

Inside the Mason Court Revolution: The High Court of Australia Transformed by Jason L Pierce (Durham: Carolina Academic Press, 2006) pages vii–x, 3–334. Price US\$30.00 (hardcover). ISBN 1 59460 061 9.

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I INTRODUCTION

This is the work of an outsider (an American political scientist and PhD student) about a critical period in the history of the High Court of Australia. As such it had the potential to be utterly fascinating or completely misconceived. The actual result is mixed. Parts of the book are compelling reading. These are the anecdotal parts, where the author records the candid views of senior Australian judges about the High Court, the role of the judiciary, the judicial method and criticisms of particularly controversial judgments. Other parts, being the attempts to support the anecdotal material with sufficient theory and evidence to justify the award of a PhD, including graphs and statistics, appear (at least from a practical lawyer's point of view) to be artificial and sometimes meaningless.¹

It must first be acknowledged that this book was written primarily for an American audience. It provides clear and concise explanations of the Australian constitutional system and the context of particular cases for that audience, and does so in terms familiar to Americans. To Australian ears however, some of that language is grating, such as the references to the High Court's 'docket', 'agenda' and those who have 'clerked' for the Court. There is a particularly egregious reference to 'Down Under' on page 3.

Secondly, the book was written for an audience of social scientists. Pierce locates his analysis firmly within the context of the existing theoretical scholar-

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¹ See, eg, Jason L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (2006) 140, for the far from stunning conclusion that s 51 is the most litigated section of the *Constitution*. Pierce's attempt to provide a 'macro-picture of constitutional litigation' involved adding up the constitutional provisions listed as 'considered' in the back of each CLR volume. This would have missed constitutional litigation concerning implications, despite the fact that this is one of the major subjects of study and criticism in this book. It also reveals nothing substantive about the nature of the High Court's consideration of sections — whether it was a mere passing reference, the application of precedent or innovative interpretation.

ship by North American political scientists on the operation of the United States Supreme Court. While he challenges some of that scholarship, his work is informed by it and builds upon it. Whether that is done well or badly is impossible for an Australian lawyer to judge. However, it is likely that an Australian legal audience will find these aspects of the book somewhat alienating or unconvincing. Indeed, the very judges who gave their forthright and critical comments to Pierce about the use of theory and principle by the Mason Court would be likely to have a few choice words about the more obscurely theoretical aspects of this book.² One could imagine ‘Judge No 3’, for example, describing it as ‘pseudo-scientific, airy-fairy, mumbo-jumbo’, or the like.

Fortunately, much of the book weaves together the comments of a wide range of senior Australian judges who give their appraisal not only of the Mason Court and some of its particularly controversial judgments, but also the role of the judge and the judicial method. It is these parts of the book that an Australian legal audience will find fascinating on two levels.

II THE ANECDOTAL ASPECT OF THE BOOK

First, there is the superficial level of gossip and entertainment. Pierce somehow managed the extraordinary feat of getting 85 senior judges (including 10 current and former High Court judges) and other senior barristers to speak candidly to him about the Mason Court and judging generally. Perhaps it was his status as an outsider that helped. It is extremely unlikely that these judges would have made the same comments to an Australian legal academic. Pierce guaranteed each of his informants anonymity, although all agreed to being listed in the back of the book as participants. The grant of anonymity was, as Sir Harry Gibbs once said in a different context, ‘a frail shield’.³ Pierce describes to his readers ‘the Sydney-based judge whose office was filled with enough museum-quality sculptures, busts, and *objets d’art* to open his own gallery’ and ‘the judge who photographs each visitor to his office’.⁴ No prizes would be given in Australia for the identification of either well-known judge.

