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FOREWORD

Introduction to Australian Law
By Dr. Wolfgang Babeck

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> *"Although John Gunther Fleming [who taught tort law in Australia] left his native Berlin at the age of 16 in 1935 and received his undergraduate education at Brasenose ... he seems to have brought to the common law world the high traditions of German scholarship: original, questing, systematising, undeferential, exposing the principles and policies (or lack of them) underlying the formal reasoning of the judiciary."*
> Lord [Leonard] Hoffmann, Foreword to the tenth edition of Fleming, The Law of Torts, Lawbook Co., Sydney, 2011, 4.

From the very beginning of the modern history of Australia, we have celebrated important links with Germany and its peoples.

The officer placed put in charge of the First Fleet (1787-8) that transported the first convicts to the new penal settlement established at Sydney Cove was Arthur Phillip, whose father, a German immigrant, had left Frankfurt to settle in London. Phillip became the first Governor of New South Wales. By his skills and prudence, he lost not a single soul during the long sea journey to the Great South Land. He brought with him Baron Augustus Theodore Alt as surveyor-general, to lay out the first settlement at Sydney and Parramatta. Australia was fortunate in these enlightened officials, serving the British Crown. The eventual success of the colony, on the very edges of civilisation, owes much to the wisdom and prudence of Phillip, with his German virtues.

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* Justice of the High Court of Australia (1996-2009); President of the International Commission of Jurists (1995-98); Gruber Justice Prize, 2010.

Thereafter, waves of German migrants came to Australian in colonial and post-colonial times. The *Australian Encyclopaedia* (Vol4, p1487) acknowledges that the "Germans have always been one of the largest non-English speaking groups in Australia. Their contribution to the economic and cultural life of Australia is far-reaching". It estimates that more than ten per cent of Australia's population can trace its ethnicity to German extraction.

In the field of law, some of the greatest borrowings arose in South Australia. This was not altogether surprising, given the very large settlement formed in that province after the arrival in 1838-39 of 500 Lutherans from Klemzig in the then Prussian Silesia. They were seeking to escape from religious persecution. South Australia has always boasted substantial German influence. This may help to explain the innovations that have frequently been adopted in its laws.

One of the greatest of these was the "Torrens system" of land title by registration. The system, reliant on the endorsement of ownership and other interests in land on a public register, was instituted by Sir Robert Torrens who, in 1835, had become the Chairman of the Colonisation Committee for the new province. Subsequently, as Premier in 1857, he initiated legislation that first brought into effect the system that bears his name. He ascribed the model that he followed to the system of registration of land deeds that existed in the counties of Middlesex and Yorkshire in England from Queen Anne's reign. However, later research in Australia suggests that a far greater influence (not fully acknowledged) was the system of title by registration in force in the

Hanseatic towns of Northern Germany and propagated in South Australia by a knowledgeable German immigrant, Ulrich Hübbe[1].

With terrestrial imaging, this system has proved to be one of Australia's most influential legal exports. It is now copied in many English speaking countries; but also in others that otherwise have few historical links with Australian law, such as Manchuria. In this curious way, legal ideas, born in Hamburg, find their way to the law and practice of the most unlikely beneficiaries.

The copying of legal ideas has been a common feature of the legal traditions of Australia. Overwhelmingly, since Governor Phillip raised the British flag in Sydney in January 1788, the flow has been in one direction and it originated in London. From the start, many of the parliamentary enactments of Westminster applied, or were specifically extended, to the Australian colonies. The avenue of appeals to the Judicial Committee of the Privy Council during the colonial and later years ensured that the Australian common law did not depart very far from the template of the common law of England. This had both good and bad consequences for the law in Australia. Among the good was the inculcation of a legal culture that was accustomed to a comparativist approach, especially when the comparator was English. It also rescued the law in Australia from Antipodean provincialism. It linked it, during its formative phase, to one of the world's great legal systems – that of England. It helped to provide a high measure of uniformity across a continental country. It afforded a familiar business-friendly law which was good, on the whole, for the economic and social development of

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[1] Horst Lükke, "Ulrich Hübbe or Robert R. Torrens? The Germans in Early South Australia" (2005) 26(2) *Adelaide Law Review* 211.

Australia. It constantly set before the locals the example of the high tradition of transparency and incorruptibility, copied from the English judges.

