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JUSTICES OF THE HIGH COURT

OF AUSTRALIA

DURING THE CURRENCY OF THIS VOLUME

THE RIGHT HONOURABLE SIR HARRY TALBOT GIBBS, G.C.M.G., K.B.E.,
CHIEF JUSTICE (retired 5 February 1987).

THE HONOURABLE SIR ANTHONY FRANK MASON, K.B.E.,
CHIEF JUSTICE (appointed 6 February 1987).

THE HONOURABLE LIONEL KEITH MURPHY (died 21 October 1986).

THE HONOURABLE SIR RONALD DARLING WILSON, K.B.E., C.M.G.

THE HONOURABLE SIR FRANCIS GERARD BRENNAN, K.B.E.

THE HONOURABLE SIR WILLIAM PATRICK DEANE, K.B.E.

THE HONOURABLE SIR DARYL MICHAEL DAWSON, K.B.E., C.B.

THE HONOURABLE JOHN LESLIE TOOHEY (appointed 6 February 1987).

THE HONOURABLE MARY GENEVIEVE GAUDRON (appointed 6 February 1987).

ATTORNEY-GENERAL

THE HONOURABLE LIONEL FROST BOWEN, M.P.

MEMORANDA

1986.

October 21 — Death of THE HONOURABLE LIONEL KEITH MURPHY, a Justice of the High Court of Australia.

1987.

February 5 — Retirement of THE RIGHT HONOURABLE SIR HARRY TALBOT GIBBS, G.C.M.G., K.B.E., from the office of Chief Justice of the High Court of Australia.

February 6 — Appointment of THE HONOURABLE SIR ANTHONY FRANK MASON, K.B.E., to the office of Chief Justice of the High Court of Australia.

— Appointment of THE HONOURABLE JOHN LESLIE TOOHEY, a Judge of the Federal Court of Australia and MARY GENEVIEVE GAUDRON, Q.C., Solicitor-General for the State of New South Wales, to the offices of Justice of the High Court of Australia.

RETIREMENT OF CHIEF JUSTICE SIR HARRY GIBBS

On Thursday, 5 February 1987, to mark the retirement of the Right Honourable SIR HARRY TALBOT GIBBS G.C.M.G., K.B.E., from the office of Chief Justice of the High Court of Australia, farewell addresses were delivered before the High Court at Canberra by the Honourable L. F. BOWEN M.P., Attorney-General for the Commonwealth, Mr. R. V. GYLES Q.C., President of the Australian Bar Association, Mr. I. D. F. CALLINAN Q.C., President of the Queensland Bar Association, and Mr. D. R. WILLIAMS Q.C., President of the Law Council of Australia.

In his reply, SIR HARRY GIBBS said:—

Mr. Bowen, Mr. Gyles, Mr. Callinan, Mr. Williams, thank you for your generous remarks.

I am grateful to all of you who, by attending here this afternoon, have done honour to the office which I am about to relinquish and, to me. I would wish to acknowledge individually all who are present, but time does not permit me to do so and I am sure that no one will think it invidious if, for special reasons, I mention the names of a few only.

I very much appreciate the presence of four of the six former members of the Court: Sir Garfield Barwick, under whom I served for over ten years; Sir Frank Kitto, whose place on the Court I filled when he retired, and Sir Victor Windeyer and Sir Ninian Stephen, who were my colleagues. Sir Edward McTiernan has sent his apologies. Unfortunately, the state of his health prevents him from being present and Sir Kenneth Jacobs is in England.

It is a particular compliment that the Chief Justice or Chief Judge of every superior court in Australia is present. I also thank, for their presence, the representatives of the governments of the States and of the various associations of lawyers throughout the Commonwealth. I am glad that a number of my former associates, two of whom are now judges, my former tipstaff Mr. Davis, the present members of my staff and last but not least, my wife and some members of my family, are able to be here today.

During the time of my membership of this Court there have been great changes, not only in society generally, but also affecting the Court. Most recent and, perhaps most important, have been the

abolition of all appeals to the Court as of right, and the removal of the right of appeal from Australian courts to the Privy Council.

Besides that, the Court has moved to this fine building in Canberra and so no longer sits regularly in all the capital cities of the States. The Court now has the power to control its own finances and administer its own affairs. A compulsory retiring age has been introduced and after Sir Anthony Mason has been sworn in as Chief Justice tomorrow, all the members of the Court will be obliged to retire at the age of seventy.