Almost every quote in the book is attributed to a judge given a particular number. Some characteristics of the judge are usually revealed in introducing the quote (for example, ‘a NSW appellate judge’ or a ‘High Court justice’) and other characteristics are often revealed by the quotations themselves (for example, the cases the informant argued or heard). The consequence is that if one works through the book playing a game of ‘judicial sudoku’, one can identify a number of the anonymous judges, some positively and others through a process of

² See, eg, Pierce, above n 1, 235, where Pierce attempts to analyse the outcome of Privy Council appeals with respect to Australia as compared with other countries. Pierce deals with this by conducting ‘WLS regression analysis on dummy variables for each country’ in order to address ‘heteroscedasticity problems’. The result, however, is a conclusion apparent on the face of the raw data: that decisions of Australian courts were reversed as much as those of any other courts from other countries. It does not, however, tell us anything about the reasons for the reversals or the type of cases that resulted in reversals, or the effect, if any, on the High Court’s jurisprudence.

³ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 200 (Gibbs CJ).

⁴ Pierce, above n 1, 23.

elimination. For example, Justice Slicer was the only Tasmanian Supreme Court judge interviewed, and is therefore identified by the reference to 'a Tasmanian Supreme Court judge'. No doubt some unfortunate functionary of the Commonwealth Attorney-General has been ploughing through the book trying to identify those judges whose critical views of the Mason Court single themselves out for higher appointment.

Nearly all the truly colourful quotations, however, can be traced back to one source — the legendary Judge No 3, who wages the good fight against “‘with-it” professors’,⁵ ‘women’s lib’,⁶ those who have succumbed to ‘the siren song of the left-wing intellectuals’,⁷ and those who say ‘bugger the *Constitution*.’⁸ Judge No 3 is quick to paint a portrait of judges past and present: ‘Toohey was a terrible communist. Brennan wasn’t much better.’⁹ However, his Honour gives some begrudging respect to Chief Justice Gleeson who ‘doesn’t have a heart so there is no danger in him being overly smuffy to anyone.’¹⁰ Few in the legal profession would have difficulty in guessing the identity of Judge No 3, and most would take his opinions in the exuberantly pot-stirring and mischievous manner in which they were intended (which would probably not be apparent to an American audience).

Beyond the gossip, the judicial comments recorded in this book are in many cases both thoughtful and thought-provoking. They provide great insight into the judicial role and method from those who practise it. Both the divergences and similarities in views are instructive and this material could well prove useful for future studies on the judiciary.

III THE SUBSTANCE OF THE BOOK

Pierce’s book has a relatively simple structure. First, he sets out to identify what was ‘orthodoxy’ in judicial behaviour before the Mason Court. He describes a number of ‘dimensions’ of orthodoxy, including the importance of certainty, the separation of judges from the political world, legal reasoning that is clinical, logical and technical, a high reliance on precedent and ‘interstitial’ legal development.¹¹

Secondly, he attempts to demonstrate how the Mason Court supplanted that orthodoxy both in its behaviour and its legal reasoning. He argues in chapters four and five that the Mason Court:

- placed a higher premium on fairness and individualised justice than certainty;

⁵ Ibid 64.

⁶ Ibid 156.

⁷ Ibid 206.

⁸ Ibid 166.

⁹ Ibid 283.

¹⁰ Ibid 278.

¹¹ See *ibid* ch 3.

- became politicised because it addressed overarching principles and policy matters in its judgments, writing its judgments for the public rather than directing them to the parties in the case;
- took on the role of a public educator, with justices more commonly speaking out in public on political issues;
- changed its ‘agenda’ by increasing constitutional cases and in particular, human rights cases;
- ‘made’ law rather than simply declaring it, and was open in acknowledging this fact;
- identified and promoted constitutional values, particularly through the development of constitutional implications;
- referred to wider sources of authority, including Canadian and US cases, international law and the original constitutional convention debates;
- weakened the tradition of *stare decisis*; and
- developed the law too far and too quickly.

