

Speech to the Law Council of Australia Hong Kong Chapter

*The Influence of the Australian judges on
the Hong Kong Court of Final Appeal*

The Hon. Mr Justice Joseph Fok, PJ

Introduction

1. In the course of this year, three eminent and very learned retired judges from Australia, including a former Chief Justice of the High Court of Australia, have addressed this Chapter.¹ So to have been invited to follow in their footsteps and to address you this evening is something I regard as a great honour.²

2. I should say at once that I have little in common with the three preceding speakers I have mentioned. For one thing, I am not Australian; nor do I hold any Australian legal qualification; but the one thing I do have in common with them is that they are each, like me, a Hong Kong judge. To be precise, each of them is a Non-Permanent Judge of the Hong Kong Court of Final Appeal (“the CFA”) and they were here in Hong Kong in that capacity when speaking to this Chapter.

3. It is that common connection that led me to choose the subject matter of my talk this evening. First, it allows me to speak about a distinctly Australian topic; secondly, it is, I believe, an interesting subject; and thirdly, it enables me

¹ Mr Justice Gummow NPJ, former Justice of the High Court of Australia; Mr Justice Spigelman NPJ, former Chief Justice of New South Wales; and Mr Justice Gleeson NPJ, former Chief Justice of the High Court of Australia.

² I wish to acknowledge my gratitude to Mr Hui Sui Hang, Mr Franklin Koo and Ms Amanda Xi, Judicial Assistants in the Court of Final Appeal (2016-17), for their assistance in the preparation of this talk.

to explain a feature of our legal system that some may be unaware of and about which others may well have significant misconceptions.

4. Let me explain that third point. It is clearly not universally understood that the composition of the CFA includes a panel of overseas non-permanent judges who form part of the Hong Kong Judiciary. The status of those judges as Hong Kong judges is a matter of surprise and confusion to some unfamiliar with our legal system. Indeed, one of my three predecessors recalled being asked on the occasion when he spoke whether he was here in Hong Kong solely for the purpose of giving his speech; a reflection, no doubt, of the importance of an address to this Chapter, but a misconception nonetheless.

5. So what I propose to talk about this evening is, first, the constitution of the CFA and how it comes to consist of overseas judges at all. Then I would like to discuss the role played by the overseas judges in the CFA. Next, I shall identify the Australian judges who have been and are members of the CFA. Finally, I shall address the influence that those Australian judges have had on the jurisprudence and standing of the Court.

The constitution of the CFA

6. The constitution of the CFA will likely be old hat to those of you who are also locally qualified lawyers. But there may be some of you who are not, so it would be wrong to assume general familiarity with this topic.

7. The CFA is the final appellate court within the court system of the Hong Kong Special Administrative Region (“the HKSAR”). The Court was established on 1 July 1997, on the commencement of the Hong Kong Court of

Final Appeal Ordinance (“the Court’s founding Ordinance”),³ and it replaced the Judicial Committee of the Privy Council in London as Hong Kong’s highest appellate court after 30 June 1997. The Court hears civil and criminal appeals involving important questions of law, including in particular points of public and constitutional importance, or where leave to appeal has otherwise exceptionally been granted.

8. The jurisdiction and constitution of the CFA is to be found in the Basic Law of the HKSAR and in the Court’s founding Ordinance. Article 81 of the Basic Law provides for the establishment of the CFA and that the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the establishment of the Court. Crucially, Article 82 of the Basic Law then provides:

“The power of final adjudication of the Hong Kong Special Administrative Region shall be vested in the Court of Final Appeal of the Region, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal.”

9. The first part of that provision is arguably of greater importance, conferring on the CFA the power of final adjudication within the Region. It is that power, coupled with the three separate references in the Basic Law to exercise by the courts in Hong Kong of judicial power independently⁴ that guarantees the power and duty of the courts to exercise judicial independence including the role of constitutional review of legislative and administrative acts.

10. However, the latter part of Article 82, enabling judges from other common law jurisdictions to be invited to sit on the CFA, is also, I believe, one

³ (Cap.484).

⁴ In Articles 2, 19 and 85.

of the key factors in the success of the Court since its establishment. It also provides the starting point of the explanation how the three former speakers, each of them eminent retired Australian judges, are now also Hong Kong judges.

11. Two other provisions of the Basic Law may be mentioned.

- (1) First, Article 88 provides that the appointment of judges of the courts of the HKSAR shall be by the Chief Executive “on the recommendation of an independent commission” – this is the Judicial Officers Recommendation Commission (“JORC”).⁵
- (2) Secondly, Article 84 provides that the courts of the HKSAR shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in the Basic Law “and may refer to precedents of other common law jurisdictions”. This is a second reference to “other common law jurisdictions” in the Basic Law, expressly stating the power of the Hong Kong courts to draw on the jurisprudence of those jurisdictions.

12. Under the Court’s founding Ordinance, the Court is constituted by the Chief Justice and the permanent judges and may as required also invite other non-permanent Hong Kong judges and judges from other common law jurisdictions to sit. To hear a substantive appeal, the Court sits as a bench of five.⁶ The number of permanent judges appointed at any one time has not been more than three, so to constitute the full Court, at least one other non-permanent judge – either a non-permanent Hong Kong judge or a judge from another common law jurisdiction – is required to sit. As a matter of convention and

⁵ The Judicial Officers Recommendation Commission Ordinance (Cap.92).