Some of these measures have, in theory, enhanced the status of the Court. I say in theory, because its status was already high before they were taken. There can, however, be no doubt that in fact as well as in theory the jurisdiction and organization of the Court have undergone changes more significant than at any time since Federation. It is impossible to predict the effect which all these changes in combination will have on the working of the Court, for reforms, beneficial in themselves, not infrequently have consequences which those who initiated them could not foresee. I hope that none of the changes will reduce the importance of the role of the Court as the final appellate tribunal in all matters of general law.

The exercise by the Court of its functions of interpreting and upholding the Constitution tends to attract the interest of commentators and of the public more than its work in the fields of the general law. The constitutional judgments of the Court are, of course, of very great importance but constitutional cases, nevertheless, form a comparatively small part of the total body of the Court's work and the Court has never regarded constitutional law as standing apart from the rest of the law or as unaffected by its general principles.

The standing which the Court has acquired has been very much due to its achievements in the field of the general law. There has recently been a considerable increase in the volume of cases involving administrative law and the interpretation of statutes. Such litigation is important but it would be regrettable if it occupied so much time that the Court became unable to hear cases of other kinds, particularly those arising under the common law and those affecting the rights of ordinary citizens.

Since the Court has moved to Canberra more public attention has been attracted to its work although that does not mean that its work is better understood. It no doubt makes it easier for some to explain the decisions of the Court if the Justices are regarded as stereotypes and if one is described as a conservative or upholder of State rights and another as a liberal or centralist. Implicit in this approach is the assumption that judges make decisions on the basis of their own preconceived opinions regarding social, economic or political matters.

In truth, the difficulties of decision are sometimes such that two judges may be led to opposite conclusions, although each rigorously applies legal methods and legal principles. Some critics claim that it is quite unreal to say that judicial decisions are guided by strict and complete legalism.

The words of that expression of Sir Owen Dixon have perhaps acquired an unfortunate connotation. No one seriously suggests that there should be a rigid adherence to the very words of previous judgments or that statutes should be construed with unthinking literalism and everyone recognizes that the law must and does develop to meet the needs of the changing times but in that development principle and logic and precedent have their proper place and a judge would fail to perform a judicial function if he or she deserted all three and gave a decision based simply on individual notions of right and wrong. Stability and certainty in the law are virtues, particularly in unsettled times.

Although the High Court is at the apex of the hierarchy of courts in Australia and can set standards for and give guidance to other courts as well as giving authoritative decisions on questions of principle, it should never be forgotten that the strength and efficiency of the judicial system depends very largely on the work of the trial judges and on appellate courts of first remove.

One of the advantages of service on the High Court has been that it has afforded me an opportunity to get to know so many judges throughout Australia who possess all those qualities of dedication, integrity, impartiality and knowledge of the law that judges must have and be seen to have if the courts are to maintain the public confidence upon which their authority rests.

The work of the courts can be effective only if the two branches of the legal profession perform efficiently their respective functions. Barristers and solicitors do have different functions to perform and experience shows that they are performed best if performed separately. Judges in courts, and particularly appellate courts, have occasion to see more directly the work of the Bar than that of the solicitors. While I take this opportunity to acknowledge the assistance that I have derived from the arguments of counsel in the decision of many cases on which I have sat, I do not fail to recognize that the thorough preparation by solicitors is often equally important to the successful presentation of the case. There have been expressed fears that the increasing cost of legal services, both those of barristers and solicitors, may place those services out of the reach of the ordinary citizen who cannot obtain legal aid. It may well be that costs which sometimes appear to be large are in many cases by no means excessive but are made necessary by the conditions of practice today and by economic

conditions in general. Nevertheless, it will be a very sad day if the ordinary citizen is no longer able to obtain the services of the best firms of solicitors and the most eminent of barristers.

This, however, is one of the problems which is facing the legal profession and which I am sure that the Law Council and its various constituent bodies are endeavouring to solve. History shows that rights and freedoms are best protected, indeed can only be fully protected, when the law is administered openly by impartial courts and the parties are represented by lawyers who are competent and independent. The rule of law is a precious inheritance and it can be preserved only if the legal profession in Australia retains its strength and integrity.

I think it will always be true to say that the work of a Chief Justice of this Court is somewhat burdensome and during recent years the Court has faced unprecedented difficulties. Nevertheless I have derived much satisfaction from serving as Chief Justice of the Court. I have enjoyed the friendship of my fellow justices and have had the loyal support of the staff of the Court.

My endeavour has been to maintain the high standards which were set by my eminent predecessors and which have, I think, earned respect for the Court not only in Australia but also elsewhere. I offer my best wishes to my successor, Sir Anthony Mason, to the other members of the Court who are my present colleagues and to the two Justices who will take office tomorrow. I hope that they have many happy and fruitful years on the Bench.

