"IT IS TRITE AND ANCIENT LAW": THE HIGH COURT AND THE USE OF THE OBVIOUS

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INTRODUCTION

To be trite is to be worn out by constant use or repetition, or to be hackneyed or commonplace.[1] The word "trite" is derived from the Latin word *terere* meaning essentially "to rub". Thus, the word has physical associations, as if a trite remark actually erases its own origins because they are of no use anymore. Obviously the more used something is, the more trite it becomes, or so one would expect. There is even a built-in pejorative connotation, as to overuse a phrase, or resort to trite propositions can, in some cases, "rub" the listener the wrong way.

Since the very humble beginnings of the common law courts, judges have identified law that is trite. In the 15th century, Chief Justice Brian, in a case known only as *T Pasch's case*, said, in words that have since rung down the centuries:

> Moreover...your having it in your own mind is nothing, for it is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is.[2]

As the common law continues to grow, and as ever more judicial decisions are available in both reported and unreported form, this use of triteness as a legal principle will no doubt continue unabated. But what is it? Where can one go to determine what the state of trite law is? On its own, the phrase may constitute a form of legal knowledge, but without more rigorous analysis of what it means, when it is used, and what it stands for, little of that knowledge can be passed down through generations.

This paper attempts to redress this failing in part. It provides an overview of the High Court's use of the phrase as a first step in gaining understanding in this little known area of law, by examining the uses of "trite" and "trite law" since the 1947 High Court decision of *Nelungaloo Pty Ltd v The Commonwealth*.[3] It then attempts to peer into

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1 *Shorter Oxford English Dictionary* (3rd ed 1975).

2 (1478) 17 Edw. IV, Yearbooks, 2. This citation is actually taken from a decision by Lord Blackburn in *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666 at 692. I have been unable to locate the original case.

3 (1948) 75 CLR 495. The first High Court case in which "trite" has been found is *Federal Commissioner of Taxation v Australian Tesselated Tile Co* (1925) 36 CLR 119. However, as the

the deeper meanings of triteness, looking at its place in the common law system of justice. The paper concludes with a hopeful glance towards the future of trite law in Australia.[4]

"TRITE" IN THE HIGH COURT

Facts and figures

Since 1947[5] the High Court has employed the word "trite" in aid of legal doctrine 74 times.[6] On 31, or 41.9 per cent of these occasions, the word was used on its own; 35 times, or 47.3 per cent, it was used in the phrase "trite law";[7] and in 8 instances, or 10.8 per cent, it was drawn from another source as a quote (see Table 1). In all but two instances, the term was clearly meant to apply to a legal principle or doctrine.[8]

This is higher than in some other common law countries. During the period from 1947 to date, the High Court rendered approximately 3600 published decisions, so trite

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Austlii High Court database begins in 1947, this discussion is restricted to cases from this date onwards.

4 No paper of this type would be complete without acknowledging the vast changes wrought by computers and electronic search tools in the field of legal scholarship. Without the ability to search for specific phrases in the thousands of High Court cases decided since 1947, it would probably have been both soul destroying and mind-numbingly tedious to track down all the references to trite law. But there is caution in every tale, and it should be noted that, whereas electronic searching is unmatched for this kind of precise word or phrase searching, it can be much less effective for conceptually-based research, where arguments for the superiority of paper-based researching are still strong. For more on this debate see E Katsh, *Law in a Digital World* (1994) and R Haigh, "What Shall I Wear to the Computer Revolution: Some Thoughts on Electronic Researching in Law" (1997) 89 *Law Library Journal* 245.

5 The Austlii database is stated to include full text High Court judgments from 1947 onwards. In searching the database for this paper, two full text cases from 1925 were obtained which contained "trite", *Pirrie v McFarlane* (1925) 36 CLR 170 and *Federal Commissioner of Taxation v Australian Tesselated Tile Co* (1925) 36 CLR 119. These two cases have not been included in the total. Queries to Austlii as to this anomaly resulted in its acknowledgment that some stray pre-1947 cases may be found on the database.

6 The Austlii database returned 69 uses of "trite" since 1947. The same search on the Lexis Australian caselaw database returned an additional 5 cases for a total of 74. This discrepancy is another instructive example of the fallibility of computer databases.

