185 ALR 1, 99-101. His Honour seems to suggest in *Woods v Multi Sport Holdings Pty Ltd*, *ibid* at [166] that the use of this material in *Lenah Meats* was wrong as a matter of law, or if not, was only justified on the basis that others had

Honour did not seek the views of the parties in relation to those materials or to what significance he attached to them.

The use of facts, and particularly history, as an aspect of legal reasoning is so pervasive that most of the time it is not even realised that it has occurred.

Pervasive as the practice may be, there are obvious dangers in the use of history in legal reasoning. These include the limited access that the Judge may have to original and even secondary records; the equivocal nature of much of the historical record; concerns about the accuracy of secondary sources; the different purposes for which history is used by historians and lawyers; concerns about what significance or consequences the history might have; the failure of the lawyer or Judge to understand properly the history (including its limitations) and so on.

Two of these dangers are worth exploring in more detail. The first is that, even where history can be identified, it may be unclear what its significance or consequence is. The case of *Ha v NSW*⁹⁹ provides an example. In this case, New South Wales and the States that intervened in its support asked the High Court to reconsider the meaning of 'excise' in s 90 of the *Commonwealth Constitution*. Section 90 prohibits the States from imposing an excise. High Court authority had defined the word 'excise' to mean an internal tax upon goods at any stage from manufacture to ultimate retail sale. The States argued that a consideration of history showed that the mischief to which s 90 was directed was the protection of the Commonwealth tariff and that consequently the word 'excise' should be read in a narrower sense as referring only to taxes imposed on goods as an item of home production. The Court split four to three, with the majority confirming the previously accepted meaning. Both the majority and the minority referred to history in order to identify the mischief to which s 90 was directed, but they differed as to the conclusion to be drawn from the historical material. The majority held that the purpose of s 90 was to secure to the Commonwealth a real control over the taxation of commodities¹⁰⁰ whilst the minority held that the purpose of s 90 was merely to prevent the States from imposing taxes that distinguished between place of manufacture.¹⁰¹ Although some aspects of the ma-

made similar errors in the past. It is suggested, however, that the use of the material in *Lenah Meats* was unobjectionable. The only issue was whether it was appropriate, as a matter of reasoning, to use it to support the conclusion reached by his Honour.

⁹⁹ (1997) 189 CLR 465.

¹⁰⁰ *Ibid* 495, citing *Parton v Milk Board (Vic)* (1949) 80 CLR 229, 260.

¹⁰¹ *Ibid* 512-3.

jority analysis can be criticised, the fact is that both approaches were reasonably open on the historical material.¹⁰² The dispute in *Ha* was not so much about what the historical facts were, but about what conclusion should be drawn from them.

But there are cases where the identification of the relevant historical facts is itself problematical. This involves the second danger to be considered in more depth, namely the use of history when it is dubious or questionable.¹⁰³

A good example of this danger can be seen in the use of history by the courts when considering to what extent, if at all, the common law should recognise Indigenous rights. The problem starts with the judgments of Chief Justice Marshall of the US Supreme Court in a number of cases arising from the forced removal by the State of Georgia of the Cherokee Indian tribe from their lands.¹⁰⁴ In these cases Marshall CJ described the history of settlement of the North American colonies and, in particular, the relationship between the settlers and the Indian inhabitants. Marshall CJ concluded that that history identified a consistent colonial practice that Indian nations were treated as retaining a limited degree of sovereignty over their lands, even if those lands formed part of the relevant colony. On the basis of this history Marshall CJ was able to characterise the colonies of North America as settled colonies, but ones in which the aboriginal nations enjoyed a limited degree of sovereignty.¹⁰⁵ Although there are

¹⁰² See generally R McMonnies, 'Ngo Ngo Ha and the High Court v New South Wales: Historical Purpose in History and Law' (1999) 27 *Federal Law Review* 471.