It has been very gratifying to receive from many members of the profession expressions of goodwill on my retirement. I again thank those who have spoken for their kind words and thank you all for your attendance here today.

SWEARING IN OF SIR ANTHONY MASON AS CHIEF JUSTICE

On Friday, 6 February 1987, in the High Court of Canberra, the Honourable SIR ANTHONY FRANK MASON K.B.E. took the oaths of office of Chief Justice of the High Court of Australia. Addresses of congratulation were delivered by the Honourable L. F. BOWEN M.P., Attorney-General for the Commonwealth, Mr. R. V. GYLES Q.C., President of the Australian Bar Association and of the New South Wales Bar Association, and Mr. D. R. WILLIAMS Q.C., President of the Law Council of Australia.

In his reply, SIR ANTHONY MASON said:—

Mr. Attorney, Mr. Gyles, Mr. Williams; in taking up the office of Chief Justice I am greatly encouraged by your expressions of confidence, by the generosity of your remarks and by the attendance here of so many members of the judiciary and the legal profession.

It gives me much pleasure to have sitting with us, not only Sir Garfield Barwick and Sir Harry Gibbs, the Chief Justices with whom I have served since I was appointed a Justice of this Court, but also his Excellency the Governor-General, Sir Ninian Stephen, whose judgments, like those of Sir Frank Kitto and Sir Victor Windeyer, who are also sitting with us, have illuminated the law of this country.

I am especially honoured by the presence on this Bench of the Chief Justices of the Supreme Courts of the States and the Territories, the Chief Judge of the Federal Court, Sir Nigel Bowen, who was Attorney-General for the Commonwealth when I was Solicitor-General, and the Chief Judge of the Family Court. And I am glad to see the President and judges of the New South Wales Court of Appeal of which I was once privileged to be a member, my successors in the office of Solicitor-General, Mr. R. J. Ellicott Q.C., Sir Maurice Byers Q.C., now Chairman of the Constitutional Commission and Dr. Gavan Griffith Q.C., as well as the representatives of governments and professional organizations, Mr. John Spender Q.C., representing the Federal Opposition, and last but certainly not least, other members of the Constitutional Commission, including Mr. E. G. Whitlam Q.C.

Since I joined the High Court fourteen and a half years ago its dual role under the Constitution as a constitutional court and as a final court of appeal has been reinforced by the series of changes mentioned by the speakers yesterday. These changes have enabled us to concentrate on that dual role, and to devote our efforts on the

appellate side to the resolution of important cases. With the elimination of the Privy Council appeal, this Court now has the exclusive final responsibility for declaring what is the law for Australia.

The last of these developments will not make much difference to the pattern of our work except in so far as it may generate more commercial work for us. The fact is that some time past we have proceeded on the footing that the High Court is the ultimate court of appeal for this country. The elimination of the Privy Council appeal is none the less a landmark in our legal history. In conformity with our status as an independent nation, it signifies in a perceptible way that henceforth Australian courts generally will be less reliant on English authority in interpreting and declaring State law, as well as federal law.

Our courts have an obligation to shape principles of law that are suited to the conditions and circumstances of Australian society and lead to decisions that are just and fair. In discharging that obligation judges do not exercise unlimited freedom of choice or the freedom of choice that is inherent in the legislative and the political process. For the most part in this Court we are engaged in the activity of interpreting the Constitution and, more commonly, statutes. Although interpretation involves creative elements, judicial creativity designed to promote the interests of justice is exercised within a general framework that takes account of the express provisions, the purpose and the policy of the statute. And even in those cases where the rules in question are common law or judge-made rules, judicial freedom of choice is restrained by our efforts to ensure that judicial development of the law, though responding dynamically to the needs of society, is principled, orderly and evolutionary in character. There is an expectation that the rules by which conduct is to be judged should be reasonably ascertainable or predictable, as well as yielding just and fair results.

In stating the common law for Australia, we now place closer attention to the common law as is reflected in the judicial decisions and academic writings of other countries. Despite differences in principle and technique, courts in countries following the common law tradition inherited from England have achieved a remarkable degree of uniformity in evolving principled answers to common problems.

These differences in principle and technique remind us that controversial legal questions are often finely balanced, leading sometimes to differences of opinion between courts and between judges of the same court. In this Court the scope for divergence of opinion is magnified because we usually sit as a court of seven or five members. But divergence of judicial opinion should be viewed in its true perspective, a perspective which recognizes that, though each Justice

gives individual expression to the law, each of us is only a contributor to the decision-making processes of the Court as an institution, for it is the Court that decides the cases and declares the law.