Next, Pierce seeks to establish the causes and timing of these changes. He notes the importance of individual appointments to the Court and tries to trace the influence of the political parties in office when appointments were made. He provides charts of the ‘partisan composition of the High Court’, observing that ‘the Court had an uninterrupted Liberal majority from 1952 to 1989’ and arguing that ‘[t]his lopsidedness made for a more conservative Court during these decades’.¹² He contends that there is ‘a case to be made that changes in party control of government contributed to the Court’s transformation’, as a Labor appointed majority took hold of the Mason Court from 1989.¹³ However, he notes that this theory begins to break down when one considers that much of the ‘transformation’ discussed above was led by Sir Anthony Mason and Sir William Deane, both originally appointed by Liberal governments.¹⁴

Pierce also points to the importance of institutional factors in the transformation of the Court. These included: the introduction of mandatory retirement at the age of 70, which reduced the average age of the members of the Court and resulted in greater turnover;¹⁵ the introduction of special leave requirements in 1984, which allowed the High Court to choose the cases to be heard and to set their ‘agenda’ in accordance with particular policy preferences;¹⁶ and the abolition of Privy Council appeals, leaving the High Court as the final court of appeal for all Australian matters.¹⁷ Pierce also notes the ‘hot potato’ theory that in some cases, governments and Parliaments abdicated their responsibility for

¹² Ibid 195.

¹³ Note that this change in ‘majority’ only works on a statistical level if Sir Anthony Mason suddenly changed his stripes from a Liberal appointee to a Labor appointee on taking up the office of Chief Justice: see *ibid* 197–8.

¹⁴ Ibid 202–3.

¹⁵ Ibid 211–14.

¹⁶ Ibid 214–24.

¹⁷ Ibid 224–37.

matters such as aboriginal land rights in the hope that the High Court would resolve the issues and take the political flack in the process.¹⁸

Finally, Pierce considers how the Brennan and Gleeson Courts have since retreated from what he sees as the 'politicised' role of the Mason Court. He does so by describing the Court's limitation and consolidation of the implied freedom of political communication.¹⁹ He also suggests that the High Court has turned away from its politicised role and resorted to legalism and technicality, using *Re Wakim; Ex parte McNally* ('*Wakim*')²⁰ as an example. It is interesting that *Wakim* is used as an example of the return to orthodoxy, when the majority in that case relies firmly on an implication that it derives from Chapter III of the *Constitution*. Nowhere in the text of the *Constitution* does it say that state judicial power can or cannot be conferred upon federal courts. *Wakim* could just as easily be characterised as subject to the 'nowhere-in-the-text' and 'judges were making it up' accusations levelled at the Mason Court.²¹ Indeed, one Federal Court judge is quoted as describing *Wakim* as a 'f***ing outrage' and arguing that the 'real justification for *Wakim* — the one they will never articulate — is that the Federal Court pinched all the good work from the state courts and left the state supreme courts languishing.'²² Is what is meant by 'orthodoxy' simply the retreat behind a facade of legalism to conceal the true reasons for decisions?

IV THE RELATIONSHIP BETWEEN COMMONWEALTH GOVERNMENTS AND THE HIGH COURT

In analysing the causes of the transformation of the Mason Court, Pierce places some importance on two aspects of politics at the Commonwealth level. First, there is the influence of the political party in office upon the appointment of justices of the High Court. Secondly, there is the 'hot potato' thesis about governments trying to transfer responsibility for politically contentious matters to the courts. Both require further analysis.

First, in relation to the appointment of justices of the High Court, there appears to be an inbuilt assumption that Liberal governments seek to appoint 'conservatives' and Labor governments seek to appoint 'radicals' and that when a government's appointee takes a different political approach, this simply shows that the government was mistaken in making its appointment.²³ This assumption is not necessarily borne out in practice. A government may appoint a judge for a range of reasons, including adding some form of balance to the Court (state, sex or expertise in a particular area of law in which the Court is lacking) or because a judge is the leading jurist of their generation, or simply because a person is an uncontroversial compromise when views are polarised in relation to other

¹⁸ Ibid 237–43.

¹⁹ Ibid 248–57.

²⁰ (1999) 198 CLR 511.

²¹ Pierce, above n 1, 165.

²² Ibid 260.