⁶ Overseas NPs only sit in substantive appeals and not on the Appeal Committee, which hears applications for leave to appeal as a bench of three.

practice, except for about 10 cases (mostly heard in the early years of the court's existence and when an erupting Icelandic volcano interfered with air travel), the Court has heard all other full appeals with one overseas non-permanent judge on the panel. The practice is for an NPJ to come to Hong Kong for a stint of four weeks in the course of which the Court hears appeals during the first two weeks, leaving the latter two weeks for the writing of the judgments.

13. To be eligible for appointment as an overseas non-permanent judge, the Ordinance provides that he or she must be (i) a judge or retired judge of a court of unlimited jurisdiction in either civil or criminal matters in another common law jurisdiction; (ii) a person who is ordinarily resident outside Hong Kong; and (iii) a person who has never been a judge of the High Court, a District Judge or a permanent magistrate, in Hong Kong.⁷ Non-permanent judges hold office for terms of three years, and these terms may be extended by the Chief Executive on the recommendation of the Chief Justice.⁸

14. That overseas non-permanent judges are very much Hong Kong judges once appointed is underscored by the provisions in the Ordinance that require the Chief Executive, when acting in accordance with a recommendation of JORC to make the appointment, (i) to obtain the endorsement of the Legislative Council for that appointment and (ii) to report the appointment to the Standing Committee of the National People's Congress of the People's Republic of China in accordance with Article 90 of the Basic Law.

15. It is also reinforced by the fact that, upon taking up appointment, in practice on the first occasion on which the overseas non-permanent judge comes to Hong Kong to sit, he or she will attend before the Chief Executive to take the

⁷ (Cap.484), s.12(4).

⁸ *Ibid.*, s.14(4).

judicial oath of a Hong Kong judge to uphold the Basic Law, bear allegiance to Hong Kong and to serve it “conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit”.⁹ So it bears emphasising that the non-permanent judge, although he has acquired that status because of his pre-eminence in another common law jurisdiction, is appointed to be a Hong Kong judge and to discharge a constitutional function as such.

16. I have not personally heard reservations expressed by any Australian judge to the taking of the judicial oath, but it may amuse you to hear the recollections of Lord Millett about it. In his autobiography, he says this:

“Before I sat in Hong Kong for the first time I had to attend on the Chief Executive and take the oath of allegiance to the Special Administrative Region of Hong Kong. I was worried by this, even though I was merely swearing allegiance to a local authority. So I carefully put my British passport in my breast pocket and took the oath in the American manner with my right hand over my heart and, more importantly, over my passport.”¹⁰

17. Unlike the Chief Justice and permanent judges of the CFA, there is no retiring age for the non-permanent judges.¹¹ Similar to the position for all other judges in Hong Kong, a non-permanent judge of the CFA may only be removed

⁹ The full text of the judicial oath reads: “I swear that, in the Office of a Judge of the Judiciary of the Hong Kong Special Administrative Region of the People’s Republic of China, I will uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, bear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China, serve the Hong Kong Special Administrative Region conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit.”

¹⁰ *As in Memory Long*, Peter Millett (Wildy, Simmonds & Hill Publishing, 2015) at p.191. It is, of course, obvious from the context that Lord Millett intended this merely as a light-hearted and humorous recollection. Lord Millett has served the CFA and the HKSAR diligently and faithfully for over 17 years since he was first appointed on 28 July 2000, being the second most active NPJ after Sir Anthony Mason (to date) and contributing significantly to the jurisprudence of the Court.

¹¹ (Cap.484) s.14(3).

by the Chief Executive on the recommendation of an independent tribunal consisting of other judges.¹²

The role of the overseas judge on the CFA

18. So much for the nuts and bolts. What is the role of the overseas judge on the CFA?

19. Under the constitutional framework, as a matter of the CFA's jurisdiction, each judge has an equal say to that of the other members of the Court in the outcome of any appeal. The Court's founding Ordinance provides that: "The judgment or order which is that of the majority of the judges sitting shall be deemed to be the judgment or order of the Court."¹³ So the judgment of an overseas non-permanent judge is but one voice out of five as far as the determination of an appeal is concerned.

20. Also, as I have endeavoured to explain, the overseas non-permanent judge is, and sits on the CFA, as a Hong Kong judge. The significance of this capacity can again be illustrated by an anecdote from Lord Millett's autobiography. In it, he recalls an appeal in which the Court declined to follow a long line of English cases ruling that the court had no power to award compound interest on damages for breach of contract.¹⁴ He agreed with his colleagues who held that a Chinese businessman would never understand why he should be confined to simple interest, but included a passage in his draft judgment in which he said that, just as the Privy Council deferred to the views of the domestic courts on matters where knowledge of local conditions was relevant, so too the overseas judge should defer to the views of his colleagues

¹² BL89 & BL90; (Cap.484) s.14(8).

¹³ (Cap.484) s.16(5).

¹⁴ The case was *China Everbright-IHD Pacific Ltd v Ch'ng Poh* (2002) 5 HKCFAR 630.

on such matters. He describes being asked by Chief Justice Andrew Li to remove the passage since it would cut across his attempt to persuade the public that the CFA was a domestic court and that its overseas members sat as Hong Kong judges, not foreign judges. Lord Millett says he saw the force of this and deleted the offending passage.¹⁵

21. But the overseas non-permanent judge is, of course, much more than just another Hong Kong judge sitting as an equal member of the Court. By dint of their backgrounds, the overseas NPJs bring enormous judicial experience and wisdom to the Court. They are all judges who have had significant influence in shaping the jurisprudence of their own jurisdictions and they bring that wealth of experience to bear when they participate in the deliberations and decisions of the Court.