7 This is a strict reading—to qualify, the word "trite" has to modify law or a distinct body of law, so that it ultimately forms a corpus of law characterised as "trite law". For example, in *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 315, Brennan J stated "All of this is established, if not trite, constitutional law." Here "trite" is modifying "constitutional law", so it qualifies as an instance of the body of law known as trite law. Similarly in *Thompson v The Queen* (1989) 169 CLR 1 at 19, Brennan J said "it is trite and ancient law...". In this case, his Honour was referring again to that specific corpus of law known as trite law.

8 The two occurrences, where the use of "trite" is arguably meant non-legally or as a form of colloquial speech, rather than a particularly legal usage, are in *Bartter's Farms Pty Ltd v Todd* (1978) 139 CLR 499 at 510 per Gibbs J: "It is trite to say that the deceptively simple words of s 92 conceal many difficulties..." and in *Commissioner for Railways (NSW) v Anderson* (1961) 105 CLR 42 at 55 per Fullagar J: "A trite example is that of an invitee who walks up a garden path in daylight...". Even in these examples, however, there is a definite link to a legal proposition.

is represented in 2.06 per cent of the decisions made. By comparison, the House of Lords has used trite only 47 times since 1947,[9] and the United States Supreme Court has used the word or phrase, one could say almost reproachfully, a lowly total of 10 times since 1947, and only 27 times in its almost 300 year history. Interestingly, the Canadian Supreme Court has, in the same period, decided approximately 5400 cases, and used trite in 131, for a rate of 2.43 per cent.[10] Could it be that two of the more successful Commonwealth colonies have set their own post-colonial course by developing an expertise in the little known area of trite law?

The use of trite in Australia has also grown over time, as one might expect in a system of common law built upon precedent. Table 1 shows that, with the exception of 1970-1974, there has been steady growth since the 1940s. Although its use peaked in the period 1985-1989, this is due largely to the anomalous year of 1986, where it was used a total of five times, four of those by Gibbs CJ alone. In all, the last two decades have seen its use significantly increase over that of the decades of the 1940s, 50s and 60s.

Table 1: Use of Trite by Year, 1947-1999[11]

Years	Used "Trite"	Used "Trite Law"	Quoted from other source	Total
1947[12]-49	1	2	0	3
1950-54	1	0	0	1
1955-59	1	3	0	4
1960-64	3	2	0	5
1965-69	7	2	0	9
1970-74	2	1	0	3
1975-79	3	8	1	12
1980-84	2	7	1	10
1985-89	5	4	2	11
1990-94	1	4	3	8
1995-99	5	2	1	8
Total	31	35	8	74

Table 2 is a breakdown of the top ten years in which trite has been used. As expected, the majority of these are in the latter part of the century. In fact, four out of

Source: Lexis, English and Wales cases file.

0 The Supreme Court of Canada web-based database gives full text judgments from 1989 only, pointing to the superiority of Austlii's internet system. This could be due to the earlier development in North America of private electronic databases such as Lexis and Quicklaw, which began in the late 1960s and quickly developed a monopoly over electronic case reports. These private databases generally cover the entire history of the court: in the SCC's case, from 1876, and the USSC from 1705.

1 Source: Lexis, Australia High Court Decisions and Austlii's Commonwealth: High Court of Australia decisions file.

2 Austlii's and Lexis' High Court Decisions files begin in 1947.

the top ten have taken place since 1985. Again, in this the High Court sits comfortably in the middle of the common law pack.

On no occasion has the High Court used trite more than once in a single decision. Compare this with the more prolific and reckless Supreme Court of Canada. Their high water mark occurred in *Brissette Estate v Westbury Life Insurance Co; Brissette Estate v Crown Life Insurance Co*[13] where the words appeared four times in a single judgment! There, Gonthier and Cory JJ, in a joint judgment, twice quoted instances of the Court's earlier forays into trite law and twice developed their own specific brand of trite law. In contrast, the High Court has been more restrained, only once, in 1969, venturing to string together a trite succession. Two cases, decided five days apart, *Brooks v Burns Philip Trustee Co Ltd*[14] and *Olsson v Dyson*[15] both employed the phrase, although in defence of the Court, different judges were involved.

