THE USE AND MISUSE OF LEGAL HISTORY IN THE HIGH COURT OF AUSTRALIA

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Will no one tell me what she sings?
Perhaps the plaintive numbers flow,
For old, unhappy, far-off things,
And battles long ago:
Or is it some more humble lay,
Familiar matter of today?

The Solitary Reaper, William Wordsworth, (1807).[1]

Legal history is sometimes seen as little more than the study of "old, unhappy, far-off things" or worse, as a kind of legal antiquarianism that has little to contribute towards the development of contemporary private law. As a result, as Paul Finn has observed, legal history has "for the most part … been marginalised to the point of near extinction." To which he quite correctly adds that, "This is more than a matter for regret. It impoverished our legal imagination."[2] He is not alone in fearing for the future of the teaching of legal history in

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[1] *The Collected Poems of William Wordsworth* (London: Wordsworth Poetry Library, 2006), 344.

[2] *Historical Foundations of Australian Law: Institutions, Concepts and Personalities*, ed. J. T. Gleeson, J. A. Watson, R. C. A. Higgins (Alexandria, NSW: Federation Press, 2013), v.

Australia.[3] In 2005, Wilfred Prest found that, at the ten Australian Law Schools established before 1982,[4] legal history was taught in only six of them.[5] There has been a small further decline in those universities teaching legal history since that time.[6]

The relative marginalisation of legal history in universities is not confined to Australia. Although the subject remains in good health in the United States,[7] the position of legal history in the United Kingdom is equally precarious. It is probably no coincidence that the four English law schools of genuine world standing at the University of Oxford, University of Cambridge, the London School of Economics and University College London run courses in the subject.[8] The reasons behind the decline are complex.[9] When taught properly, legal history makes heavy demands. It requires a level of intellectual engagement, broad knowledge and sheer persistence that puts it beyond the reach of many students and academics alike. When there are easier, trendier or apparently more "relevant" alternatives, the path of least resistance is usually a more attractive one. Once a subject is no longer on the

[3] M. D. Kirby, "Is Legal History now Ancient History?," *Australian Law Journal* 83 (2009): 31.

[4] This includes all of the Group of Eight plus Macquarie and the University of Tasmania.

[5] Wilfrid Prest, "Legal History in Australian Law Schools: 1982 and 2005," *Adelaide Law Review* 27, no. 2 (2006): 272, http://www.austlii.edu.au/au/journals/AdelLawRw/2006/7.pdf.

[6] In 2021 distinct courses in legal history in some form are offered at the following pre-1982 law schools: University of Adelaide, University of Melbourne, UNSW, University of Sydney, and University of Tasmania. It should also be noted however that other courses in all ten universities have some legal historical content. Legal history is also taught at some of the newer law schools but they have not been systematically surveyed . For an impressionist view on this issue, see: Amanda Whiting and Ann O'Connell, *Legal History Matters: From Magna Carta to the Clinton Impeachment* (Melbourne: Melbourne University Publishing, 2020), 5.

[7] Joan Howland, "A History of Legal History Courses Offered in American Law Schools," *American Journal of Legal History* 53 (2013): 363, https://doi.org/10.1093/ajlh/53.4.363. There is an extraordinary variety of legal history taught in the United States. Some flavour of this can be gleaned from Robert M. Jarvis, *Teaching Legal History* (London: Wildy, Simmonds & Hill Publishing, 2014).

[8] The situation in Scotland is different with a strong focus on legal history albeit sometimes Civilian legal history at the University of Edinburgh, Glasgow and Aberdeen.

[9] For some suggestions, see Prest, "Legal History," 274–76.

curriculum, usually because the person teaching it has left or retired, it can be very difficult to revive it.

Despite the prospects for legal history in Australian universities looking slightly gloomy, an analysis of the High Court's judgments tells a very different story. Bruce Kercher observed that the period since the 1960s has seen a "rejection of the symbols of deference to English legal ideas."[10] As is well chronicled during the 1980s, the High Court began to shift Australian private law in new directions, which involved a departure from English law.[11] The precise manner in which the High Court has gone about this process, particularly through the use of historical sources, is less well documented.[12] At the heart of the process is a paradox. In reforming the common law arguments derived from English legal history, sometimes quite ancient history has played a pivotal role.

[10] Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Sydney: Allen and Unwin, 1995), 203.

[11] Discussions include: Anthony Mason, "Future Directions in Australian Law," *Monash University Law Review* 13, no. 3 (1987), https://heinonline.org/HOL/P?h=hein.journals/monash13&i=159; Anthony Mason, "The Impact of Equitable Doctrine on the Law of Contract," *Anglo-American Law Review* 27 (1998), https://heinonline.org/HOL/P?h=hein.journals/comlwr27&i=19; J. W. Carter and Andrew Stewart, "Commerce and Conscience: The High Court's Developing View of Contract," *University of Western Australia Law Review* 23, no. 1 (1993), http://www.austlii.edu.au/au/journals/UWALawRw/1993/4.pdf; Paul Finn, "Common Law Divergences," *Melbourne University Law Review* 37, no. 2 (2013): 509, http://www5.austlii.edu.au/au/journals/MelbULawRw/2013/20.html.

[12] For some discussion of this issue, see: Enid Campbell, "Lawyers' Uses of History," *University of Queensland Law Journal* 6 (1968–1969), http://www.austlii.edu.au/au/journals/UQLJ/1968/1.pdf; Rob McQueen, "Why High Court Judges Make Poor Historians: The Corporations Act Case and Early Attempts to Establish a National System of Company Regulation in Australia," *Federal Law Review* 19 (1990), http://classic.austlii.edu.au/au/journals/FedLawRw/1990/11.pdf.