Nothing that I have said is intended to suggest that the High Court occupies precisely the same position in our system of government as does the Supreme Court in the United States. True it is that this Court is a constitutional court armed with the power of judicial review. But we have no Bill of Rights, let alone a constitutionally entrenched Bill of Rights, which is the mainspring of so much constitutional litigation in the United States and of the Supreme Court's authority to strike down legislation that violates fundamental rights.

Our Constitution was framed with a close eye to the doctrine of parliamentary supremacy. As a community, we still believe that the clash of interests and values involved in the protection of fundamental human rights is better left for resolution by our politicians in Parliament than by judges in giving effect to a general Bill of Rights. So, the doctrine of parliamentary supremacy continues to play an influential part in shaping the multi-faceted inter-relationship which exists between the courts, the Executive and the Parliament in Australia, an inter-relationship that calls for a sensitive appreciation by each branch of the role of other branches in our system of government. For this reason, our constitutional role is necessarily more restricted than that of the Supreme Court of the United States and the Supreme Court of Canada now that Canada has a constitutionally entrenched Bill of Rights.

With the goodwill and co-operation of my colleagues on the Court and of the legal profession I trust that the expectations which have been expressed by the speakers today will be fulfilled.

I thank the speakers for all that they have said and everyone for attending.

The mode of citation of this volume of
the COMMONWEALTH LAW REPORTS will be as follows:
162 C.L.R.

A TABLE
OF THE
NAMES OF THE CASES REPORTED
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Attorney-General (Saskatchewan) v. Canadian Pacific Railway Co., [1953] A.C. 594, at p. 616.
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Australian Broadcasting Commission v. Industrial Court (S.A.) (1977), 138 C.L.R. 399.
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Banque Belge v. Hambrouck, [1921] 1 K.B. 321.
Applied 162 C.L.R. 110.

Bentsen v. Taylor, Sons & Co., [1893] 2 Q.B. 274.
Considered 162 C.L.R. 549.

Broxtowe Borough Council v. Birch, [1983] 1 W.L.R. 314; [1983] 1 All E.R. 641.
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Bunge Corporation v. Tradax S.A., [1981] 1 W.L.R. 711; [1981] 2 All E.R. 513.
Considered 162 C.L.R. 549.

Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad" (1976), 136 C.L.R. 529.
Considered 162 C.L.R. 341.

Canterbury Municipal Council v. Moslem Alawy Society Ltd. (1985), 1 N.S.W.L.R. 525; 55 L.G.R.A. 318.
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Castlemaine Tooheys Ltd. v. Williams & Hodgson Transport Pty. Ltd. (1985), 7 F.C.R. 509.
Reversed 162 C.L.R. 395.

Church of Jesus Christ of Latter-Day Saints v. Henning, [1964] A.C. 420.
Distinguished 162 C.L.R. 145.

Clarke v. Shee and Johnson (1774), 1 Cowp. 197 [98 E.R. 1041].
Applied 162 C.L.R. 110.

Cook v. Cook (1986), 41 S.A.S.R. 1.
Affirmed 162 C.L.R. 376.

Deposit and Investment Co. v. Kaye (1962), 63 S.R. (N.S.W.) 453.
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Federal Tax on Exported Natural Gas, Re (1982), 136 D.L.R. (3d) 385.
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Fire Commissioners, Board of v. Ardouin (1961), 109 C.L.R. 105, at pp. 117-118, 124, 127.
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Geddes v. Magrath (1933), 50 C.L.R. 520.
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Gino D'Allesandro Constructions Pty. Ltd. v. Powis, [1987] 2 Qd R. 40.
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Hackshaw v. Shaw (1984), 155 C.L.R. 614, at pp. 662-663.
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He Kaw Teh v. The Queen (1985), 157 C.L.R. 523.
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Considered 162 C.L.R. 549.

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House v. The King (1936), 55 C.L.R. 499, at pp. 504-505.
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Humberside County Council v. The Queen, [1977] 1 W.L.R. 1251; [1977] 3 All E.R. 964.
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Insurance Commissioner v. Joyce (1948), 77 C.L.R. 39, at pp. 56, 57, 59.
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Jackson v. Sterling Industries Ltd. (1986), 69 A.L.R. 92.
Reversed 162 C.L.R. 612.

Jaensch v. Coffey (1984), 155 C.L.R. 549.
Considered 162 C.L.R. 341.