Table 2: Years in which Trite appears 3 or more times

Year	Number	Judges
1986	5	**Gibbs CJ (4), Deane J (1)**
1968	4	**Kitto J (2), Windeyer J (2)**
1977	4	**Aickin J (2), Gibbs J (1), Jacobs J (1)**
1980	4	**Aickin J (2), Gibbs J (1), Stephen J (1)**
1991	4	**Brennan J (1), McHugh J (2), Toohey J (1)**
1969	3	**Taylor J (1), Windeyer J (2)**
1978	3	**Barwick CJ (1), Aickin J (1), Gibbs J (1)**
1981	3	**Barwick CJ (1), Aickin J (1), Mason J (1)**
1985	3	**Gibbs CJ (2), Mason ACJ/Wilson J/ Brennan J/Deane J/DawsonJ (1)**
1997	3	**Kirby J (2), McHugh J (1)**

Not only is trite law becoming more widespread, but it is seemingly without legal boundaries. Table 3 shows the breakdown of decisions into specific subject areas.[16] These are not necessarily the categories under which the case is indexed, but rather the area to which the trite proposition related. As would be expected from a court with a limited and exclusive jurisdiction, there is a greater emphasis on public law matters, such as constitutional and administrative law, and on interpretation issues relating to statutes or legal words and phrases. Where trite law is found more infrequently is in private law areas such as trusts, wills, and, somewhat surprisingly, corporations law.

13 [1992] 3 SCR 87.

14 (1969) 121 CLR 432 at 441 per Taylor J (5 March 1969).

15 (1969) 120 CLR 365 at 386 per Windeyer J (28 Feb 1969).

16 Of course, standard categorisation can itself be problematical—see R Delgado and J Stefancic, "Why do we Tell the Same Stories? Law Reform, Critical Librarianship and the Triple Helix Dilemma" (1989) 42 *Stanford LR* 207; R Haigh, above n 4.

Table 3: Category of Use

Legal Category	Number of Occurrences[17]
Administrative	5
Constitutional	16
Contract	9
Corporations	1
Criminal	5
Damages	7
Evidence	9
Family	2
Industrial	1
Intellectual Property	2
Legal Practice/Procedure	13
Negligence	6
Partnerships	2
Property and Land	3
Statutory Interpretation[18]	9
Tax	3
Trusts	1
Wills	1
Words and Phrases	16

Of additional interest is an individual judge's usage patterns. There is very little uniformity. Some judges are much more prone to using trite than are other judges. Table 4 lists all the judges using it since 1947, either in individual judgments or jointly. As can be seen, Gibbs and Windeyer JJ used it most frequently. In contrast, Dixon CJ and Owen J only used the phrase once, in both cases in a jointly rendered judgment. Of all appointees since 1947, only Murphy and Walsh JJ never used the term at all.[19]

17 Due to some overlap of categories, the total adds up to more than 69.

18 This includes interpretation of all statutes as well as the Constitution.

19 Ignoring, of course, Gleeson CJ and Callinan JJ, who have not referred to it as yet, but are still active and too new to render a decisive opinion on the point.

Table 4: Individual Breakdown of Judges[20]

Judge	Individual	Joint	Total[21]
Rich	2	0	2
Dixon	0	1	1
McTiernan	0	2	2
Williams	1	1	2
Webb	0	2	2
Fullagar	3	1	4
Kitto	4	0	4
Taylor	1	2	3
Menzies	1	0	1
Windeyer	9	1	10
Owen	0	1	1
Barwick	2	1	3
Gibbs	14	3	17
Stephen	1	1	2
Mason	2	2	4
Jacobs	1	0	1
Aickin	7	0	7
Wilson	0	2	2
Brennan	5	3	8
Deane	1	2	3
Dawson	2	1	3
Toohey	1	1	2
Gaudron (to date)	1	1	2
McHugh (to date)	4	2	6
Kirby (to date)	3	1	4
Gummow (to date)	0	1	1
Hayne (to date)	1	0	1
TOTALS	66	32	98

A noteworthy observation, and one for which there is no ready explanation, is the disparity between the 66 individual uses of trite and the relatively low level of 32 joint instances (representing only 8 separate decisions). It may be that the tendency to show a bit of individuality or rebelliousness is tempered in a group, but one could argue equally forcefully that joint judgments should, by their nature, be less controversial,