¹⁰³ See eg, discussion in Gummow, above n 58, 78-88; Campbell, 'Lawyers' Uses of History', above n 92; R McQueen, 'Why High Court Judges Make Poor Historians: the Corporation Act Case and Early Attempts to Establish a National System of Company Regulation in Australia' (1990) 19 *Federal Law Review* 245. Callinan J commented in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 186 ALR 145, 184 [165] that if he were to accept the approach of the post-modernists he would 'hold that there is no such thing as true history: history itself is no more than a series of subjective interpretations by different historians'.

¹⁰⁴ *Johnson v McIntosh*, 21 US 543 (1823); *The Cherokee Nations v The State of Georgia*, 30 US 1 (1831); *Worcester v Georgia*, 31 US 515 (1832).

¹⁰⁵ See also G I Bennett, 'Aboriginal Title in the Common Law: A Stony Path through Feudal Doctrine' (1978) 27 *Buffalo Law Review* 617, 620-2; H R Berman, 'The Concept of Aboriginal Rights in the Early Legal History of the United States' (1978) 27 *Buffalo Law Review* 637; M Davies, 'Aspects of Aboriginal Rights in International Law' in B W Morse (ed), *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (1991) 34-42; R Bartlett, 'Native Title: From Pragmatism to Equality Before the Law' (1995) 20 *Melbourne University Law Review* 282, 284-6; L G Robertson, 'John Marshall as Colonial Historian: Reconsidering the Origins of the Discovery Doctrine' (1997) 13 *Journal of Law and Politics* 759; A Lokan, 'From Recognition to Reconciliation: The Functions of

some who still maintain that this view of history is essentially correct,¹⁰⁶ it now seems to be well accepted that it is simplistic, and probably misleading. The fact is that there were significant differences between the practices adopted by the Spanish in their colonies that subsequently became part of the United States from the practices adopted by the Dutch in theirs, which were different again from the practices of the English in theirs. Even amongst the English colonies there were obvious differences between the terms of the Charters by which they were established and the practices adopted in them in their relationship with the Indian tribes.¹⁰⁷ Accepting Marshall's premise that history was relevant in determining the rights that the Indian tribes had then, these differences should have been reflected in different legal consequences in relation to the various former colonies and even in respect of different parts of those colonies. Instead, the theory adopted by Marshall CJ, involving a mixture of the common law applicable to settled colonies with that applicable to conquered colonies, had no obvious precedents, whether in Spanish, Dutch, English or Indian law.

It is likely that Marshall CJ was aware of the true historical position, or at least that this position was more complex than his analysis suggested. Instead, he used a relatively simple historical analysis in order to justify a largely pragmatic result – a description of Indian rights that was broadly consistent with history and that applied consistently throughout the United States. Chief Justice Marshall himself made the point clearly and forcefully:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land and cannot be questioned'.¹⁰⁸

Although not directly adopted in other common law countries,¹⁰⁹ the approach of Marshall CJ has been cited with apparent approval by

Aboriginal Rights Law' (1999) 23 *Melbourne University Law Review* 65, 67-8 (particularly fn 11).

¹⁰⁶ See eg, R Strickland (ed), *Felix Cohen's Handbook of Federal Indian Law* (1982) 50-8.

¹⁰⁷ See generally, Berman, above n 105; G Lester, *The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument* (D Jur Thesis, York University, 1981) 175-259, 342-636; Robertson, above n 105.

¹⁰⁸ *Johnson v McIntosh*, 21 US 543 (1823) 591 (see also at 571).

¹⁰⁹ B Selway, 'The Role of Policy in the Development of the Common Law' (2000) 28 *Federal Law Review* 403, 406-9, 418-29.

courts in various countries when considering the recognition of native title in their own jurisdictions.¹¹⁰ So it is that an apparently simplistic analysis of colonial history in the North American colonies has had ramifications throughout the common law world.