Law books have played a role in the development of the common law for centuries, but the nineteenth century was a golden age of the legal treatise.[13] Early New South Wales lawyers brought law books with them. What sort of works they saw as useful can be gathered from a request for books made by Deputy Judge Advocate Thomas Hibbins in 1796.[14] In addition to the *Statutes at Large,* he also asked to be sent Blackstone's *Commentaries on the Laws of England*,[15] Hale's *Pleas of the Crown*,[16] Burn's *The Justice of the Peace*,[17] Reeves's *A History of English Law*,[18] Impey's *The New Instructor Clericalis*,[19] Buller's *Nisi Prius*,[20] Dogherty's *The Crown Circuit Assistant*,[21] Jacob's *Law Dictionary*,[22] Wood's

[13] A. W. B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature," *University of Chicago Law Review* 48, no. 3 (1981), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=4245&context=uclrev.

[14] *Historical Records of New South Wales,* ed. F. M. Bladen, vol. 3, (Sydney: Charles Potter, 1895), 13.

[15] William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765–69) ('*Commentaries*').

[16] Matthew Hale, *Pleas of the Crown* (London: E. & R. Nutt, 1736).

[17] Richard Burn, *The Justice of the Peace* (London: A. Millar, 1756).

[18] John Reeves, *A History of English Law* (London: T. Wright, 1783).

[19] John Impey, *The New Instructor Clericalis* (London: W. Strahan and W. Woodfall, 1784) which was usually referred to by the sub-title of *Practice in the Court of King's Bench*.

[20] Francis Buller, *Nisi Prius* (London: C. Bathhurst, 1775).

[21] C. J. Dogherty, *The Crown Circuit Assistant* (London: P. Uriel, 1787).

[22] Giles Jacob, *Law Dictionary* (London: E. & R. Nutt, 1729).

Conveyancing,[23] Hawkins's *Treatise of Pleas of the Crown*[24] and Foster's *Reports and Discourses on Crown Law*.[25]

Blackstone's *Commentaries* were popular in the early colony. The four volumes contain a broad overview of the common law.[26] If the strength of the work was its brevity, then it was also a weakness. Some subjects like the law of contract barely receive a mention. The merit of the *Commentaries* to early judges (such as Judge Advocate Richard Atkins), who were not trained lawyers,[27] was that they were accessible to those without expert knowledge.[28] The *Commentaries* were portable in a society that travelled on horseback. From the 1820s[29] to the present day, the Australian courts continue to cite the *Commentaries* regularly. Whilst no distinctively Australian edition was produced,[30] the English versions of the *Commentaries* were given a radical re-working by Henry Stephen in the 1840s and continued to be published for a further hundred years.[31]

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[23] Edward Wood, *Conveyancing* (London: J. Worrall, 1749).

[24] William Hawkins, *Treatise of Pleas of the Crown* (London: J. Walthoe, 1721).

[25] Michael Foster, *Reports and Discourses on Crown Law* (Oxford: Clarendon Press, 1762).

[26] Wilfred Prest, "Antipodean Blackstone: The Commentaries Down Under," *Flinders Journal of Law Reform* 6, no. 2 (2003): 155–56, https://search.informit.org/doi/abs/10.3316/agispt.20033796.

[27] J. M. Bennett, "Richard Atkins: An Amateur Judge Jeffreys," *Journal of the Royal Australian Historical Society* 52 (1966): 261.

[28] The lectures on which the *Commentaries* were based were delivered to an audience of young gentleman who paid a fee to attend. The common law was not taught as part of a degree at Oxford in the eighteenth century.

[29] Prest, "Antipodean Blackstone," 157–59.

[30] In America a home-grown edition first appeared in 1803. On the impact of Blackstone in America, see Dennis Nolan, "Sir William Blackstone and the New American Republic: A Study of Intellectual Impact," *New York University Law Review* 51 (1976), https://heinonline.org/HOL/P?h=hein.journals/nylr51&i=755. The original *Commentaries* also sold well in America: M. H. Hoeflich, *Legal Publishing in Antebellum America* (New York: Cambridge University Press, 2010), 131–34.

[31] The last edition was: Henry Stephen, *Commentaries on the Laws of England*, ed. L. Crispin Warmington (London: Butterworth, 1950).

The value placed on iconic English writers was evident from the earliest days of the High Court. In *Delohery v Permanent Trustee Company of New South Wales*,[32] a decision about prescription and the right to light, Griffith CJ referred to a passage in Justinian's *Digest*[33] alongside a quotation from *Coke on Littleton*, and cited Blackstone's *Commentaries* and *The Laws and Customs of England*, which was commonly called *Bracton*.[34] *Bracton* was the oldest of the English treatises mentioned[35] and concerned the Royal Court's practices of the early thirteenth century. However, it was more than just a work of procedure. The author developed substantive legal ideas and displayed a reasonable knowledge of Roman law. *Bracton* was the most sophisticated and comprehensive book about the common law before Blackstone.[36] The final work referred to, Sir Thomas Littleton's *New Tenures*, known as *Littleton*, was written around 1460 and first published, in law French,[37] just after Sir Thomas's death in 1481.[38] Coke described *Littleton* as "the most perfect and absolute work that ever was written in any human science"[39] and he produced his own version with a

[32] (1904) 1 CLR 283.

[33] *The Digest of Justinian*, ed. Alan Watson (Pennsylvania, United States: University of Pennsylvania Press, 1998), D 41.3.1.

[34] The standard modern version is: *On the Laws and Customs of England*, 4 vols., trans. Samuel E. Thorne (Cambridge, Mass.: Belknap Press, 1968).

[35] A number of theories have been put forward as to the date and authorship of Bracton: H. G. Richardson, *Bracton: The Problem of his Text* (London: Selden Society, 1965); J. L. Barton, "The Mystery of Bracton," *Journal of Legal History* 14, no. 3 (1993), https://doi.org/10.1080/01440369308531085; Paul Brand, "The Age of Bracton" in *The History of English Law. Centenary Essays on 'Pollock and Maitland'*, ed. John Hudson (Oxford: Oxford University Press, 1996), 65–89; J. L. Barton, "The Authorship of Bracton: Again," *Journal of Legal History* 30, no. 2 (2009), https://doi.org/10.1080/01440360903069742; Paul Brand, "The Date and Authorship of Bracton: a Response," *Journal of Legal History* 31, no. 3 (2010), https://doi.org/10.1080/01440365.2010.525913.