20 Source: Lexis and Austlii files, above n 11.

21 The total is greater than 74 due to multiple counting of individual judgments.

and therefore more likely to rely on well-established, trite principles of law. Further research is warranted, particularly quantitative comparisons with Canada, where proportionately more joint judgments are rendered, yet triteness is prevalent.[22]

As shown, Justice Gibbs was by far the biggest advocate of the well-placed trite. In the 17 judgments in which he used the term, eight were when he was Chief Justice, which commenced in 1981; three were rendered in joint judgments with others (both as a puisne judge and as the Chief Justice); and six occurred as individual judgments when he was a puisne judge.[23]

Gibbs J was promoted to the High Court in 1970 from the Federal Bankruptcy Court and the Supreme Court of the Australian Capital Territory. In his first year at the High Court, he joined in judgment with Barwick CJ, McTiernan, Windeyer and Owen JJ in *Buckley v Tutty*[24] where they stated "but it is immaterial whether that is so, for it is now trite to repeat what Lord Atkin said in *Hepworth Manufacturing Co Ltd v Ryott*..."[25] After this inauspicious beginning,[26] Gibbs J made a few forays into the world of trite law in the mid-1970s before hitting his stride later on in the decade. From 1976 to 1986 he used it 13 times; five of those were in his final year. From 1976 to 1981 Justices Gibbs and Aickin wrestled for the honour of tritest judge; Aickin J employing it seven times while Gibbs J and CJ, not to be outdone completely, resorted to it five times.

Looking more closely at Justice Gibbs' use of the term, it is difficult to discern any particular pattern. On only two occasions, *Boughey v The Queen* and *Hospital Products*, did he use it to represent a similar idea. In these cases he foreshadowed much of the post-structuralist debate on meaning in his exegesis that it is trite that words must be assessed within the context in which they appear. If only he had gone that extra step and discussed the folly of debating meaning under such traditional categories as objective and subjective and, indeed, spoken about the idea of an "interpretive community" so eloquently promoted by Stanley Fish.[27]

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22 Perhaps the last word on this point should lie with JK Galbraith, who should have said, "In any great organization, it is far, far safer to be wrong with the majority than to be trite alone."

23 The following are the cases in which Justice Gibbs used trite, listed chronologically: *Buckley v Tutty* (1971) 125 CLR 353; *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99; *Sharpe v Smail* (1975) 5 ALR 377; *Barca v The Queen* (1975) 133 CLR 82; *Lewis Construction (Engineering) Pty Ltd v Southern Electric Authority of Queensland* (1976) 11 ALR 305; *B & M Auto Sales Pty Ltd v Budget Rent-A-Car Systems Pty Ltd* (1976) 12 ALR 363; *Griffiths v Kerkemeyer* (1977) 139 CLR 161; *Bartter's Farms Pty Ltd v Todd* (1978) 139 CLR 499; *Cullen v Trappell* (1980) 146 CLR 1; *Redding v Lee* (1983) 151 CLR 117; *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41; *Denn v Midland Brick Company Pty Ltd* (1985) 157 CLR 398; *Kioa v West* (1985) 159 CLR 550; *Brown v The Queen* (1986) 160 CLR 171; *Boughey v The Queen* (1986) 161 CLR 10; *Re F; ex parte F* (1986) 161 CLR 376; and *Van Den Hoek v The Queen* (1986) 161 CLR 158.

24 (1971) 125 CLR 353.

25 Ibid at 371.

26 In fact, up to the date of that judgment, those words of Lord Atkin had only been relied upon by the High Court on that one occasion! See discussion below text at n 65 as to when a principle actually becomes trite.

27 See S Fish, *Is There a Text in this Class?* (1980), especially ch 14 for a good source on this debate.

Nevertheless, there is a bit more to it. Other than the few instances where there is a pattern, in most cases Gibbs J's reliance on triteness seems to run the gamut from family law, evidence and damages assessment through to constitutional law, criminal law and administrative discretion. But digging a little deeper shows that meaning and interpretation are often allied with trite in Justice Gibbs' decisions. In *Bartter's Farms Pty Ltd v Todd*[28] he declared it as trite that the words of s 92 of the Constitution hold many traps for the unwary, and so held that its meaning should be considered by keeping previous jurisprudence on the section in mind. In *Australian Broadcasting Commission v Australasian Performing Right Association Ltd*,[29] he remarked that it is trite that a court, in construing a written contract, is to discover the intention of the parties from the words written—another form of the same interpretative theory. In *Buckley v Tutty*,[30] Gibbs J, in a joint judgment with Barwick CJ, McTiernan, Windeyer and Owen JJ, relied on a previous House of Lords decision to hold that the meaning of "trade" included, tritely, professions as well.