22. I will deal with the particular contributions of the Australian NPJs in a moment but at this stage would like to highlight four important aspects of the role of the overseas NPJ on the CFA.

23. The first aspect is the dimension of judicial experience at the level of a final appellate court. This dimension should not be under-estimated. Prior to 1997, there were no Hong Kong judges who had experience of sitting in any court here other than an intermediate court of appeal: the first Chief Justice¹⁶ had deputised in the High Court at first instance and the other three permanent judges¹⁷ had only sat as members of the Court of Appeal in Hong Kong at a time when there was no final appellate court sitting within the jurisdiction and before the development of any jurisprudence of such a court. The role and function of the CFA as a final appellate court, especially in a jurisdiction where

¹⁵ *As in Memory Long (supra)* at p.192.

¹⁶ Chief Justice Andrew Li Kwok-Nang, who was Chief Justice from 1997 to 2010.

¹⁷ Justices Litton, Ching and Bokhary.

the courts are charged with a duty of constitutional review of laws, is different to that of an intermediate court of appeal. It is not simply a second court of appeal reviewing again the decision of a trial court. Instead, it fulfils the role, at the apex of the court hierarchy, of resolving questions of law of general importance.¹⁸ This was not a capacity in which any Hong Kong judge had prior experience when the CFA was originally established and commenced operation. In contrast, the overseas non-permanent judges sitting on the Court bring this experience with them in spades. This was particularly important in the early years of the Court's existence, when it was building up its initial body of jurisprudence, in particular in constitutional law, an area in which Sir Anthony Mason has played a pre-eminent role.

24. The second aspect I would highlight is the practical ability that the Chief Justice has of assigning cases to particular non-permanent judges, in whose fields of specialty a particular case may lie. The panel of overseas non-permanent judges consists of judges who, both in practice as advocates and on the bench, have specialised in various areas of the law. It is certainly no exaggeration to say that, in many cases, their expertise in those fields is recognised worldwide. Lord Hoffmann, for example, is widely recognised as “one of the pre-eminent legal minds of his generation” in England.¹⁹ Lords Millett and Walker are widely recognised as experts in Chancery work. Similarly, as you will all know well, Mr Justice Gummow is a co-author of *Jacobs' Law of Trusts in Australia*, and *Equity: Doctrines and Remedies*, the pre-eminent text on equity in Australia. The panel of overseas non-permanent judges provides a deep pool of specialist expertise on which the Chief Justice draws when assigning particular overseas judges to particular sitting sessions of

¹⁸ *Solicitor v Law Society of Hong Kong & Secretary for Justice (Intervener)* (2003) 6 HKCFAR 570 at [27]-[30]; *HKSAR v Cheng Chee Tock Theodore* (2015) 18 HKCFAR 292 at [12]-[17], [31]-[33].

¹⁹ Quote from *Chambers & Partners 2013*, see: <http://www.brickcourt.co.uk/people/profile/lord-hoffmann>.

the Court during the year and also when the Appeal Committee grants leave to appeal and fixes hearing dates for specific cases in those particular sessions.²⁰

25. The third aspect I would highlight, which very much follows from the second, is the international dimension that the overseas non-permanent judge brings to the Court's deliberations and eventual judgment. As I have already mentioned, the Basic Law permits the courts of the HKSAR to refer to precedents of other common law jurisdictions, continuing the previous practice. Having experienced judges from some of those jurisdictions to whose precedents reference is made is an obvious and practical advantage. As I shall shortly be explaining, there are occasions when the CFA has benefitted from the presence of an Australian non-permanent judge when considering references to particular precedents from that jurisdiction. This aspect of the function of the NPIs was also alluded to by Lord Cooke of Thorndon in an early case heard by the Court as to whether the Hong Kong courts should give effect to a Taiwanese bankruptcy order. In that case, he stated that he was in full agreement with the judgment given by Mr Justice Bokhary PJ, with which the other three members of the Court also agreed. But he thought it right to add a separate judgment because of the role in the CFA of the judges from other common law jurisdictions. In particular, he said this:

“... I think that it may be inferred that, in appropriate cases, a function of a judge from other common law jurisdictions is to give particular consideration to whether a proposed decision of this Court is in accord with generally accepted principles of the common law.”²¹

26. The fourth aspect I would highlight is the demonstration of confidence both internally and externally in the independence of the Hong Kong Judiciary.

²⁰ *Tsit Wing (Hong Kong) Co Ltd v TWG Tea Co Pte Ltd* [2016] 2 HKC 157 at [4].

²¹ *Chen Li Hung & Ors v Ting Lei Miao & Ors* (2000) 3 HKCFAR 9 at 23B.

This, I believe, is a critically important role played by the overseas non-permanent judges. By their participation in the work of the CFA, and also their public statements about their own experiences as Hong Kong judges,²² the overseas non-permanent judges provide an external affirmation of real value about the independence of the Court and the Hong Kong Judiciary. It is perfectly reasonable to ask, “Would so many eminent serving²³ and retired judges have sat, and continue to sit, in a court in Hong Kong if any of them thought the system was subject to improper interference from outside agencies?” There is also what may, in crude terms, be described as the allied “canary in the coalmine” phenomenon. By this, I mean the confidence generated internally within the Court and the Hong Kong Judiciary as a whole that our judicial system is operating independently and free from outside interference.

The Australian NPJs

27. Next, a few facts and statistics about the individual Australian NPJs and their work on the CFA. These are rather dry but provide context to the discussion of the influence of those judges on the jurisprudence of the Court.