James v. Thomas H. Kent & Co. Ltd., [1951] 1 K.B. 551.
Applied 162 C.L.R. 221.

Jennings Construction Ltd. v. Burgundy Royale Investments Pty. Ltd. (1986), 86 F.L.R. 329.
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Joyce v. Ashfield Municipal Council, [1975] 1 N.S.W.L.R. 744.
Distinguished 162 C.L.R. 145.

King v. Ivanhoe Gold Corporation Ltd. (1908), 7 C.L.R. 617, at pp. 621, 625.
Applied 162 C.L.R. 24.

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Applied 162 C.L.R. 24.

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Applied 162 C.L.R. 24.

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Lewis v. Riverton Public Golf Course Pty. Ltd., [1971] W.A.R. 75, at p. 83.
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Luke v. Mayoh (1921), 29 C.L.R. 435.
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Mayfair Trading Co. Pty. Ltd. v. Dreyer (1958), 101 C.L.R. 428.
Distinguished 162 C.L.R. 221.

Metal Trades Industry Association v. Amalgamated Metal Workers' and Shipwrights' Union (1983), 152 C.L.R. 632.
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Miller v. Race (1758), 1 Burr. 452 [97 E.R. 398].
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Applied 162 C.L.R. 110.

Musselwhite v. C. H. Musselwhite & Son Ltd., [1962] Ch. 964, at p. 979.
Applied 162 C.L.R. 285.

Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt (1968), 122 C.L.R. 556.
Considered 162 C.L.R. 341.

Nettleship v. Weston, [1971] 2 Q.B. 691,
Not followed 162 C.L.R. 376.

Newman v. Australian National Airlines Commission (1985), 2 N.S.W.L.R. 573.
Affirmed 162 C.L.R. 466.

Olsson v. Dyson (1969), 120 C.L.R. 365, at p. 379.
Considered 162 C.L.R. 153.

Palmer v. The Queen, [1971] A.C. 814.
Considered 162 C.L.R. 645.

Papatonakis v. Australian Telecommunications Commission (1985), 156 C.L.R. 7.
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Paul v. Pavey & Matthews Pty. Ltd. (1985), 3 N.S.W.L.R. 114.
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Plimmer v. Wellington Corporation (1884), 9 App. Cas. 699.
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—— *v. Middleton* (1873), L.R. 2 C.C.R. 38.
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—— *v. Peterson; Ex parte Hartmann,* [1969] V.R. 417; (1968) 14 F.L.R. 1.
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—— *v. Potisk* (1973), 6 S.A.S.R. 389.
Considered 162 C.L.R. 110.

—— *v. Prince* (1868), L.R. 1 C.C.R. 150.
Considered 162 C.L.R. 110.

—— *v. Thames Magistrate; Ex parte Brindle,* [1975] 1 W.L.R. 1400; [1975] 3 All E.R. 71, 941.
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—— *v. Toohey; Ex parte Meneling Station Pty. Ltd.* (1982), 158 C.L.R. 327.
Considered 162 C.L.R. 24.

—— *v. Worthing Justices,* [1976] 2 All E.R. 194.
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Rahman (Prince Abdul) v. Abu-Taha, [1980] 1 W.L.R. 1268, at p. 1273; [1980] 3 All E.R. 409, at p. 412.
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Schwarstein v. Watson (1985), 3 N.S.W.L.R. 134.
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Sutherland Shire Council v. Heyman (1985), 157 C.L.R. 424.
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Viro v. The Queen (1978) 141 C.L.R. 88, at pp. 146-147.
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Welch v. Welch, [1973] A.C.L.C. 27,510.
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Whitehouse v. Carlton Hotel Pty. Ltd. (1985), 10 A.C.L.R. 20; 3 A.C.L.C. 713.
Affirmed 162 C.L.R. 285.

CORRIGENDA

153 C.L.R., page 3, line 3: After "(b)" insert "(Murphy J. contra)".

161 C.L.R., page viii and page 639, headnote: For reference to *Inglis v. Commonwealth Trading Bank of Australia*" substitute "(1969), 119 C.L.R. 334, at pp. 337-338".

162 C.L.R.; pages 155, 161: Insert reference to decision of Kearney J. "(1986) 86 F.L.R. 329".

162 C.L.R., page 514, headnote: For reference to *Reg. v. Thames Magistrate; Ex parte Brindle* substitute "[1975] 1 W.L.R. 1400".

162 C.L.R., page 549, headnote: For *"Hong Kong Fir Shipping Co. Ltd."* read *"Hongkong Fir Shipping Co. Ltd."*.

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