²³ As Pierce notes, the 'radical' leadership on the Mason Court came from Liberal government appointees Sir Anthony Mason and Sir William Deane, while the High Court's currently serving Labor appointee, Justice Gummow, appears to be more conservative: see *ibid* 202–3, 277.

candidates. Most commonly, however, Commonwealth governments have sought to choose judges who are likely to favour the extension of Commonwealth power over the states. In making this assessment, they have been largely successful, creating a Court that has progressively whittled away nearly all state power under the *Constitution*.

When working for the Commonwealth Parliament, I once did some preliminary vetting of potential High Court judges for the Commonwealth Attorney-General's office. What was interesting was that the list of candidates included the most respected judges and barristers of the day, regardless of political association. A number of them have since been appointed to the Court by governments of different persuasions. More importantly, the vetting instructions were to comb through all their writings (judicial and extra-judicial) to identify how they might decide upon certain controversial constitutional issues that were likely to arise concerning Commonwealth power. Whether a candidate was radical or conservative was not at issue — the real question was whether the candidate favoured Commonwealth dominance or federalism.

There are also real questions about what is 'radical' and what is 'conservative' today. In days gone by, 'conservatives' supported small government, checks and balances on governmental power and federalism. These days, it seems, conservatism means favouring the establishment of a central all-powerful government and the effective end of federalism. Thus a Liberal government happily overrides traditional state areas of jurisdiction by using the corporations power to enact the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) and is supported by what Pierce would consider an orthodox and conservative High Court which has expanded the interpretation of the corporations power to such an extent that the Commonwealth now has legislative power with respect to most state matters.²⁴ Had the Mason Court handed such a power to a Commonwealth Labor government, overturning a century of precedent and the results of six referenda, there would have been even greater howls of outrage than were produced by *Mabo v Queensland [No 2]*²⁵ or the implied freedom of political communication cases.²⁶ The two dissenters in the *Work Choices Case* were the curious combination of Callinan J (appointed to satisfy the demand for a 'capital C Conservative' rather than an apologist for the expansion of Commonwealth power) and the only remaining 'radical' on the Court, Kirby J. Indeed, Justice Kirby is a good example of the folly of trying to box judges into particular categories, as he is as deeply conservative on some issues as he is liberal on others.

In attempting to explain the causes for what he sees as the politicisation of the High Court during the Mason Court era, Pierce makes much of the fact that from 1984 the special leave requirements were introduced, allowing the High Court to pick and choose those appeals that it wanted to hear.²⁷ He compared the Austra-

²⁴ *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*Work Choices Case*').

²⁵ (1992) 175 CLR 1.

²⁶ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

²⁷ See Pierce, above n 1, 214–24.

lian position with the US Supreme Court's use of certiorari to choose which cases it hears, and concluded that the High Court in the same way can construct its own 'agenda' through the control of its 'docket'. Pierce uses a number of quotes from judges and barristers to suggest that the judges deny that they control their agenda through the special leave application procedure while barristers think they do.²⁸ However, Pierce does not take sufficiently into account the fact that most constitutional cases arise in the Court's original jurisdiction and not through the special leave process. Further, nearly all the particularly controversial cases that Pierce uses to illustrate the change in the Mason Court arose in the Court's original jurisdiction, either because they involved the interpretation of the *Constitution* or because the Commonwealth was a party to the case.²⁹ The Court cannot be said to have chosen them in order to pursue a particular agenda.

Indeed, there is a good argument that it was the Commonwealth government itself that set the Court's agenda in relation to most of the controversial cases that the Mason Court decided. While Pierce concentrates on the role of governments in influencing the High Court through the appointment of judges, he misses the fact that it is governments that initiate many of the matters that end up in the High Court. If governments are constitutionally conservative, keeping within well-accepted constitutional bounds, the High Court will have few constitutional matters with which to deal. If, however, a government pushes the boundaries of constitutional validity, testing the limits of powers or prohibitions, as the Whitlam government did for a short period in the early 1970s, then the High Court will be compelled to address many constitutional issues that have simply not arisen before and therefore develop and rely on principle rather than mere precedent.