[36] Which is not to say that some common law writers did not attempt to present the law in a systematic and coherent fashion, on which see: David Seipp, "Roman Legal Categories and the Early Common Law" in *Legal Record and Historical Reality*, ed. Thomas Watkin (London: Hambledon Press, 1989), 9–36.

[37] T. Littleton, *Tenores Noveli* (London: Lettou & Machlinia, 1481).

[38] Littleton also began writing a larger work on the laws of England, which was incomplete on his death, J. H. Baker, "The Newe Littleton," *Cambridge Law Journal* 30, no. 1 (1972): 145.

[39] Edward Coke, *First Part of the Institutes of the Laws of England or a Commentary on Littleton* (London: Society of Stationers, 1628), v.

commentary. *Coke on Littleton*[40] is the version usually used today. Before the nineteenth century, it was commonly read by those learning the law of real property. It continues to be cited in recent times.[41] The fact that a cultured and intelligent man like Sir Samuel Griffith was perfectly at ease with such a diverse range of older English writers is unsurprising.[42] It might also be said to be characteristic of a time when the English common law still dominated Australian private law. Yet Griffith was far from unique in his own time or later. As recently as 2020, Nettle J cited *Bracton* in two High Court judgments.[43]

It is easy enough to look at citations of the iconic English legal texts in the judgments of the High Court beginning with *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill*,[44] which was a work on the procedures of the Royal Courts from the late 1180s. The sample size includes all the decisions of the High Court as reported in the Commonwealth Law Reports between 1903 and 2019. The methodology for counting the citations is that adopted by Russell Smyth in his studies of citation practice.[45] If the source received repeat citations, it is counted only once unless on a different point. Where

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[40] Ibid.

[41] For example, in *Andrews v Australian and New Zealand Banking Group* (2012) 247 CLR 205 discussed below.

[42] For a life of Griffith, see Roger Joyce, *Samuel Walker Griffith* (St Lucia, Queensland: University of Queensland Press, 1984).

[43] *Pickett v Western Australia* (2020) 379 ALR 471, 498 [98]; *Love v Commonwealth of Australia* (2020) 375 ALR 597, 653–5 [246]–[247].

[44] The best modern translation is: *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill*, trans. G. D. C. Hall (Oxford: Oxford University Press, 1965).

[45] Russell Smyth, "Other than Accepted Sources of Law: A Quantitative Study of Secondary Source Citations in the High Court," *University of New South Wales Law Journal* 22 (1999), http://www.unswlawjournal.unsw.edu.au/wp-content/uploads/2017/09/22-1-20.pdf; Russell Smyth, "What do Intermediate Appellate Courts Cite — A Quantitative Study of the Citation Practices of Australian State Supreme Courts," *Adelaide Law Review* 21 (1999), http://classic.austlii.edu.au/au/journals/AdelLawRw/1999/3.pdf; Russell Smyth, "The Authority of Secondary Authority — A Quantitative Study of Secondary Source Citations in the Federal Court," *Griffith Law Review* 9 (2000), https://heinonline.org/HOL/P?h=hein.journals/griffith9&i=29.

a citation appears in a joint judgment, the number of citations is calculated by multiplying by the number of judges. Where a judge simply concurs, a citation is not attributed twice. For convenience, the citations are divided up into roughly twenty-year blocks in order to identify trends across time.

The main conclusion to be gathered from this exercise is that the practice of citing English legal classics and secondary historical literature continues to be healthy. Despite other evidence that the High Court is keen to jettison the past as represented by English law, the number of historical citations has in fact greatly increased in recent decades. One reason might be changes in the nature of judgments. Ex tempore judgments are rarely delivered in the High Court. Judgments are also much longer than they used to be and can include more material, including legal literature.[46] The process of writing judgments has changed too.[47] Since the 1970s, the role of judicial associates has altered from providing secretarial support to carrying out research work.[48] Even if associates do not enjoy the level of influence of their counterparts in the Supreme Court of the United States, the reliance on associates may encourage greater use of earlier authority.[49]

As shown in Table 1, the most cited of the iconic English treatises by the High Court is Blackstone's *Commentaries*. It makes up 66.8% of the total citations. Hale's *The History of the Pleas of the Crown* is a distant second, making up for 16.1% of the total citations. The

[46] Matthew Groves and Russell Smyth, "A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903–2001," *Federal Law Review* 32, no. 2 (2004): 258–66, https://doi.org/10.22145/flr.32.2.4.

[47] For some discussion of the process, see M. D. Kirby, "On the Writing of Judgments," *Australian Law Journal* 64 (1990). For some insight into the process in earlier times, see Phillip Ayers, *Owen Dixon* (Melbourne, Australia: The Miegunyah Press, 2003), 262–63.

[48] Andrew Leigh, "Associates" in *The Oxford Companion to the High Court of Australia*, eds. Tony Blackshield, Michael Coper and George Williams (Oxford: Oxford University Press, 2001), 34–35.

[49] On this phenomena in the United States, see Artemus Ward and David Weiden, *Sorcerers' Apprentices* (New York: New York University Press, 2006), 231.

oldest treatise in the sample, *Glanvill*, is cited a mere five times over the same period. Blackstone's *Commentaries* will be more familiar to modern Australian lawyers than the other works. It has an established pedigree in Australia. Other studies of the High Court have produced very similar findings,[50] although it may be that Blackstone appears less frequently in other courts.[51] The fact that Blackstone's *Commentaries* remain so popular is something of a puzzle as they were, after all, first published in the 1750s. It is difficult to see how it can have all that much relevance in the modern world. Yet citations from Blackstone in the High Court are far from receding. Instead, they have increased, along with historical citations as a whole, in the period since 1981. Curiously, this is also the period in which Australian private law has undergone the most rapid period of change. It can hardly be likely that Blackstone was part of the legal education of the current High Court Bench or those appearing before them. Perhaps it is simply a case of citation begets citation and Blackstone remains at the forefront of the legal consciousness. Another explanation is that the work captures the law at a particular time or put another way Blackstone can be used as a convenient shorthand for the history of English law.

