

FOREWORD

JUSTICE KRISTEN WALKER AM^{*}

It was with great pleasure that I accepted the invitation from the Editors to write the foreword to volume 50(1) of the *Melbourne University Law Review* ('*Review*'). This is indeed a milestone, and the *Review* remains one of the most prestigious academic journals in Australia.

The list of past Editors of the *Review* suggests that editorship is often a precursor to significant achievements in the law, with many Editors going on to become judges (including of the International Court of Justice¹ and the High Court²), silks or senior academics. I was an Editor of the *Review* in 1991, along with Anna Funder. Anna has, of course, gone on to greater and more famous things outside the law, being the author of several internationally acclaimed books.³ I hope that she looks back fondly on our time as Editors, which I very much enjoyed.

As a former academic, then a practitioner and now a judge, I have a long-standing interest in the manner in which, if at all, academic work is used by, or influences, the conduct and outcome of litigation. Indeed, as a former academic I often wondered if *anyone* read my work! I was relieved to have two concrete confirmations that some of my articles were read, both published in the *Review*. The first was when Chief Justice Stephen Gageler mentioned to me that he had read one of my articles.⁴ And more recently Kevin Yam, a Hong Kong democracy activist and PhD student at Melbourne Law School, told me that he had read one of my articles when he was a law student that

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¹ Hilary Charlesworth, Editor in 1979.

² Kenneth Hayne, Editor in 1966.

³ Anna Funder, *Stasiland* (Text Publishing, 2003); Anna Funder, *All That I Am* (Penguin Group, 2011); Anna Funder, *The Girl With the Dogs* (Penguin Books, 2015); Anna Funder, *Wifedom: Mrs Orwell's Invisible Life* (Hamish Hamilton, 2023).

⁴ Somewhat surprisingly it was this one: Kristen Walker, 'Damned Whores and the Border Police: Sex Workers and Refugee Status in Australia' (2007) 31(3) *Melbourne University Law Review* 938.

had influenced his thinking about public activism.⁵ On occasion I have had my academic work cited by the High Court,⁶ which is also reassuring.

I note that, in the past, a convention existed in England that authors could only be cited after they had died,⁷ known as the ‘better read when dead’ approach. This was said to reflect a view that authors might write in an attempt to influence the outcome of a case. It seems that this convention was previously observed, at least in parts of Australia. Chief Justice Kiefel has said that, when she was called to the Queensland Bar, the convention was still enforced by some older judges.⁸ However, Chief Justice Dixon encouraged counsel to cite academic work and on occasion cited such work in his reasons, and later justices of the High Court have also expressed the view that judicial consideration of law review articles is desirable.⁹ Chief Justice Kiefel confirmed as much in 2020, saying that judges’ use of academic work ‘confirms our shared concern with the correct and coherent development of the law’.¹⁰

Of course, I don’t want to suggest that only academic work that is of utility in litigation is valuable. Indeed, I suspect that most law review publications will not have any direct and concrete impact on litigation. Most academics will not be writing in a manner that is targeted to a particular case, or even to issues that might arise in litigation more generally — and nor should they (with perhaps the exception of the *Sydney Law Review* series ‘Before the High Court’). But law review articles can nonetheless be relevant to the judicial decisions in less direct ways. They can help to educate and inform judges in relation to particular areas of law. This might be in an area of law in which the judge specialises, and therefore in which they read widely and encounter

⁵ Kristen Walker and Kristie Dunn, ‘Mr Langer is Not Entitled to Be an Agitator: *Langer v Australian Electoral Commission*’ (1996) 20(3) *Melbourne University Law Review* 909.

⁶ For example, Kristen Walker, ‘Disputed Returns and Parliamentary Qualifications: Is the High Court’s Jurisdiction Constitutional?’ (1997) 20(2) *University of New South Wales Law Journal* 257 was cited in *Sue v Hill* (1999) 199 CLR 462.

⁷ Russell Smyth, ‘Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-Legal Periodicals in the High Court’ (1998) 17(2) *University of Tasmania Law Review* 164, 167.

⁸ Chief Justice Susan Kiefel, ‘The Academy and the Courts: What Do They Mean to Each Other Today?’ (2021) 44(1) *Melbourne University Law Review* 447, 451.

⁹ Russell Smyth, ‘Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-Legal Periodicals in the High Court’ (1998) 17(2) *University of Tasmania Law Review* 164, 169.

¹⁰ Kiefel (n 9) 448.

journal articles. Or it might be in an area of law in which the judge does not have very much familiarity, and thus needs assistance in gaining an overview of the area. In such cases, the judge will likely not refer to the article in their judgment, thus the author — and the world — will never know of the influence the article had.

In contrast, in some cases the judge might benefit from an academic article that involves a detailed engagement with a very specific issue in the area. In that kind of case, an acknowledgement in the judgment is more likely.¹¹ Often a journal article of that kind will be referred to in the parties' submissions, but on occasion it might be located by the judge or their associate. I note that there are many *Review* articles of this kind cited in significant decisions of the High Court,¹² including *Coleman v Power*,¹³ *Pape v The Commonwealth*¹⁴ and *Vanderstock v Victoria*.¹⁵

In conclusion, I congratulate the *Review* on its 50 volumes of existence¹⁶ and influence, and hope that it will have 50 volumes more.

¹¹ For this kind of usage in my Court, see, eg, Neville Crago, 'Executors of Unproved Wills: Status and Devolution of Title in Australia' (1993) 23(2) *Western Australian Law Review* 235, cited in *Lee v Yap* [2026] VSCA 20, [188] n 149 (Emerton P, Walker and Richards JJA); Annie Cossins, 'Time Out for *Longman*: Myths, Science and the Common Law' (2010) 34(1) *Melbourne University Law Review* 69, cited in *Bauer (a pseudonym) v The Queen* (2015) 46 VR 382, 401 [95] n 40 (Priest JA) and *Hermanus (a pseudonym) v The Queen* (2015) 44 VR 335, 344 [43] n 28 (Priest JA).

¹² An AustLII search for 'Melbourne University Law Review' in the HCA database brings up some 137 cases, although I confess I did not review each case for accuracy of the search results.

¹³ (2004) 220 CLR 1, 46 [83] n 179 (McHugh J), citing Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23(3) *Melbourne University Law Review* 668.

¹⁴ (2009) 238 CLR 1, 36 [53] n 127 (French CJ), citing Cheryl Saunders, 'The Development of the Commonwealth Spending Power' (1978) 11(3) *Melbourne University Law Review* 369.

¹⁵ (2023) 279 CLR 333, 33 [85] n 140 (Kiefel CJ, Gageler and Gleeson JJ), citing Christopher Caleo 'Section 90 and Excise Duties: A Crisis of Interpretation' (1987) 16(2) *Melbourne University Law Review* 296.

¹⁶ In its present form, noting that the *Review's* predecessor, *Res Judicatae*, dates back to 1935, and prior to that *The Summons: A Magazine of Legal and General Literature*, was published between 1891 and 1903. See 'Overview', *Melbourne University Law Review* (Web Page) <<https://law.unimelb.edu.au/mulr/about/overview>>.