The Fraser government was more conciliatory to the states than the Whitlam government and less ambitious in its legislation, resulting in the High Court having fewer ground-breaking constitutional issues to address. The Mason Court, however, coincided with the Hawke and Keating era where greater constitutional risks were taken by the Commonwealth, leading to less certainty about constitutional outcomes. The Hawke government started in 1983 with the enactment of the *World Heritage Properties Conservation Act 1983* (Cth) giving rise to the controversial decision in *Commonwealth v Tasmania* ('*Tasmanian Dam Case*')³⁰ which Pierce refers to as 'emblematic' of his thesis, although he notes the case technically preceded the Mason Court by two years.³¹ Pierce uses it as an example of the change in the legal reasoning of the Mason Court which began to

²⁸ Ibid 218.

²⁹ See *Constitution* ss 75(iii), 76(i). These cases include: *Leeth v Commonwealth* (1992) 174 CLR 455; *Mabo v Queensland [No 2]* (1992) 175 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. Similarly, other controversial cases were removed to the High Court under s 40 of the *Judiciary Act 1903* (Cth): *Cole v Whitfield* (1988) 165 CLR 360; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Wik Peoples v Queensland* (1996) 187 CLR 1. The choice to give special leave was only relevant in two cases: see *Dietrich v The Queen* (1992) 177 CLR 292; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

³⁰ (1983) 158 CLR 1.

³¹ Pierce, above n 1, 173 fn 22.

take into account international law and international legal obligations. It also had the effect of drastically expanding Commonwealth legislative power at the expense of the states. However, one of the significant considerations of the Mason-led majority in the *Tasmanian Dam Case* was that the High Court should not involve itself in deciding whether treaty obligations were ‘international’ in character. Mason J expressed concern that if the High Court had to make such judgments with respect to each treaty, it would politicise the High Court’s position. His Honour considered that it was a matter for the executive and the Parliament to determine, not the courts.³² This aspect of the decision was of far greater significance than any reference to international law, and would seem to be contrary to Pierce’s thesis rather than emblematic of it.

The High Court did not initiate the *Tasmanian Dam Case* controversy nor add it to the Court’s ‘agenda’ by selecting it for special leave. It was brought to the Court in its original jurisdiction as the inevitable result of the Commonwealth’s enactment of highly controversial legislation which it knew would be challenged. Many other constitutional cases fall within this category.

Examples of Commonwealth laws that provoked (and could be expected to provoke) constitutional challenges in the High Court include:

- war crimes legislation that involved the application of retrospective criminal laws to non-Australians in foreign countries decades in the past;³³
- political advertising legislation that favoured the government by giving free air time to parties in proportion to votes received in the previous election and prevented lobby groups from using the electronic media;³⁴
- legislation requiring the courts not to release boat people even if they were being held invalidly;³⁵
- legislation that gave judicial effect to the decisions of the Human Rights and Equal Opportunity Commission;³⁶
- legislation making it an offence to use terms such as ‘200 years’ and ‘Sydney 1988’ in business without the consent of the Bicentennial Authority;³⁷
- legislation charging Australian citizens a fee for the right to enter Australia;³⁸ and
- legislation taking over the field of corporations law, including the incorporation of companies.³⁹

Again, the High Court did not choose whether or not to decide these cases. They all fell within its original jurisdiction, and it had no choice but to deal with the issues they raised. Each case introduced novel questions of constitutional law

³² *Tasmanian Dam Case* (1983) 158 CLR 1, 125–6 (Mason J).

³³ *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

³⁴ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

³⁵ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

³⁶ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

³⁷ *Davis v Commonwealth* (1988) 166 CLR 79.

³⁸ *Air Caledonie International v Commonwealth* (1988) 165 CLR 462.

³⁹ *New South Wales v Commonwealth* (1990) 169 CLR 482 (‘Incorporation Case’).

that could not be determined by precedent alone. If the Commonwealth Parliament had not enacted such legislation, then the High Court would never have had the opportunity to deal with these constitutional questions.