Some of the secondary works on legal history are also commonly referred to by the High Court and are listed in Table 2. Sir William Holdsworth is the most cited author by a very large margin. The first volume of *A History of English Law* was published in 1903.[52] Sixteen further volumes followed, the last of which appeared posthumously in 1966.[53] This work is cited nearly 400 times by the High Court. However, compared to Sir Frederic

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[50] Smyth, "Other than Accepted Sources," 48; Prest, "Antipodean Blackstone," 161–62.

[51] Smyth, "Other than Accepted Sources,"; Smyth, "The Authority of Secondary Authority," 43.

[52] William Holdsworth, *A History of English Law* (London: Methuen, 1903).

[53] J. H. Baker, "Holdsworth, Sir William Searle" in *Biographical Dictionary of the Common Law*, ed. A. W. B. Simpson (London: Butterworths, 1984), 247–49.

Maitland, it is fair to say that Holdsworth is not held in such high regard by contemporary legal historians.[54] In part, this may be because Maitland built his reputation on his use of manuscript sources. Holdsworth only wrote using secondary sources or printed reports. But judges are not usually legal historians of the specialist kind, and Holdsworth's *History of English Law* is nothing if not comprehensive. It was a singular achievement for one man. The citation of the two books by Australian authors is puny by comparison. For many decades, Victor Windeyer's *Lectures on Legal History*[55] was the primary introduction to the subject in Australia. Windeyer almost exclusively focused on English legal history. Between 1958 and 1972, the author sat in the High Court of Australia[56] and would unsurprisingly make prominent use of historical sources. Alex Castles' *An Australian Legal History*[57] is a very different book. It was the first major attempt to treat Australian legal history as a serious and sustained subject for study.[58] Between the authors, Windeyer and Castles are cited 33 times in total. Admittedly Castles' book is only just over thirty years old. The first edition of Windeyer's text appeared as long ago as 1938, and he may have gained some kudos from the fact that he was a senior judge even if the substance of the work adds little to Holdsworth's more extensive *History of English Law*.

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[54] Maitland is widely seen as the finest legal historian who ever lived. For biographies see, C. H. S. Fifoot, *Frederic William Maitland: A Life* (Cambridge, Mass.: Harvard University Press, 1971); G. R. Elton, *F W Maitland* (London: Weidenfeld and Nicholson, 1986); S. F. C. Milsom, "Maitland," *Cambridge Law Journal* 60, no. 2 (2001), doi:10.1017/S0008197301000113.

[55] W. J. V. Windeyer, *Lectures on Legal History* (Sydney: Law Book Company, 1938). This is the first edition. A second edition appeared in 1957.

[56] Bruce Debelle, "Windeyer, Sir William John Victor (Vic) (1900–1987)," Australian Dictionary of Biography, accessed 16 February, 2021, http://adb.anu.edu.au/biography/windeyer-sir-william-john-victor-vic-15867.

[57] Alex Castles, *An Australian Legal History* (Sydney: Law Book Co., 1982).

[58] For this shift, see Rosemary Hunter, "Australian Legal Histories in Context," *Law and History Review* 21, no. 3 (2003), https://www.jstor.org/stable/3595121.

Raw citation scores only tell part of the story. The works referred to are only a sample. The secondary literature included are the main works of those authors. Some of these writers, especially Maitland, wrote a great deal more besides. There is considerable variation between different judges. In Table 3, Windeyer J had the greatest number of citations of the English legal classics. For a judge of that era, he made heavy use of sources beyond the law reports.[59] During his thirteen years on the High Court, he cited the English legal classics thirty-eight times. Kirby and Gummow JJ come a close second with thirty-two citations each. Isaacs CJ follows with thirty citations and Dixon CJ with twenty-nine citations. When averaged out by years on the Bench, Windeyer J also has the second highest score of 2.92 citations per year. Of this group, Dixon CJ has the lowest average of 0.82 citations per year in the very long period in which he sat on the High Court. Some more recent High Court judges have notched up a considerable number of citations. French CJ cited the English legal classics in the sample 20 times, or 3.33 citations per year, before he retired in 2017 — just ahead of Windeyer J.

Over the last thirty years the trend is towards more individual and collective citation of the English legal classics. But this does not tell the whole story. Variations are not always generational. Of the earliest High Court judges, Griffith CJ was the most prolific user of the legal classics. In contrast, Barton and O'Connor JJ rarely cited any of these works. Equally, there are contrasting citation rates within the modern High Court. Whilst Kirby J cited the legal classics thirty-two times in twelve years, Gleeson and Heydon JJ, in just two years fewer, cited these sources eleven and thirteen times, respectively. No citation count alone, even broken down in quite a fine graded fashion, can tell us anything about the importance of work referred to in the actual decision itself. Undoubtedly, historical sources appear in some

[59] Smyth, "Other than Accepted Sources," 36.

High Court decisions that changed the law in fundamental ways. Bracton and Blackstone were both cited in *Mabo v Queensland [No 2]*,[60] with Holdsworth, Windeyer and Castles also featuring in the decision. The views expressed by Sir Matthew Hale in *The History of the Pleas of the Crown*, on whether or not a husband could rape his wife, were central to the High Court's deliberations in *PGA v The Queen*.[61] Like *Coke on Littleton*, Hale's *Pleas of the Crown* was, until the nineteenth century, a standard work which has enjoyed a long afterlife.[62]

A CASE STUDY

The main conclusions from the raw citation figures are that the English legal classics and, to a lesser extent, secondary legal historical literature (Table 4) remain a feature of the High Court of Australia's judgments into modern time. For more insight into this influence, it is necessary to undertake case studies from some leading High Court cases. A good illustration is provided by two fairly recent decisions on the doctrine of penalties, *Andrews v Australia and New Zealand Banking Group Ltd*[63] and *Paciocco v Australian and New Zealand Banking Group Ltd*.[64] Space limits discussion to two decisions, but other subjects

[60] (1992) 175 CLR 1.