The bad side of the equation included a kind of unquestioning infatuation with English law. Until Privy Council appeals from Australian courts were finally abolished in 1986, it was inevitable that judges (subject to appeal) would lock their minds into an intellectual subservience to the doctrines and practices observed in England. Even when peculiar issues arose in cases brought to the Australian judiciary, it was not until after 1986 that most Australian judges felt free to look critically at English law and to question its applicability in the often very different circumstances of Australia. It is no coincidence it was not until 1992 that the important decision of the High Court of Australia, overruling earlier legal understandings of the common law derived from England, in *Mabo v Queensland [No.2*[2]*]*, held that the Aboriginal people of Australia enjoyed a legal interest in their traditional lands unless that interest was extinguished by other specific interests granted by law.

These features explain why the emergence of Australian statute and common law, from under the great shadow cast throughout its Empire by English law, did not really occur until comparatively recently. Even in 1942, in *Waghorn v Waghorn*[3], Justice Owen Dixon, one the greatest of Australian judges, declared:

> "When a general proposition is involved, the [High] Court [of Australia] should be careful to avoid introducing into Australian law a principle inconsistent with that which has been accepted in England. The common law is administered in many jurisdictions,

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2 (1992) 175 CLR 1. See also *Wik Peoples v Queensland* (1996).

3 (1942)

> and unless each of them guards against needless divergences of decision, its uniform development is imperilled".

Today, the unity of the common law is no longer a feature of common law countries, including those that remain members of the Commonwealth of Nations. Each land must express its own common law to suit its unique historical, cultural and legal needs. Increasingly, as in the *Mabo* decision, an influence upon the common law in Australia, as elsewhere, are the universal principles of human rights. Although Australia has no general constitutional or statutory bill or Charter of Rights (sub-national laws are in force in two jurisdictions only), the comparativist tradition facilitates a habit of mind of reading foreign judicial and other legal material. This can sometimes have an impact on local judicial reasoning.

Released from the judicial supervision of the Privy Council, Australian judges are now at liberty, at least where there is doubt or ambiguity about the state of the law, to reach for universal principles expressed in international law. And also to access principles and approaches (even the language) expressed in judicial reasoning and scholarly texts of other countries.

Obviously, such sources, where written in the English language, are more likely to have impact on Australian judges and other law-makers. The mass of legal materials now available on the internet from English-speaking countries provides much stimulus for Australian judicial and legal thinking. Thus, in *Cattanach v Melchior*[4], when seeking to express the requirements of the common law of Australia concerns a case of

[4] (2003) 215 CLR 1 at 51 [132].

"wrongful birth", I did not hesitate to examine developments, not only in other common law countries, but in nations of the civil law tradition, including Germany. In particular areas of administrative and constitutional law, resort has increasingly been had in recent years to the German legal notion of 'proportionality'. To some extent, a bridge between the common law and civil law systems is now afforded to jurists in countries like Australia by the opinions of the European Court of Justice and the European Court of Human Rights, commonly published in English.

This process of borrowing is likely to continue. Only last year, a post-doctoral monograph about the *Rechtsgutstheorie* in German criminal law became available in Australia: see Carl Constantin Lauterwein, *The Limits of Criminal Law: A Comparative Analysis of Approaches to Legal Theorising* (Ashgate, 2010). This has proved controversial[5]. But controversy is a good thing. All of us are more likely to be challenged by ideas concerning law that come from outside our own particular comfort zone than by familiar utterances that offer insight conceived wholly within the local tradition.

This is why the present book is both timely and potentially influential. The Australian and German legal systems face may similar challenges. The laws of both nations derive their origins from ancient sources and jurisdictions. In the Australian case, this is still the law of England, expressed in the language of that country that has accompanied, and contributed to, globalism. In the German case, the law was built upon the conceptual taxonomies of Roman law. But one feature of globalism today is the interaction of both of these legal traditions upon each other.

[5] Greg Taylor, Book Review, (2011) 29(2) *University of Queensland Law Review* 202.

Understanding the workings and mechanics of other legal systems means that they will be accurately accessed, and intelligently criticised, in deriving our own. All of which is to say no more than Johann Wolfgang von Goethe said when he declared:

> "*Wer fremde Sprachen nicht kennt, weiss nichts von seiner eigenen*"[6]

I congratulate Dr. Babeck for writing *Introduction to Australian Law*. It is an exceptional work designed to compare Australian law, as it has developed, with the civil law tradition observed in German-speaking countries. By affording this link, it may be hoped that the book will stimulate fresh thinking and controversy so that each of the two systems can learn something about the other. Now that he has provided this window of insight for German lawyers concerning the content of Australian law, Dr. Babeck should to be encouraged to write a companion volume in English, focusing on those areas of German law where he feels a new wave of borrowing from Germany might be timely.

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[6] Those who do not know foreign languages do not know their own.