The High Court has also used history extensively in the development of the Australian common law as to the recognition of native title. In doing so it has relied, in part, upon secondary sources, including particularly the writings of Professor Reynolds. For example, in *Mabo v Queensland (No 2)*,¹¹¹ Justices Gaudron and Deane referred to Professor Reynold's book, *The Law of the Land*,¹¹² as authority for the proposition that, over time, the proprietary rights of the Aboriginal inhabitants to their lands were increasingly acknowledged by the colonial authorities. Reference was particularly made to the inclusion of a specific provision in the Letters Patent of 1836 establishing South Australia. In *Wik Peoples v Queensland*,¹¹³ the appellants handed up to the Court a paper by Reynolds and Dalziel.¹¹⁴ That paper suggested that the creation of pastoral leases in Australia was a specific response to the official concern for the protection of Aboriginal rights. The paper was expressly referred to and relied upon by Toohey J¹¹⁵ and at least by implication was used by Gaudron J¹¹⁶ and Kirby J.¹¹⁷ Relying in large part upon that history, the majority were able to conclude, as a matter of law, that pastoral leases were not 'true' leases, in that they did not confer a right to exclusive possession. Subsequently, this historical analysis of the purpose and objects of pastoral leases has been challenged by other historians.¹¹⁸

¹¹⁰ See eg, *Queen v Symonds* (1847) NZPCC 387, 390, 393-4; *St Catherine's Milling v The Queen* (1886) 13 SCR 577, 610; *Tamaki v Baker* [1901] AC 561, 580; *Calder v AG (British Columbia)* [1973] SCR 313, 320-1; *Guerin v The Queen* [1984] 2 SCR 335, 377-8; *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 32, 83, 193-4. As Dawson J remarked in *Mabo* at 135, '... the notion of native or Indian title owes much to the celebrated judgment of Marshall CJ in the case of *Johnson v McIntosh*'.

¹¹¹ (1992) 175 CLR 1, 107. See also Toohey J at 181 n 79.

¹¹² (1987).

¹¹³ (1996) 187 CLR 1.

¹¹⁴ After revision, the paper was published in due course: H Reynolds and J Dalziel, 'Aborigines and Pastoral Leases - Imperial and Colonial Policy, 1826-1855' (1996) *University of New South Wales Law Journal* 315.

¹¹⁵ (1996) 187 CLR 1, 108, 119-20.

¹¹⁶ *Ibid* 140-1.

¹¹⁷ *Ibid* 226-30.

¹¹⁸ See eg, J Fulcher, 'Sui Generis History - The Use of History in *Wik*' in G Hiley (ed), *The Wik Case: Issues and Implications* (1997) 51; Williams, above n 54, 334-6.

In *Anderson v Wilson*¹¹⁹ the respondent argued (amongst other things) that the Full Federal Court should decline to follow *Wik* on the basis that the decision was flawed by reason of the historical errors on which it was based. The Court properly concluded that the determination of the High Court on the legal meaning and effect of pastoral leases in Queensland was a question of law upon which the decision of the High Court was final, subject only to reconsideration by the High Court itself. Whether the history was right, wrong or indifferent, it had formed part of the legal reasoning of the High Court and, to that extent, had become binding.

Finally, it should be mentioned that in *Fejo v Northern Territory*,¹²⁰ it was argued that freehold grants made in the Northern Territory were invalid because the Governor (at the relevant time, the Governor of South Australia) had no power to make the relevant grant under the Letters Patent establishing the Province of South Australia. This argument was based upon the historical analysis by Professor Reynolds in his book, *The Law of the Land*, referred to above.¹²¹ For various reasons it was not necessary for the majority to deal with the argument relating to the effect of the Letters Patent on land grants,¹²² although Kirby J did so, at least to an extent.¹²³ However, that argument was analysed at considerable length in *Milirrpum v Nabalco Pty Ltd*¹²⁴ and in argument in *Fejo*. It seems plain that the argument has little substance when all of the material is considered in its legal context. It is probably unlikely that it will be pursued in the future.

For present purposes, it does not much matter whether Professor Reynold's description of history is correct or not. If nothing else, he has done a service in showing that previous attempts to describe the history of settlement of Australia were hopelessly inadequate, as was the then common law that reflected that erroneous history. For present purposes, it is sufficient to show that there is an obvious danger even in using a 'history' written by a well-accepted academic histo-

¹¹⁹ (2000) 171 ALR 705, 715-8 [47]-[57], 763-4 [246]-[251], 768-72 [280]-[300]. The case is subject to appeal to the High Court.