[61] (2012) 245 CLR 355.

[62] The edition usually cited by the High Court is, George Wilson, *The History of the Pleas of the Crown*, ed. Sir Matthew Hale (London: T. Payne, 1800). For a discussion of the treatise in context see, Lindsay Farmer, "Of Treatises and Textbooks: the Literature of the Criminal Law in Nineteenth-Century Britain," in *Law Books in Action Essays on the Anglo-American Legal Treatise*, eds. Angela Fernandez and Markus Dubber (London: Hart, 2012), 145, 147–48.

[63] (2012) 247 CLR 205 ('*Andrews*').

[64] (2016) 258 CLR 525 ('*Paciocco*').

could have been chosen just as easily. Legal history has, for example, played a key role in the debates around the basis and scope of a doctrine of unjust enrichment in Australia.[65]

In recent years, the scope of the penalty doctrine has been the subject of lengthy debate in both the English Supreme Court[66] and the High Court of Australia. Two recent academic monographs have also considered the subject in detail.[67] The appellants in *Andrews* were bank customers who had found themselves subject to bank charges for various transactions, including honour and dishonour fees when there were insufficient funds to meet cheques drawn on an account, late payment fees and fees for exceeding an agreed overdraft. The main point of contention was whether the penalty doctrine ought only to apply in cases of breach of contract or whether it had wider application to cases like the present, in which a fee was payable without a breach. The Federal Court had concluded that the penalty doctrine only applied in instances of breach of contract.[68] This view was consistent with existing practice and reflected in a number of earlier High Court decisions.[69] A key feature of how the High Court came to a different conclusion was by using legal history, to the extent that it was even said that "an understanding of the penalty doctrine requires more than a brief backward glance."[70]

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[65] For example, *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516. See Warren Swain, "Unjust Enrichment and the Role of Legal History in England and Australia," *New South Wales Law Journal* 36, no. 3 (2013), https://ssrn.com/abstract=2378154.

[66] *Cavendish Square Holding BV v Talal El Makdessi* [2016] AC 1172 ('*Cavendish'*).

[67] Roger Halson, *Liquidated Damages and Penalty Clauses* (Oxford: Oxford University Press, 2018); Nicholas A. Tiverios, *Contractual Penalties in Australia and the United Kingdom History, Theory and Practice* (Sydney: The Federation Press, 2019).

[68] *Andrews v Australia and New Zealand Banking Group Ltd* (2011) 211 FCR 53.

[69] *Ringrow v BP Australia Pty Ltd* (2005) 224 CLR 656, 662–63. For a discussion of the earlier High Court authority, see J. W. Carter et al., "Contractual Penalties: Resurrecting the Equitable Jurisdiction," *Journal of Contract Law* 30 (2013): 102–103, http://hdl.handle.net/2440/81558.

[70] *Andrews* (2012) 247 CLR 205, 218 [14].

The High Court had already considered the history of penalties nearly twenty years ago in *AMEV-UDC Finance Ltd v Austin*,[71] where some of the same precedents were discussed. On that occasion, Mason and Wilson JJ had warned that "The doctrine of penalties has pursued such a tortuous path in the course of its long development that it is a risky enterprise to construct an argument on the basis of the old decisions."[72] A majority of the High Court in *Austin* came to two conclusions. First, that the penalty doctrine only applied in cases of breach of contract.[73] Secondly, as Mason and Wilson JJ made clear, although there was once a separate equitable doctrine that applied to penalties, it had been subsumed into the common law[74] or, at best, marginalised, for example, in situations in which specific performance is ordered as a remedy.[75]

The point at issue in *Paciocco* was different. There was undoubtedly a breach of contract,[76] and the High Court was merely asked to determine whether late payment fees imposed by a bank fell within the definition of a penalty. Nevertheless, there were some important obiter comments on *Andrews*. Until recently, *Dunlop Pneumatic Tyre Co v New Garage & Motor Co Ltd*,[77] especially the speech of Lord Dunedin, was regarded as the established English position on whether or not a clause was a penalty.[78] This was something

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[71] (1986) 162 CLR 170 ('*Austin*').

[72] *Austin* (1986) CLR 170, 186.

[73] *Austin* 176 (Gibbs CJ), 184 (Mason and Wilson JJ), 211 (Dawson J), contrary on this point Deane J 199.

[74] *Austin* 191 (Mason and Wilson JJ).

[75] *Austin* 195 (Deane J).

[76] *Paciocco* (2016) 258 CLR 525, 605 [253] (Keane J).

[77] [1915] AC 79 ('*Dunlop*'). Discussed for other purposes in *Andrews* (2012) 247 CLR 205, 234–36 [69]–[77].

[78] In *Cavendish* [2016] AC 1172, 1199 [22], Lords Neuberger and Sumption described Lord Dunedin's speech has having "achieved the status of a quasi-statutory code".

to be determined, he said, as a matter of construction at the time that the contract was made rather than at the time of the breach.[79] Rather than simply applying *Dunlop*, the High Court in *Paciocco* chose instead to adopt a test which more closely resembled the one favoured by the United Kingdom Supreme Court in *Cavendish*: whether or not a late payment fee or other clause could be enforced depended on whether the party seeking to enforce it had a "legitimate interest" in enforcing the obligation. This process remains an exercise in construction, but the inquiry is a broader one than suggested by Lord Dunedin's analysis. Once again, this conclusion was partly justified by reference to the penalty doctrine's historical foundation in equity.[80]

In *Cavendish*, Lords Neuberger and Sumption observed that "The penalty rule in England is an ancient, haphazardly constructed edifice which has not weathered well."[81] The history is difficult to unravel. Agreements with a penalty for non-performance attached have been used in a wide variety of situations since the Middle Ages.[82] One significant application was a money bond with a condition attached.[83] The conditional bond was a flexible device and a useful means of securing performance. Take a simple example: A agrees to loan B £100. B will execute a bond in A's favour for a larger sum, say £200, to be repaid on a certain day. The bond will be subject to a condition of defeasance so that if £100 is repaid before that day the bond is void. The basis of the obligation was the bond itself. Failure to

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[79] [1915] AC 79, 86–87. This was in line with earlier authority: *Public Works Commissioner v Hills* [1906] AC 368, 376.