The New South Wales government similarly provoked a constitutional challenge with the enactment of its *Community Protection Act 1994* (NSW), resulting in *Kable v Director of Public Prosecutions (NSW)*⁴⁰ which was handed down by the Brennan Court. If it were not for the extreme nature of the legislation, which provided the means for the preventive detention of Gregory Kable, it is unlikely that such a precedent would ever have been developed.⁴¹ This is where the 'hot potato' theory comes into its own. In the intense 'law and order' political debates that arise from time to time, state governments sometimes prefer to enact legislation of doubtful constitutional validity in order to pass the burden of striking it down onto the courts. The government can then claim that it did all that it could to keep the potential molesters and murderers incarcerated and blame the courts if they commit any crime in the future. It is a way of letting the government out of jail as well as the prisoners, while deliberately politicising the role of the courts. Similar considerations may well come into play at the Commonwealth level with regard to terrorism. From a political point of view, it is better to enact extreme measures and leave it to a court to find them invalid on constitutional grounds so that if a terrorist attack occurs, the government can disclaim responsibility for the failure to prevent it and pass blame onto the courts.

V STARE DECISIS AND THE HIGH COURT

As mentioned above, Pierce argues that the Mason Court weakened the principle of *stare decisis* by overturning longstanding precedents and relying on overarching principles.⁴² He then discusses how the current High Court has retreated from that position and reverted to a more legalistic precedent-based system. He does this by addressing how the High Court has modified and restrained the effect of the more controversial cases decided by the Mason Court, being largely those concerned with the implied freedom of political communication. However, one could just as easily choose other examples that show the reverse.

Excise is a good example. The Mason Court applied the precedents that had developed since *Dennis Hotels Pty Ltd v Victoria*⁴³ when confronted with challenges to the validity of tobacco franchise fees in *Philip Morris Ltd v Commissioner of Business Franchises (Vic)*.⁴⁴ Indeed, Mason CJ and Deane J noted that '[t]he Court has refused to retreat from its decision in *Dennis Hotels* because of the need to ensure certainty in the area of State business franchise fees'.⁴⁵ Their Honours noted that while they disagreed with the decisions in *Dennis*

⁴⁰ (1997) 189 CLR 1. The case is discussed by Pierce: see Pierce, above n 1, 64–5.

⁴¹ It has since been effectively neutered by *Fardon v A-G (Qld)* (2004) 223 CLR 575.

⁴² See Pierce, above n 1, 73–5, 178–83.

⁴³ (1960) 104 CLR 529.

⁴⁴ (1989) 167 CLR 399.

⁴⁵ *Ibid* 440.

Hotels and Dickenson's Arcade v Tasmania,⁴⁶ they would accept them as authority.⁴⁷ Their Honours continued to resist the temptation to overturn authority in *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]*, where Mason CJ, Brennan, Deane and McHugh JJ stressed that federal financial arrangements had been designed and implemented on the basis of earlier precedents and that to overrule those precedents 'would have widespread practical ramifications and generate extraordinary confusion.'⁴⁸ It was the Brennan Court, once Mason CJ and Deane J had departed, that overturned these precedents in *Ha v New South Wales*⁴⁹ and caused the confusion and financial disruption that had earlier been predicted. It was this Court that resorted to 'principle' rather than precedent.

Similar arguments could be made with respect to the interpretation of the corporations power in s 51(xx) of the *Constitution*. It was the Mason Court that maintained the limitations on that power in the *Incorporation Case*⁵⁰ and *Re Dingjan; Ex parte Wagner*,⁵¹ while it was the Gleeson Court that overturned the limitations expressed in earlier precedents and expanded the scope of the corporations power well beyond previous acceptance in the *Work Choices Case*.⁵² It was left to Kirby J to query in his dissenting judgment why the High Court had laboured for over a century to interpret and apply s 51(xxxv) of the *Constitution* (the industrial relations power) when in almost all cases it was not necessary to do so because according to the majority in the *Work Choices Case*, s 51(xx) would have supported such legislation without resort to s 51(xxxv). His Honour queried how generations of justices of the High Court could have been wrong for so long, as indeed were the governments who introduced referenda on six occasions to obtain power they would appear to have always had, not to mention the voters who refused them that power on all those occasions.⁵³