¹²⁰ (1998) 195 CLR 96.

¹²¹ Above n 112.

¹²² *Ibid* 129-30, 143-6.

¹²³ *Ibid* 143-6. In particular, Kirby J made the point that, at settlement in South Australia, land grants were made by the Land Commissioners under the *Colonisation Act 1834* (UK), not by the Crown under the prerogative.

¹²⁴ (1971) 17 FLR 141, 274-83.

rian. This is not surprising. As John Waugh has pointed out,¹²⁵ lawyers use history for a different purpose than historians. Historians are concerned primarily with why things happened in the past. They seek to discover all causes. Lawyers are concerned with ‘applicable history’ – history that has current effects and consequences; they search for primary or single causes.¹²⁶ Or, as Dr John Williams has put it, for the historian, ‘history is a contested terrain. Interpretation, as well as the method of interpretation, is an ongoing debate in which historical “truths” are constantly revisited and revised’.¹²⁷ For the Judge, however, history, once used in legal reasoning, becomes part of the law – history becomes as fixed and unchangeable (or not) as is the law itself. Where history is employed in the reasoning of the Court, ‘to which precedential force is then attached, history assists in the transmission throughout the body politic of constitutional doctrine’.¹²⁸

In *Anderson v Wilson*¹²⁹ the danger from the ‘fixation’ of a mistaken view of history through its incorporation into legal doctrine in the development of the common law was noted. The problem is all the greater if the relevant mistaken view of history is made in a constitutional context, if only because of the greater difficulty in then correcting a constitutional error.

A notorious case from the United States provides a striking example. In *Scott v Sandford*,¹³⁰ the US Supreme Court faced the question of whether the ‘Missouri compromise’ was valid.¹³¹ The effect of the compromise was that slaves or former slaves within ‘free States’ (including ‘free Territories’) were no longer subject to slavery. In *Dred Scott* the relevant slave had been moved from a ‘slave’ State to a free State and back again. The issue was whether Mr Scott was now a slave or was free. The law of the State where Mr Scott was when the action was commenced clearly provided that a former slave, once re-

¹²⁵ J Waugh, ‘Review Essay’ (2000) 24 *Melbourne University Law Review* 1028, 1037; see also J Waugh, ‘Commentary’ (Paper presented at the National Conference of the Australian Association of Constitutional Law, Perth, 22 September 2001); Williams, above n 54, 341.

¹²⁶ Campbell, ‘Lawyers’ Uses of History’, above n 92, 1: ‘when a lawyer looks to the history to inform and guide his judgement on a legal question, he is consulting the past for a particular purpose and employing a methodology not entirely historical ... the past he looks to is a controlling past’.

¹²⁷ Williams, above n 54, 333.

¹²⁸ Gummow, above n 58, 86; McQueen, above n 103, 245-6.

¹²⁹ (2000) 171 ALR 705.

¹³⁰ 60 US 393 (1857).

¹³¹ *Ibid* 546-7 for a description of the Missouri compromise.

turned to that State, continued to be a slave. In order to have any prospects of success, Mr Scott needed to take his action in federal jurisdiction and one of the issues before the Supreme Court was whether a slave or former slave could bring an action in federal jurisdiction. This in turn depended upon whether Mr Scott was a 'citizen' for the purposes of the diversity jurisdiction under the US *Constitution*.

The US Supreme Court held that a slave or former slave or a descendent of a slave was not a citizen and that consequently the proceedings had to be brought in State rather than federal jurisdiction. The Court based its decision, in part, upon its view of colonial history. For this purpose Chief Justice Taney concluded that, at the time that the colonies separated from Great Britain,

the legislation and histories of the times ... show that neither the class of persons who had been imported as slaves nor their descendants, whether they had become free or not, were then acknowledged as part of the people, nor intended to be included in the general words used in that memorable instrument.¹³²

Consequently, former slaves and their descendants could not enjoy the rights afforded by the US *Constitution* to US citizens. They were not citizens and were incapable of becoming citizens. Mr Scott could only bring his action in a State court. Justice Curtis dissented. In large part that dissent was also based upon an historical analysis of colonial practice. After considering the colonial history, he concluded:

At the time of ratification of the Articles of Confederation, all native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.¹³³

The historical analysis by Justice Curtis certainly seems to be more compelling than that of Chief Justice Taney. For present purposes it does not much matter which analysis is correct. What does matter is that this difference in opinion as to a matter of history resulted in a different view of the effect and operation of the US *Constitution*. In the result, the Missouri compromise failed. This was one of the causes of the American Civil War. One of the consequences of that

¹³² Ibid 407. See also 481-2.