28. Since the establishment of the CFA in 1997, there have been seven judges from Australia who have served as non-permanent judges of the Court. Three current NPJs are from Australia: Murray Gleeson,²⁴ James Spigelman,²⁵ and

²² See, as a recent example, the speech of Lord Neuberger of Abbotsbury NPJ to the Hong Kong Competition Association on 13 September 2016, *The Implementation of Competition Law in Hong Kong and the Role of Judges*, at [29]: see http://www.hkcfa.hk/en/documents/publications/speeches_articles/index.html.

²³ From 1997, it has been, by agreement with the Lord Chancellor, a convention that two serving Law Lords (and now two members of the UK Supreme Court), would be available to sit as NPJs: *Hong Kong’s Court of Final Appeal*, edited by Simon N.M. Young and Yash Ghai (CUP, 2014), at p.231.

²⁴ From 1 March 2009 to date.

²⁵ From 8 April 2013 to date.

William Gummow.²⁶ The four former Australian NPs, in chronological order of appointment, are: Sir Anthony Mason,²⁷ Sir Daryl Dawson,²⁸ Sir Gerard Brennan,²⁹ and Michael McHugh.³⁰

29. Of the seven, three served as Chief Justice of the High Court of Australia, two as Chief Justice of New South Wales and six as members of the High Court of Australia. The Australian lawyers present will, I am sure, be familiar with their individual backgrounds and the details of their respective judicial careers in Australia and this is not the occasion to address their impressive biographies. For that purpose, there are various sources available ranging from the encyclopaedic *Oxford Companion to the High Court of Australia*³¹ to the more accessible potted résumés available on the CFA's website.³² These are all judges of the highest intellectual ability and no less a commentator than Lord Bingham has pointed to the High Court of Australia as the single exception to what he describes as “an almost universal article of faith” when he started practice “that English law and legal institutions were without peer in the world, with very little to be usefully learned from others”.³³

30. In terms of their Hong Kong judicial careers, the Australian judges have served as non-permanent judges for periods ranging from 3 years to 18 years. In ascending order of length of service: Sir Daryl Dawson served for 3 years, Mr Justice Spigelman and Mr Justice Gummow have each so far served for around 3½ years, Mr Justice McHugh served for 6 years, Mr Justice Gleeson has so far served for around 7½ years, Sir Gerard Brennan served for 12 years and Sir Anthony Mason for 18 years. Given that Sir Anthony retired from the

²⁶ From 8 April 2013 to date.

²⁷ From 28 July 1997 to 27 July 2015.

²⁸ From 1 September 1997 to 31 August 2003.

²⁹ From 28 July 2000 to 27 July 2012.

³⁰ From 1 July 2006 to 30 June 2012.

³¹ OUP, Sydney, 2001.

³² <http://www.hkcfa.hk/en/about/who/judges/introduction/index.html>.

³³ Tom Bingham, *The Business of Judging* (OUP, 2000) at p.88.

Court at the age of 91, it may surprise you to know that he is not the longest serving NPJ: that accolade goes to Lord Hoffmann, who to date has served as an NPJ for just over 18 years and 9 months.³⁴

31. The more significant statistics concern the number of appeals heard by each of the Australian judges and the number of judgments they have written.³⁵ As to these, again in ascending order:

- (1) Sir Daryl Dawson heard 4 appeals, writing 1 concurring opinion;
- (2) Mr Justice Spigelman has so far heard 7 appeals, writing or joining in 3 leading majority opinions³⁶ and writing 1 concurring opinion;
- (3) Mr Justice Gummow has so far heard 6 appeals, writing 2 leading majority opinions;
- (4) Mr Justice McHugh heard 10 appeals, writing 1 leading majority opinion and 2 concurring opinions;
- (5) Mr Justice Gleeson has so far heard 19 appeals, writing or joining in 5 leading majority opinions and writing 2 concurring opinions;
- (6) Sir Gerard Brennan heard 21 appeals, writing or joining in 5 leading majority opinions and writing 2 concurring opinions; and
- (7) Sir Anthony Mason heard 106 appeals, writing or joining in 34 leading majority opinions and writing 8 concurring opinions.

³⁴ Lord Hoffmann was first appointed on 12 January 1998.

³⁵ In compiling these statistics, the data for the period 1997-2010 has been taken from Table 11.5 in *Hong Kong's Court of Final Appeal* (CUP, 2014), at p.266. The figures in that table have been updated for the period 2011 to date.

³⁶ Leading majority opinions being judgments reported in the Hong Kong Court of Final Appeal Reports (HKCFAR).

32. Given the number of NPJs on the panel of available judges to sit with the CFA and depending on their individual availability, each NPJ will tend to sit once every 12 to 18 months or so. As you will probably have gleaned from the statistics, the glaring exception to that rule is Sir Anthony Mason who has to date sat more frequently, and in the greatest number of CFA appeals, than any other NPJ. I doubt there was any particular expectation or plan that this would happen since no one could have known what cases would come before the Court when it was established. But Sir Anthony Mason's interest and pre-eminence in constitutional law will have made him an obvious choice to hear cases in that field. Since many of the cases in the first decade or so of the CFA's existence involved important constitutional issues, Sir Anthony was simply invited to sit more often than other NPJs.

33. That, of course, is not to diminish the contribution of any of the other Australian NPJs, which collectively has been significant in other ways, so I would like now to examine how the various Australian NPJs have influenced the CFA's jurisprudence and its standing.

How the Australian NPJs have influenced the Court's jurisprudence

34. The standing of any court and its jurisprudence is primarily, if not solely, to be measured by the quality of its judgments and it is in this respect that the overseas NPJs make their most direct and important contribution to the work of the Court. There are two ways in which they do so: first and foremost in writing a judgment; and secondly, in collegiate discussions contributing to a judgment written by another member of the Court.