A third example is the development of the *Melbourne Corporation* principle.⁵⁴ The Mason Court in *Queensland Electricity Commission v Commonwealth*⁵⁵ and *Re Australian Education Union; Ex parte Victoria*⁵⁶ maintained the orthodox interpretation of this principle in accordance with precedent, while it was the Gleeson Court in *Austin v Commonwealth*⁵⁷ that overturned precedent and resorted to principle to develop a new (and poorly articulated) test. McHugh J pointed out that if there is a difference between the new and old tests 'it may lead

⁴⁶ (1974) 130 CLR 177.

⁴⁷ *Philip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399, 440.

⁴⁸ (1993) 178 CLR 561, 590–1 (Mason CJ, Brennan, Deane and McHugh JJ).

⁴⁹ (1997) 189 CLR 465.

⁵⁰ (1990) 169 CLR 482.

⁵¹ (1995) 183 CLR 323.

⁵² *Work Choices Case* (2006) 229 CLR 1.

⁵³ *Ibid* 185–8 (Kirby J).

⁵⁴ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

⁵⁵ (1985) 159 CLR 192.

⁵⁶ (1994) 184 CLR 188.

⁵⁷ (2003) 215 CLR 185.

to unforeseen problems in an area that is vague and difficult to apply', while if there is no difference, no advantage is gained by jettisoning the established test.⁵⁸

There are other examples where it is the Gleeson Court, rather than the Mason Court, which appears to be in breach of the principles of 'orthodoxy' identified by Pierce. One of these is the principle that judges confine themselves to deciding the matters in dispute between the parties on the basis of the arguments put to them by counsel, rather than going off on frolics on their own.⁵⁹ Interestingly, Pierce cites as an example not a decision of the Mason Court, but the Gleeson Court. In *Coleman v Power*, the last survivor of the Mason Court, McHugh J, criticised the majority for determining issues that were not in dispute between the parties.⁶⁰ Similarly, in *Combet v Commonwealth*⁶¹ McHugh J pointed out in his dissenting judgment that the joint judgment of the majority was based upon an interpretation of appropriation legislation that was not argued, was not supported by either party in the case and was contrary to parliamentary practice and the understanding of members of Parliament 'irrespective of party or ideology.'⁶²

The point of these observations is not to assert that the Mason Court was conservative and orthodox while the Gleeson Court is radical and has no regard for precedent or traditional methodology. The point is that Pierce in his book has characterised the Mason Court by reference to a small number of controversial cases that were uppermost in the minds of those judges and barristers that he interviewed. One could use the same methodology to produce the same result for the Gleeson Court, if one tried. Pierce did not balance the controversial decisions of the Mason Court against the large number of orthodox and non-controversial decisions that the Mason Court made. Nor when he addressed the 'retreat' from the Mason Court undertaken by the Brennan and Gleeson Courts did he consider whether any of their own judgments could be characterised in the same manner as those of the Mason Court. This leaves the book unbalanced and probably unfair in its assessment of the Mason Court.

VI CONCLUSION

The virtue and the flaw in this work is that it is based upon anecdotal statements from judges. It is a virtue because these views are in themselves interesting and instructive and have not been collected in any substantial manner before. It is a flaw, however, as it leads the author to conclusions that might not necessarily be borne out by a more comprehensive study of the whole output of the Mason Court and its successors. Pierce, himself, does not purport to undertake such a study and frequently notes in the course of the book that such matters are beyond its scope. Yet the selectivity of the work and its focus upon the sensational, rather than the common, undermine the credibility of its conclusions. A court cannot and should not be characterised by six or so of its more newsworthy

⁵⁸ Ibid 282.

⁵⁹ Pierce, above n 1, 78–9.

⁶⁰ (2004) 220 CLR 1, 44–5.

⁶¹ (2005) 224 CLR 494.

⁶² Ibid 532.

judgments. To do so does not do it justice. This book may well provide useful material for such a study in the future, but it does not itself adequately assess the Mason Court.