¹³³ Ibid 572-3.

War was the passing of the XIII and XIV Amendments that effectively overruled the *Dred Scott* decision.¹³⁴ Obviously, historical errors in constitutional reasoning can have dramatic consequences.

This does not mean that there is any obvious or available solution. As Justice Gummow has noted, the unreliability of historical analysis in judicial reasoning is, at least to an extent, related to the adversarial process and the limitations of evidence.¹³⁵ However, this is not a complete explanation of the problem when history is used in judicial reasoning. In this context the Court can inform itself as it thinks fit. The problem is more properly seen as one involving the limitations of access to historical sources and materials and of limited expertise in understanding them. Of course, these are problems with which historians themselves must grapple, but they may be better trained to deal with them than lawyers.

One suggested solution might be to not use history at all,¹³⁶ or only to use it if it is confirmed by some acceptable historian.¹³⁷ Another might be that suggested by Justice Callinan in *Woods v Multi-Sport Holdings Pty Ltd*,¹³⁸ that history can only be referred to

if a very large measure of agreement could be obtained and, I would suggest, from the parties themselves, as to what are accepted writings and who are serious historians that the court would be entitled to resort to them.

But to suggest these as solutions is to misunderstand how history is used in legal reasoning.

There are at least two objections to these proposed solutions. First, history is only an example of a broader problem. History is not the only 'fact' used in legal reasoning. History and historical facts are merely an example of the use of facts in legal proceedings and in legal reasoning. If there is any difference, it is likely to be that lawyers are, by their training, more likely to use history rather than other facts, at

¹³⁴ See generally as to the consequences of the *Dred Scott* decision – the entry on 'Scott v Sandford' in K L Hall (ed), *The Oxford Companion to the Supreme Court of the United States* (1992) 759 ff.

¹³⁵ *Wik Peoples v Queensland* (1996) 187 CLR 1, 182-3; see also Gummow, above n 58, 84-6.

¹³⁶ Which seems to be the conclusion reached by Sherry, above n 88.

¹³⁷ As suggested in Campbell, 'Lawyers' Uses of History', above n 92, and in Mullane, above n 13, 455.

¹³⁸ (2002) 186 ALR 145, 184 [165]. However, his Honour was apparently discussing the issue in the context of the judicial review of facts in issue, which raises different issues: see above.

least as a step in their reasoning, and are more likely to assume that they are competent to do so. This assumption may well be erroneous. But there are other factual matters that are adopted by lawyers in argument and by Judges in their reasoning and about which there may well be argument. There are scientific, cultural, social and economic facts (to say nothing of the broad category of experience encompassed in the phrase 'common sense') that are used as a matter of course in legal argument and in legal reasoning and that are not strictly proved in evidence.

To return to the example of *Ha v NSW*, which has been discussed already, one of the matters on which the majority and the minority disagreed was the effect upon the retail price of goods of differing taxes.¹³⁹ The Justices presumably relied upon various official reports and upon the analyses of economists (all of which were passed up by the parties and interveners) and upon their own common sense and experience to reach their differing conclusions.