35. A commentary of the leading judgments of the CFA written by its Australian NPJs can conveniently be sub-divided, rather like financial markets. So we can consider first “Asia Pacific ex. Japan” – or, all those judgments excluding Sir Anthony Mason’s. Judgments by those Australian NPJs have become the leading judgments in Hong Kong in various fields of law, including these:

- (1) In environmental law, in relation to the power to impose limits under the Noise Control Ordinance³⁷ and the constitutionality of such limits³⁸ and in relation to the operation of the Environmental Impact Assessment Ordinance³⁹ and the scope and exercise of the power of approval of an environmental impact assessment report;⁴⁰
- (2) In revenue law, as to the indicia of carrying on a trade and of carrying on a business;⁴¹
- (3) In relation to the law of contempt, on the approach to proof of civil contempt;⁴²
- (4) In criminal law relating to the offence of money laundering: on the *actus reus*⁴³ and *mens rea*⁴⁴ of the offence and also on the issue of duplicity in relation to the offence;⁴⁵

³⁷ (Cap.400).

³⁸ *Noise Control Authority & Anor v Step In Ltd* (2005) 8 HKCFAR 113 (judgment of Sir Gerard Brennan NPJ).

³⁹ (Cap.499).

⁴⁰ *Shiu Wing Steel Ltd v Director of Environmental Protection & Airport Authority (No.2)* (2006) 9 HKCFAR 478 (Court’s joint judgment to which Sir Gerard Brennan NPJ contributed).

⁴¹ *Lee Yee Shing v Commissioner of Inland Revenue* (2008) 11 HKCFAR 6 (judgment of McHugh NPJ).

⁴² *Kao, Lee & Yip v Koo Hoi Yan* (2009) 12 HKCFAR 830 (judgment of Sir Gerard Brennan NPJ).

⁴³ *Oei Hengky Wiryo v HKSAR (No.2)* (2007) 10 HKCFAR 98 (judgment of McHugh NPJ); *HKSAR v Yeung*, unrep., FACC 5 & 6/2015 and FACC 1/2015 (Heard Together), Judgment dated 11 July 2006 (Court’s joint judgment to which Gleeson NPJ contributed).

⁴⁴ *HKSAR v Pang Hung Fai* (2014) 17 HKCFAR 778 (judgment of Spigelman NPJ); *HKSAR v Yeung* (*supra*).

- (5) In building and construction law, in relation to the nature of the duty imposed on the proprietor of an undertaking in respect of the safety of employees under the Factories and Industrial Undertakings Ordinance;⁴⁶
- (6) In company law, in relation to the duty of a director towards an insolvent company in not prejudicing the interests of creditors and preserving the company's assets and the equitable remedies that a company might pursue for breach of such duty;⁴⁷ and
- (7) In the law of intellectual property, on the scope of the remedy for passing off and the correct approach to a claim for infringement of trade mark under the Trade Marks Ordinance.⁴⁸

36. This list, I hasten to add, is simply illustrative of the wide range of cases in which the Australian NPs have contributed to the work of the Court by the writing of judgments. If we now examine the contribution of Sir Anthony Mason to that body of jurisprudence, we will see that his influence is felt in virtually all areas of the law and in particular in the field of constitutional law. Sir Anthony's judgments (or his contribution to jointly authored judgments) in numerous CFA cases are recognised both within Hong Kong and in some cases beyond this jurisdiction⁴⁹ as leading judgments. Amongst the many

⁴⁵ *HKSAR v Yeung (supra)*.

⁴⁶ (Cap.59); *HKSAR v Gammon Construction Ltd* (2015) 18 HKCFAR 110 (judgment of Gleeson NPJ).

⁴⁷ *Moulin Global Eyecare Holdings Ltd v Olivia Lee Sin Mei* (2014) 17 HKCFAR 466 (judgment of Gummow NPJ).

⁴⁸ (Cap.559) s.18(3); *Tsit Wing (Hong Kong) Co Ltd v TWG Tea Co Pte Ltd (No.2)* (2016) 19 HKCFAR 20 (judgment of Gummow NPJ).

⁴⁹ See the discussion of this topic generally in *Hong Kong's Court of Final Appeal* (CUP, 2014) at Chapter 22.

constitutional law cases on which he has written or contributed are cases dealing with the following issues:

- (1) The approach to interpretation of the Basic Law and the constitutional duty of the courts of the HKSAR to examine whether legislation or acts of the executive authorities are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid;⁵⁰
- (2) The effect of an interpretation of a provision of the Basic Law by the Standing Committee of the National People's Congress under Article 158(1) of that law;⁵¹
- (3) The scope of the Court's duty to refer a question of interpretation to the Standing Committee of the National People's Congress under Article 158(3) of the Basic Law⁵² and also on the question of the scope of state immunity applicable in the HKSAR;⁵³
- (4) The common law offence of misconduct in public office and the principle of legal certainty mandated by the phrase "prescribed by law" in Article 39(2) of the Basic Law;⁵⁴
- (5) The freedom of assembly and freedom of speech and the approach of the courts to the constitutionality of restrictions on those rights applying the proportionality test;⁵⁵

⁵⁰ *Ng Ka Ling v The Director of Immigration* (1999) 2 HKCFAR 4, Li CJ's judgment being expressed to be the unanimous judgment of the Court: at p.12.

⁵¹ *Lau Kong Yung v The Director of Immigration* (1999) 2 HKCFAR 300.