[80] *Paciocco* (2016) 258 CLR 525, 545 [22] (Kiefel J), 577 [155] (Gageler J). For a more sceptical view of the continued relevance of the equitable history see: *Paciocco* (2016) 258 CLR 525, 605 [252] (Keane J).

[81] *Cavendish* [2016] AC 1172, 1192 [3] (Lords Neuberger and Sumption). In *Paciocco* (2016) 258 CLR 525, 603 [247], Keane J said that, "The penalty rule is of ancient but somewhat uncertain origin."

[82] Joseph Biancalana, "Contractual Penalties in the King's Court 1260-1360," *Cambridge Law Journal* 64, no. 1 (2005): 213–15, https://www.jstor.org/stable/25166350.

[83] A. W. B. Simpson, "The Penal Bond with Conditional Defeasance," *Law Quarterly Review* 82 (1966).

perform the condition cannot be equated with breach of contract in the modern sense. Performance merely provides the condition of defeasance. Chancery began to grant relief from the sixteenth century in exceptional cases.[84] By the seventeenth century, relief was granted in equity as a matter of course when the sum in the bond did not reflect the size of the debt.[85]

In *Andrews,* it was suggested that the common law developed a doctrine of relief against penalties in the 1670s, which was regulated by statute at the time.[86] However, recent scholarship shows that the common law courts applied a penalty doctrine before the legislation was passed using a process in which the defendant paid the principal interest and cost into court, which could then be taken as full satisfaction of the debt.[87] Nevertheless, the default rule was still that the bond was enforceable at common law irrespective of the size of the actual debt. The scope of exceptions to the strict common law position significantly increased under the statutory procedure because it covered performance bonds[88] and common money bonds[89] whereas the existing practice covered only money bonds. On payment of the principal, interest and costs into court, the debt was deemed to be discharged. The sum paid then acted as a security pending the action. At the trial, the question of loss was put to a jury

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[84] E. G. Henderson, "Relief from Bonds in the English Chancery: Mid-Sixteenth Century," *American Journal of Legal History* 18, no. 4 (1974), https://www.jstor.org/stable/845168.

[85] D. E. C. Yale, *Lord Nottingham's Chancery Cases* (London: Selden Society, 1961), 15–16.

[86] *Andrews* (2012) 247 CLR 205, 229–30 [53].

[87] For details of the process, see P. G. Turner, "*Lex Sequitur Equitatem* Fusion and the Penalty Doctrine" in *Equity and Law Fusion and Fission*, ed. John C. P. Goldberg, Henry E. Smith and P. G. Turner (Cambridge: Cambridge University Press, 2019), 258–60. There are even earlier statements disapproving of penalties in the common law but these do not add up to a regular stand against penalties for example, *Umfraville v Lonstede* YB 2 Edw II; (1308) 19 SS 58.

[88] *Administration of Justice Act 1696*, 8 & 9 Wm 3, c 11, s 8.

[89] *Perpetuation and Amendment of Acts 1704*, 4 Anne, c 16, ss 12–13. For a discussion of its application see *Murray v Earl of Stair* (1823) 2 B & C 82; 107 ER 313.

who came up with a sum that reflected the actual loss suffered instead of the amount stated in the bond and that might be different. Whilst formally an action of debt and therefore resting on an entitlement to a fixed sum, the claim had become in substance an action for damages reflecting the loss suffered.[90] Where the transaction was covered by the statutes it was compulsory to proceed under this process. In many cases it was no longer necessary to seek an injunction in equity and then ask for a *quantum damnificatus* (to assess the actual loss) before a jury.[91] This was obviously a more efficient process and also cheaper.

The High Court in *Andrews* insisted that the equitable jurisdiction survived in the face of a regular intervention from the common law courts. This analysis was necessary because equitable relief was not confined to cases of breach of contract.[92] Still, the relationship between the equitable and common law jurisdictions over penalties was not static. By the early nineteenth century, other means of raising credit were becoming popular.[93] The action of assumpsit had taken the place of debt. The courts began applying the same technique as they had used in actions of debt to claims in assumpsit for damages.[94] It was said that, otherwise, the statute could be evaded.[95] A clause that fixed a sum in advance payable on breach and which was not deemed a penalty was enforceable, whereas a penalty was not. In the latter, the damages awarded reflected the actual loss. Distinguishing between the two types of clauses was difficult. Lord Eldon would concede, having reviewed the authorities,

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[90] For a discussion of this important point see D. J. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 1999), 150–51.

[91] *Roles v Rosewell* (1794) 5 TR 538; 101 ER 302; *Hardy v Bern* (1794) 5 TR 636; 101 ER 355.

[92] Hence in *Paciocco* which was a breach case it was unnecessary to rely on equity on this point, see *Paciocco* (2016) 258 CLR 525, 605 [253] (Keane J).

[93] Notably through negotiable instruments and changes in banking practice, see James Rogers, *The Early History of the Law of Bills and Notes* (Cambridge: Cambridge University Press, 1995), 112–16.

[94] *Davies v Penton* (1827) 6 B & C 216; 108 ER 433.

[95] *Astley v Weldon* (1801) 2 B & P 345; 126 ER 1318, 1322 (‘*Astley*’).

that he was "much embarrassed in ascertaining the principle upon which those cases were founded."[96] His judgment shows the earlier cases in equity were still of some relevance in addressing this question.[97] The common law was soon developing a doctrine of penalties. The assertion in *Andrews* that, prior to the *Judicature Acts*, the common law penalty doctrine did "not somehow supplant the equity jurisdiction"[98] was technically correct. However, it does not reflect practice in which equity, by this stage, had a more peripheral role. One of the leading writers on classical contract law, Frederick Pollock, conceded that the equitable doctrine still existed but thought it was mainly confined to mortgage transactions.[99] Whatever the scope of the original equitable doctrine and its influence on the common law, it was smothered both by the statutes and developments within the common law itself. The new orthodoxy was reflected in the remarks of Lord Eldon, who said, "it appears to me extremely difficult to apply with propriety the word 'excessive' to the terms in which the parties choose to contract with each other."[100] In *Kemble v Farren*, Tindal CJ had stressed that, "For we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree."[101]

In *Dunlop*, having briefly discussed the history of the subject at common law and in equity, Lord Dunedin said that it was "probably more interesting than material."[102] A few years earlier, Lord Halsbury had stated that he saw no difference between common law and

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[96] *Astley*, 1321 (Lord Eldon).