Even matters such as philosophy can be relied upon. For example, the development by the High Court of the implied limitation upon legislative power to restrict the freedom to communicate about political matters rested upon the political and philosophical assumption that free speech was an essential precondition to the maintenance of the system of representative democracy created by the *Commonwealth Constitution*.¹⁴⁰ It is unlikely that many would challenge that assumption, although the extent and nature of the freedom may be more arguable. However, in *Australian Broadcasting Corporation v Lenah Game Meats*,¹⁴¹ Justice Callinan doubted that a legally enforceable limitation upon legislative power was a necessary precondition to the maintenance of representative government, if only for the sensible reason that representative government had existed for a century without it.¹⁴²

Another objection to the suggestion that history not be used at all, or only subject to conditions, is that this almost certainly overstates the effect of historical analysis and reasoning on the conclusion ultimately reached by the High Court. In those cases, such as *Cole v Whitfield* and *Re Tracey*, where the Court has made use of historical materials to support a particular interpretation of the *Commonwealth Constitution*, the relevant materials were extensive and compelling. In cases where

¹³⁹ (1997) 189 CLR 465, 494-5, contrast 508-9.

¹⁴⁰ See *Lange v ABC* (1997) 189 CLR 520, 559-62.

¹⁴¹ (2001) 185 ALR 1.

¹⁴² *Ibid* 97-8 [338]-[339].

the Court has been criticised for its use of historical materials, such as in *Ha*, the *Incorporation Case*¹⁴³ or in *Wik*, it may be suspected that the relevant members of the Court were swayed by other considerations, such as those arising from the text or structure of the *Constitution*, or from broad perspectives of justice and equity, and that their reliance upon the historical record was to support a conclusion arrived at by other means.

The reality is that the use of history in judicial reasoning is merely an example of judicial reasoning itself. The problem, if there be one, is in the process of reasoning where the material used in that reasoning as part of its support and justification are incapable of doing so. The problem is not history, it is the reasoning itself. This is an error that all courts and all judges, including even those on the High Court, are subject to from time to time.

In this regard it may be recalled that the second ground upon which Justice Callinan disagreed with the use of the reports of sport injuries by Justice McHugh in *Woods v Multi-Sport Holdings Pty Ltd* was that the reports did not lead to the conclusion reached by the Judge.¹⁴⁴ Justice McHugh used the relevant facts as part of his reasoning – they were not facts in issue; they were not constitutional facts. The criticism of the use of the facts, on the basis that the facts did not support the conclusion reached, was a proper ground for criticism. Whether the criticism was, in the circumstances of that case, correct or not, is a different question best left for another day.

Conclusion

In *Woods v Multi-Sport Holdings Pty Ltd*, Justices McHugh and Callinan both analysed the use of facts in terms of the two-fold classification of legislative and adjudicative facts. That classification was not capable of permitting their Honours to identify the circumstances when it was appropriate, or inappropriate, to rely upon facts. For example, Justice McHugh refers to taking ‘judicial notice’ of facts when those facts are used as an aspect of legal reasoning,¹⁴⁵ whereas the better view would appear to be that these facts were not facts in issue at all. He was using the facts as an aspect of legal reasoning. The facts were not evidence. Similarly, the criticism made by Callinan J of the

¹⁴³ (1990) 169 CLR 482 – see eg, McQueen, above n 103.

¹⁴⁴ (2002) 186 ALR 145, 186 [168].

¹⁴⁵ *Ibid* 157 [64].

use of facts without seeking the views and comments of the parties,¹⁴⁶ may have considerable force when applied to facts requiring proof (including constitutional facts), but has considerably less force when applied to facts as used in judicial reasoning as they were in that case.

An analysis of the use of facts (including history) by the High Court of Australia shows that such use can be divided into at least three separate classifications. The first classification is of facts in issue. These facts must be proved, including by judicial notice. The second is of constitutional facts. These facts do not need to be proved by the parties, although they should be tested by the parties. The third involves the use of facts in legal reasoning. In this context, the facts do not need to be proved and there is not even any requirement that the facts be tested before the parties.

The analysis also tends to confirm what should have been obvious in any event, namely, that the use of history and historical fact by the High Court is merely an example of the use by the Court of facts generally. History is not a separate classification and involves no separate principles. It does, however, have the specific problem that lawyers may assume greater historical skills than they in fact possess. This may suggest that the courts, and those appearing before them, need to be particularly cautious when relying upon historical facts within any of the three categories identified.

¹⁴⁶ *Ibid* 183-4 [163]-[165].