⁵² *The Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, Li CJ's judgment being expressed to be the unanimous judgment of the Court: p.215; *Democratic Republic of the Congo v F.G. Hemisphere Associates LLC (No.1)* (2011) 14 HKCFAR 95.

⁵³ *Democratic Republic of the Congo v F.G. Hemisphere Associates LLC (No.1)* (*supra*).

⁵⁴ *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381.

- (6) The methodology for interpretation of provisions of the Basic Law purposively by reference to theme of continuity;⁵⁶
- (7) The distinction between an order according temporary validity to a statute held to be unconstitutional and an order temporarily suspending (or suspending the effect of) a declaration of invalidity of an unconstitutional statute and the Court's power to make such orders;⁵⁷
- (8) The constitutionality of reverse onus provisions, which were held not to be proportionate restrictions on the constitutional rights engaged if persuasive but not if evidential, and the Court's ability to give a remedial interpretation to a statute by reading the provisions as imposing the latter;⁵⁸
- (9) The offence of conspiracy to defraud and whether it is formulated with sufficient precision to satisfy the principle of legal certainty;⁵⁹
- (10) The Court's ability to strike down a legislative provision that did not itself infringe constitutional rights but the operation of which resulted in violations of such rights, so as to achieve a result that best conformed with the legislative intent of the impugned legislation and to render it constitutional as far as possible;⁶⁰ and

⁵⁵ *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229.

⁵⁶ *Secretary for Justice v Lau Kwok Fai* (2005) 8 HKCFAR 304.

⁵⁷ *Koo Sze Yiu v Chief Executive of the HKSAR* (2006) 9 HKCFAR 441.

⁵⁸ *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574; *HKSAR v Hung Chan Wa* (2006) 9 HKCFAR 614.

⁵⁹ *Mo Yuk Ping v HKSAR* (2007) 10 HKCFAR 386.

⁶⁰ *Koon Wing Yee v Insider Dealing Tribunal* (2011) 14 HKCFAR 170.

(11) The ambit of a legislator’s right to participate in legislative processes under Article 73(1) of the Basic Law and the principle of non-intervention by the courts in such processes.⁶¹

37. In addition to the considerable body of Hong Kong constitutional law to which Sir Anthony Mason has contributed, he has also written judgments on issues of criminal evidence and procedure,⁶² admiralty law,⁶³ administrative law,⁶⁴ revenue law,⁶⁵ land law,⁶⁶ rating,⁶⁷ contract law⁶⁸ and arbitration.⁶⁹

38. The second way in which the Australian NPJs influence the jurisprudence of the Court, that is by way of collegiate discussions leading to the Court’s decisions, is more abstract but nevertheless very real. This is an indirect way in which the Australian NPJs shape the eventual judgment or judgments that decide a particular appeal. The CFA has been described, accurately, by the former Chief Justice as a “collegiate” court⁷⁰ and this involves extensive discussion of a case before, during and after a hearing amongst the participating judges. Even if they are not writing, the NPJs all contribute to a greater or lesser extent in each appeal.

⁶¹ *Leung Kwok Hung v President of the Legislative Council* (2014) 17 HKCFAR 689.

⁶² *Chim Hon Man v HKSAR* (1999) 2 HKCFAR 145, on the admissibility of evidence of multiple acts of an offence where only one specific offence of is charged; *HKSAR v Lee Ming Tee & SFC* (2003) 6 HKCFAR 336, on the prosecution’s duty of disclosure to the defence of relevant material.

⁶³ *Re Resource 1* (2000) 3 HKCFAR 187, on the scope of the Admiralty jurisdiction.

⁶⁴ *Ng Siu Tung v The Director of Immigration* (2002) 5 HKCFAR 1, on the doctrine of substantive legitimate expectation.

⁶⁵ *Shiu Wing Ltd v The Commissioner of Estate Duty* (2000) 3 HKCFAR 215, on the application of the *Ramsay* principle in relation to tax avoidance transactions and the need to treat this both as a rule of statutory construction and an approach to the analysis of the facts.

⁶⁶ *Chi Kit Co Ltd & Anor v Lucky Health International Enterprise Ltd* (2000) 3 HKCFAR 268, on the question of whether an owner’s liability to meet a contribution to the incorporated owners constituted a defect in title.

⁶⁷ *Commissioner of Rating & Valuation v Agrila Ltd & Ors* (2001) 4 HKCFAR 83, on the assessment of rent during a period of construction and development.

⁶⁸ *Big Island Construction (HK) Ltd v Wu Yi Development Co Ltd* (2015) 18 HKCFAR 364, on whether *Seldon v Davidson* should be followed in Hong Kong.

⁶⁹ *Hebei Import & Export Corp. v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111, on the enforcement in Hong Kong of a CIETAC arbitration award made in Beijing and affirming the international norm for enforcing international commercial arbitration awards.

⁷⁰ *Hong Kong’s Court of Final Appeal* (CUP, 2014) at p.260.

39. The area in which the Australian NPJs particularly contribute in a way other NPJs are less obviously able to is in relation to the citation of comparative law from Australia. The important place of comparative law in the development of the jurisprudence of Hong Kong has been recognised, in particular in an article written by Sir Anthony Mason to commemorate the 10th anniversary of the establishment of the HKSAR.⁷¹ As Sir Anthony has separately noted, there is a strategic advantage in referring to authorities in other jurisdictions since external impressions of Hong Kong judicial decision-making may be important for its reputation and standing in the international commercial world.⁷² The Australian NPJs are necessarily best placed to offer insights as to the relevance of any Australian case or legislation cited to the Court.