[97] *Astley*, 1321–2.

[98] *Andrews* (2012) 247 CLR 205, 232 [61].

[99] Frederick Pollock, *Principles of Contract at Law and in Equity* (London: Stevens and Sons, 1876), 417.

[100] *Astley* , 1321.

[101] (1829) 6 Bing 141; 130 ER 1234, 1237.

[102] [1915] AC 79, 87.

equity in relation to penalties beyond an administrative one.[103] In *Cavendish*, Lords Neuberger and Sumption explained at some length why they rejected the position in *Andrews* that there was a broader equitable penalties doctrine that had survived fusion.[104] By doing so, they underplay the extent to which the common law relating to penalties grew out of equitable doctrine before the nineteenth century. Focusing on the law post-fusion[105] ignores the older history of the subject. They are hardly the first to be sceptical about the continued importance of equity in shaping the development of the penalties doctrine as applied in the common law courts of the nineteenth century. In the 1880s, Jessel MR, having examined the common law cases on penalties, said: "The ground stated by the Judges in two or three of the cases is this — they say it was an extension to the Common Law of the well-known doctrine of Equity. I do know a little of Equity, but I am sorry to say I cannot assent to the accuracy of the statement that it is an extension to the Common Law of the well-known doctrine."[106] The implication here seems to be that it was wrong to suggest that the common law doctrine of penalties was transplanted from equity.

In *Andrews*, there is no doubt that the High Court took a different view of the importance of the history of the penalties doctrine from the English Supreme Court. *Paccioccio* also accepted the continued existence of an equitable jurisdiction over penalties. Simultaneously, the High Court applied the same test of a penalty as used by the Supreme Court in *Cavendish*. In *Cavendish*, this approach was unproblematic because the Supreme Court was clear that there was a single jurisdiction over penalties which only applied to a

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[103] *Clydebank Engineering and Shipping Co Ltd v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6, 10, albeit that was a Scottish case and therefore different considerations applied, see Lord Dunedin in *Public Works Commissioner v Hills* [1906] AC 368, 375.

[104] *Cavendish* [2016] AC 1172, 1208–1209 [42].

[105] Ibid.

[106] *Wallis v Smith* [1882] 21 Ch D 243, 256.

breach of contract.[107] Any of the pre-fusion equitable doctrine was irrelevant. Only Gageler J in *Paciocco* explicitly addressed the relationship between law and equity. He seems to suggest that there are two penalty doctrines, one at law and one in equity.[108] In the absence of clear guidance, it is also possible that the High Court in *Andrews* and *Paciocco* were engaged in an even more ambitious project of arguing that the whole doctrine of penalties was, in essence, equitable in character. There are, after all, other examples of the High Court doing just that in other contexts.[109] It is difficult to come to any firm conclusions, though Gageler J did talk about the "equitable root of the penalty doctrine."[110]

All of this still leaves unclear what test would be applied to determine whether a clause is a penalty where there was no breach of contract and, therefore unarguably, the equitable doctrine applies. In a discussion of *Dunlop* in *Andrews*, it seems to be hinted that a version of the "legitimate interest" test is appropriate in an equity case as well as at common law.[111] Yet, it is very difficult to see how the "legitimate interest" test reflects historical practice in equity. Kiefel J explained that "The aim of the equity courts was to compensate in the event of a default, not to punish."[112] The basis of equity's intervention was to allow compensation and no more.[113] This is a perfectly correct summary of the position in equity. More problematic is how Kiefel J gets from this position to one in which she argues that the

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[107] More specifically where the term was a secondary obligation to pay a sum of money rather than a primary obligation to perform, *Cavendish* [2016] AC 1172, 1196 [14] (Lords Neuberger and Sumption), 1240 [129]–[130] (Lord Mance), 1274 [242], 1279 [258] (Lord Hodge), 1285 [291] (Lord Clarke).

[108] *Paciocco* (2016) 258 CLR 525, 569 [125]–[126].

[109] Notably in the development of estoppel in *Waltons Stores (Intestate) Ltd v Maher* (1988) 164 CLR 387.

[110] *Paciocco* (2016) 258 CLR 525, 577 [155].

[111] *Andrews* (2012) 247 CLR 205, 236 [75]

[112] *Paciocco* (2016) 258 CLR 525, 577, 544 [21].

[113] *Paciocco*, 577, 544 [21].

appropriate test of enforcement is whether the innocent party had a legitimate interest in enforcing the clause. She does this by suggesting that the reason that equity intervened was because "it would not tolerate individuals exacting punishment."[114] From this position, it is then assumed that a clause that punishes is one where there is no legitimate interest.[115] The problem with this reasoning is that whether the amount claimed was more than compensatory and whether the clause was a punishment are not precisely overlapping concepts. It is possible to imagine a clause which the sum exceeds the loss suffered but is not penal or in the modern language where there is a legitimate interest in enforcing the clause. To trace the legitimate interest test into equity does not reflect the nature of equity's original jurisdiction over penalties, which was to ensure proper compensation rather than to stop the enforcement of a clause because it was a punishment.

Relief in Chancery was premised on the legitimacy of recovering actual loss suffered along with some interests and costs. This was why a *quantum damnificatus* was used so that a common law jury could assess the damage suffered. The legitimate interest test is different. It looks at the clause before the breach has occurred. It does not involve an inquiry into the extent of the loss caused by the breach. This explains why in England, clauses for sums much larger than the loss suffered might be legitimate, for example because the clause in question acts as a deterrent.[116] At best, whether the sum is commensurate is one factor of a number in determining whether the clause is legitimate.[117] If, as the High Court seems to accept, there is

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[114] *Paciocc*, 577, 544 [21].