40. Indeed, a recent example of a case in which Australian authority, as interpreted by an NPJ from Australia, has been decisive is the recent case of *Big Island Construction (HK) Ltd v Wu Yi Development Co Ltd*.⁷³ In that case, the plaintiff claimed the repayment of sums of money on the basis that they were loans. Relying on the English case of *Seldon v Davidson*,⁷⁴ the plaintiff argued that the burden of proof rested on the defendant to show a basis for retaining the monies that had been paid to it. Sir Anthony Mason, with whom the majority of the other members of the Court agreed, held that *Seldon v Davidson* was wrongly decided in two respects and should no longer be followed in Hong Kong: first, in relation to the imposition of a resulting trust, it was unjustified by reference to principle and authority in both England and Australia;⁷⁵ secondly,

⁷¹ *The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong* (2007) 37 HKLJ 299.

⁷² *Sitting as Non-Permanent Judge in the Court of Final Appeal for the past 16 years: a speech given by Sir Anthony Mason to the Hong Kong Judicial Institute, 25 October 2013.*

⁷³ (2015) 18 HKCFAR 364.

⁷⁴ [1968] 1 WLR 1083.

⁷⁵ (2015) 18 HKCFAR 364 at [91]-[98] by reference, in the case of Australian authority to: *Jacobs' Law of Trusts in Australia* (7th Ed., 2006) p.1210; *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353; *Napier v Public Trustee (Western Australia)* (1980) 32 ALR 153; and *Calverley v Green* (1984) 155 CLR 242.

the reasoning in relation to the proposition that the payment of money *prima facie* imported an obligation to repay it was inconsistent with earlier English authority and Australian authority.⁷⁶

41. There have been many other CFA cases in which Australian authority has been cited and considered and even preferred. For example, in *Tang Siu Man v HKSAR (No.2)*,⁷⁷ the Court (sitting with Sir Daryl Dawson) declined, by a majority, to follow English authority and chose instead to follow the approach in Australia and other common law jurisdictions as to a trial judge's discretion whether to give a direction whenever evidence of good character is adduced; and, in *Solicitor (24/07) v Law Society of Hong Kong*,⁷⁸ the Court (sitting with Sir Anthony Mason) declined to follow *Young v Bristol Aeroplane Ltd*,⁷⁹ as to the Court of Appeal being bound by its own decisions, thereby putting Hong Kong in line with other jurisdictions such as Australia where that rule has not been adopted.⁸⁰

42. A notable and unusual example of the consideration of Australian authority is the tax case of *Lee Yee Shing v Commissioner of Inland Revenue*. In that case, Mr Justice McHugh cited an Australian Law Journal article and considered over a dozen Australian cases specifically dealing with the indicia of the carrying on of a business of betting, none of which were mentioned in any of the other judgments.⁸¹ Such lengthy unilateral consideration of Australian

⁷⁶ (2015) 18 HKCFAR 364 at [101]-[109] by reference, in the case of Australian authority to: *Heydon v The Perpetual Executors, Trustees and Agency Co (WA) Ltd* (1930) 45 CLR 111 and *Joaquin v Hall* [1976] VR 788.

⁷⁷ (1997-98) 1 HKCFAR 107.

⁷⁸ (2008) 11 HKCFAR 117.

⁷⁹ [1944] KB 718.

⁸⁰ See also, *Lee Fuk Hing v HKSAR* (2004) 7 HKCFAR 600, where the Court preferred the reasoning of the High Court of Australia in *Petty & Anor v R* (1991) 55 A Crim R 322, refusing to follow English authority which had drawn a distinction between the exercise of an accused of his right to silence leading to an inference of guilt and the failure of an accused to advance an explanation later relied upon at trial as relevant to his credibility.

⁸¹ (2008) 11 HKCFAR 6 at [91]-[97].

cases by an Australian NPJ tends, though, to be the exception rather than the rule.

43. Another clear illustration of the contribution of our Australian judges to the Court's understanding of Australian case law is provided in a case involving a constitutional challenge to the time limit for commencing an election petition.⁸² In his judgment in that case, Ma CJ referred to reliance that was placed on a number of Australian authorities to support a contention that time provisions only defined the limits of jurisdiction.⁸³ Hence, it was sought to contend that the time limits in that case did not substantively interfere with the right to access to the courts in Article 35 of the Basic Law. In his judgment, Ma CJ said this:

“38. In the course of argument, it was pointed out by Mr Justice Gleeson NPJ, who it must be noted was the former Chief Justice of the High Court of Australia, that those cases were not concerned with any consideration of a constitutionally declared right of access to the courts. There is no equivalent in the Australian Constitution to Article 35 of the Basic Law although s.75(v), which directly confers on the High Court original jurisdiction to issue constitutional writs against an officer of the Commonwealth, is a mainstay of the capacity of the judicial arm of government to enforce the rule of law. Those cases were more to do with the power vested in the Australian Parliament to make laws conferring jurisdiction on the courts. ...

39. This is the distinguishing feature in the Australian cases to which we have been referred and it is in my view a critical distinction. In Hong Kong, where Article 35 of the Basic Law articulates this right, the approach of the court will be different. ...”

⁸² *Leung Chun Ying v Ho Chun Yan Albert* (2013) 16 HKCFAR 735.
⁸³ *Ibid.* at [37].

44. It is, one would hope, unlikely the Court would not have reached the same view even if unaided by an Australian NPJ, but I think it safe to say that Mr Justice Gleeson’s presence on the bench for that appeal would have considerably foreshortened the time occupied in oral argument in considering those particular Australian authorities.

Contributions of the Australian NPJs to the standing of the Court

45. Finally, as well as influencing and contributing to the jurisprudence developed by the CFA, the Australian NPJs have also contributed positively to the standing of the Court and the independence of the Judiciary.

46. As to the latter, I have earlier mentioned how the non-permanent judges provide reassurance that Hong Kong continues to be served by an independent judiciary. Another of Sir Anthony Mason’s specific contributions to maintaining the independence of the Hong Kong Judiciary was his authorship, in 2003, of the *Consultancy Report: System for the Determination of Judicial Remuneration*.⁸⁴ This report was produced following the Administration’s introduction of the Accountability System in 2002 and made various recommendations concerning the regulation of judicial pay and, importantly, a prohibition on its reduction. This report led to a review of the mechanism for determination of judicial remuneration in 2008, premised on the need to uphold the principle of judicial independence.

47. As well as this, over the years, the Australian NPJs have contributed very positively by “flying the flag” for the CFA. This has been done both within and outside Hong Kong to the great benefit of the Court and raising its profile

⁸⁴ http://www.judiciary.gov.hk/en/publications/consultancy_report_e.pdf

overseas. In a Melbourne Journal of International Law article,⁸⁵ Sir Anthony Mason described the constitutional role of the Court and similarities and differences between the judicial systems of Hong Kong and other common law jurisdictions. As to the similarities, he said this: “Sitting as a judge in the CFA is no different from sitting as a judge in the High Court of Australia, with the exception that the faces and the accents are different.” As to the differences, he commented, naturally, on the provisions of Article 158 of the Basic Law.

48. That theme was revisited by Sir Anthony in an article by him in the Sydney Law Review⁸⁶ after the *Congo* judgment in which the Court referred a question of interpretation of the Basic Law to the Standing Committee of the National People’s Congress pursuant to Article 158(3) of the Basic Law. Sir Anthony referred to the distinction drawn in the Basic Law between the power of final adjudication and that of final interpretation and commented that this approach marked a departure from the traditional separation of powers integral to the rule of law. However, his conclusion was that despite the tensions inherent, Article 158 is an ingenious link between two legal systems and debate of the rule of law in Hong Kong must proceed from the centrality of Article 158.

49. In an article in the Southern Cross University Law Review, Sir Anthony included a reflection, in the context of a discussion of the argument for joint judgments in the High Court of Australia, on the practice in the CFA of seeking to arrive at an agreed judgment and that he adjusted to this practice, which is more rigid than that in Australia, “because it involves more continuous discussion between the judges than occurred in the High Court”. He

⁸⁵ *The Hong Kong Court of Final Appeal* (2001) 2 MJIL 216.

⁸⁶ *The Rule of Law in the Shadow of the Giant* (2011) 33(4) Sydney Law Review 623.

commented that the collegiality and practice of the CFA “has a lot to commend it”.⁸⁷

50. In recent talks given to the Hong Kong Judicial Institute, Sir Anthony Mason has reflected on “Sitting as [a] Non-Permanent Judge in the Court of Final Appeal for the past 16 years”,⁸⁸ Mr Justice Gummow spoke on the subject of “The Strengths of the Common Law”⁸⁹ and Mr Justice Spigelman has given an address on “Institutional Integrity and Public Law”.⁹⁰ Through these various speaking engagements, the Australian NPs raise awareness of their role as members of the CFA and make a material contribution to the development of the law in Hong Kong.

51. In addition, although none of the Australian NPs are still sitting members of courts in Australia, it is an inevitable by-product of their continuing judicial careers here in Hong Kong that, in discussions on matters of law with their former colleagues and legal connections in Australia, they are likely to refer to any relevant decisions of the CFA and thereby propagate the jurisprudence of the Court in Australian legal circles.

52. Finally, it is worth mentioning that the judicial contacts between Hong Kong and Australia that have developed since the establishment of the CFA has led to Hong Kong judges being included in a biennial judicial colloquium between final appellate judges from Australia, Canada and New Zealand. The last colloquium was held in Hong Kong and coincided with the ceremonial opening of the new Court of Final Appeal Building next door.⁹¹ This judicial

⁸⁷ *The High Court of Australia – Reflections on Judges and Judgments* (2013) 16 Southern Cross University Law Review 3 at 14-15.

⁸⁸ http://www.hkcfa.hk/en/documents/publications/speeches_articles/index.html, speech dated 25.10.13.

⁸⁹ http://www.hkcfa.hk/en/documents/publications/speeches_articles/index.html, speech dated 10.7.14.

⁹⁰ http://www.hkcfa.hk/en/documents/publications/speeches_articles/index.html, speech dated 30.10.14.

⁹¹ The papers presented at the Colloquium are available on the CFA’s website at www.hkcfa.hk under “Documents” and “Publications”, at “List of Speeches/Articles”.

dialogue between the four jurisdictions is clearly beneficial and ensures that Hong Kong is kept firmly on the map of the common law world.

Conclusion

53. I would conclude by stating the obvious. It is to Hong Kong's great advantage that we have distinguished Australian judges participating in the work of the CFA as overseas non-permanent judges. Their influence, collectively, on the development of the law of Hong Kong since 1997 has been immense. What they derive from their participation is a matter you will have to ask them. But, from a Hong Kong judge's point of view, it is a privilege and a pleasure to sit with them and I have no doubt we owe our Australian colleagues a great deal of respect, admiration and gratitude.

54. Thank you for your attendance this evening.

3rd November 2016