[115] *Paciocc*, 77, 545 [22].

[116] Hence a parking fine which is not commensurate with the loss suffered might be perfectly legitimate and enforceable: D. Campbell and R. Halson, "By Their Fruits Shall Ye Know Them," *Cambridge Law Journal* 79, no. 3 (2020).

[117] For a recent example, see *ST Investment Pty v Geng* [2020] NSWSC 329 at [46]. A number of cases have continued to emphasise this element: *Melbourne Linh Son Buddist Society v Gippsreal* [2017] VSCA 161.

an equitable doctrine of penalties and one at common law, then the implication as far as one can make out is that the same test of enforcement applies to both, namely whether there is a legitimate interest in enforcing the clause. There will be other differences in whether the equitable or common law doctrine applies because the former can be used without a breach of contract. The remedies may also be different. But this leaves us with the confusing position of a penalty doctrine said to be derived from equity with a test for enforcement that is difficult to square with the historical scope of Chancery jurisdiction over penalties.

THE IMPORTANCE OF HISTORY

It is evident from the analysis of citations and the analysis of recent decisions on penalties that the High Court continues to make significant use of historical sources, whether in the form of classic legal texts, secondary literature or old English precedents. One might expect this practice to decline as Australian private law moves further away from its English roots. However, this has not happened. All the evidence shows that, far from declining, the use of historical sources is increasing. An understanding of the history of legal doctrine is useful. It can explain why doctrine has evolved in a particular way, but some care needs to be taken.

History can be used creatively to reach a particular outcome. The High Court in *Andrews* was perfectly correct to claim that Chancery would intervene beyond breach of contract. The authorities concern conditional bonds and not contracts. At the same time, Roscoe Pound once observed that "Law must be stable and yet it cannot stand still."[118] There

[118] Roscoe Pound, *Interpretations of Legal History* (Cambridge: Cambridge University Press, 1923), 1.

are dangers in taking the history of a legal doctrine at a particular point in time and transplanting it into another period. Lord Thurlow LC in *Sloman v Walter*[119] said that "The rule, that where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional, and, therefore, only to secure the damage really incurred, is too strongly established inequity to be shaken."[120] Put another way, it was perfectly valid to insert a term to secure performance. This was, after all, how conditional bonds worked. The focus of the penalty doctrine in both equity and at common law before the nineteenth century was on whether the sum reflected the agreed performance hence the importance of the loss suffered. Yet, the modern penalty doctrine has a quite different emphasis — whether there is a "legitimate interest" protected by the clause. The problem with the two High Court cases is one of consistency. History is used for one purpose — to allow the penalty doctrine to apply outside of breach of contract — and not another — in determining how a court properly characterises a clause as penal. The result has been some uncertainty at the expense of doctrinal purity.[121] Looking to the future, it may well be that "statutory law reform offers more promise than debates about the true reading of English legal history" in this area.[122] But one thing is certain: legal history continues to shape the modern private law in Australia.

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[119] (1783) 1 Bro CC 418; 28 ER 1213.

[120] Ibid 1214.

[121] *Arab Bank Australia Ltd v Sayde Developments Pty Ltd* (2016) 934 NSWLR 231 at [10].

[122] *Paciocco* (2016) 258 CLR 525, 540–41 [10] (French CJ).

APPENDIX

Total citations of English legal classics by the High Court from 1903–2019 (**Table 1**)

Author	1903-1920	1921-1940	1941-1960	1961-1980	1981-2000	2001-2019	Total of the author
Glanvill	3	0	1	0	0	1	5
Bracton	2	4	9	5	10	20	50
Littleton	18	6	11	7	12	24	78
Hale	4	7	1	21	43	50	126
Blackstone	24	33	32	45	191	197	522
Total citations	51	50	54	78	256	312	781

Total citations of secondary legal historical literature by the High Court 1903–2019 (**Table 2**)

Author	1903-1920	1921-1940	1941-1960	1961-1980	1981-2000	2001-2019	Total of the author
Pollock and Maitland	0	6	9	10	22	5	52
Holdsworth	0	33	55	47	114	150	399
Windeyer	N/A	0	0	0	11	5	16
Castles	N/A	N/A	N/A	N/A	15	2	17
Total citations	0	39	64	57	162	162	484

Citation of English legal classics by High Court judges of ten or more (**Table 3**)

Judge	Number of citations	Years on the Bench (rounding down) to the end of 2019	Average number of citations per year
Windeyer	38	13	2.92
Gummow	32	17	1.88
Kirby	32	12	2.66
Isaacs	30	24	1.25
Dixon	29	35	0.82
Brennan	27	17	1.58
McHugh	26	16	1.62
Mason	25	22	1.13
Deane	25	13	1.92
Gaudron	25	15	1.66
Hayne	24	17	1.41
Crennan	20	9	2.22
French	20	6	3.33
Toohey	19	10	1.9
Dawson	17	15	1.13
Rich	14	37	0.37
Kiefel	14	7	2
Bell	14	5	2.8
Griffith	13	16	0.81
Heydon	13	10	1.3
Callinan	12	9	1.33
Murphy	11	11	1
Gleeson	11	10	1.1
Kitto	10	20	0.5
Gibbs	10	16	0.62

Citations of historical secondary literature by High Court judges of ten or more (**Table 4**)

Judge	Number of citations	Years on the Bench (rounding down) to the end of 2019	Average number of citations per year.
McHugh	27	16	1.68
Brennan	25	17	1.47
Dixon	24	35	0.68
Windeyer	19	13	1.46
Deane	17	13	1.30
Toohey	16	10	1.6
Kirby	14	12	1.16
Gummow	13	17	0.76
Mason	11	22	0.5
Gaudron	11	15	0.73

Callinan	11	9	1.22
Starke	10	29	0.34
Stephen	10	10	1
Dawson	10	15	0.66