While these show Justice Gibbs' consistency, all is not sweetness and trite. In *Brown v The Queen*,[31] Gibbs J stated that it is "trite but true to say that the Constitution was framed to endure and to be capable of application to changing circumstances". On the surface, that would seem uncontroversial. However, it is puzzling how Justice Gibbs argued for such a trite proposition, yet when it came to discussing the possibility of entrenching a Bill of Rights, stated that "A Bill of Rights, like any other statute, is a creature of its time."[32] Accepting that he may not have considered the idea of a Bill of Rights being incorporated into a constitution (which is doubtful), at the very least, its enduring value can hardly be said to be a trite proposition if arguments about its viability over time are so easily changeable.

If one accepts Milton's old adage that the child shows the man, there are aspects of Gibbs J's early life which hint at this later fondness for trite, in both its empathy with the commonplace and its value as a neat turn of phrase. According to his biographer, Joan Priest, he was an early devotee of science fiction and loved imaginative games, both inventing a character named Hiram Fisher King Ulysses Bott, with whom he spun stories, and creating a family magazine.[33] For such a vivid and active imagination, much of the ordinary world would seem trite. He also had a formidable memory, especially for history, so much so that his secondary school history teacher took Gibb's statements for gospel on facts he himself was unable to remember. Such a capacious memory would surely render more triteness in the world due to the sheer accumulation of excess detail.

Finally, Gibbs was a lover of literature and language, and a writer from an early age. For someone who was moved to say (writing as editor of the literary magazine at the University of Queensland),

> If contributions are dashed off grudgingly as an irksome duty, the writers are wasting their own time and their readers'. No point can be gained by flogging a stubborn ass. A

28 (1978) 139 CLR 499 at 510.
29 (1973) 129 CLR 99 at 109.
30 (1971) 125 CLR 353 at 372.
31 (1986) 160 CLR 171 at 183.
32 Sir H Gibbs, "Eleventh Wilfred Fullagar Memorial Lecture: The Constitutional Protection of Human Rights" (1982) 9 *Monash LR* 1 at 6.
33 J Priest, *Sir Harry Gibbs: Without Fear or Favour* (1995).

> poor editor, after all his blustering, cajoling and beseeching...to win a morsel more for his hungry press...[34]

an odd reference or two to trite law would seem as natural as daybreak. Nearly 60 years later, well beyond his days on the High Court, that literary flourish remains. Writing about the dangerous centralising tendencies of the Constitution, Sir Harry stated:

> [t]he nature of the malady is apparent, but it is not so easy to prescribe the remedy...I have inevitably been reminded of the well known lines of Virgil (*Aenid*, VI, 126):
>
> Facilis descensus Averno...
> Sed revocare gradum, superasque evadere ad avra,
> Hoc opus, hic labor est.
>
> (Easy is the descent to Avernus, but to retrace one's footsteps, and ascend again to the upper air—that is the labour, that is the toll.)[35]

It is that beautifully wrought "inevitably" and the ellipses on the first quoted line of Virgil in Latin (how many others would know the Latin, never mind either the punctuation or excision?) that could only come from a person for whom much of the law must truly be trite.

Since his retirement from the Court in 1987 Gibbs remains wedded to the idea of a thread of triteness running through the common law, employing the phrase in his extra-judicial writing. In "Appellate Advocacy"[36] he said, regarding the learning of advocacy skills, "[t]here are, it is true, certain general principles mostly rather trite, of which anyone who aspires to be an advocate ought to be aware."[37] And in "Judgment Writing"[38] he stated, "in the end, the Judge must relate the law to the facts that have been found. This may seem trite, but it is a rule that is by no means always observed."[39] Old habits, seemingly, die hard. If Sir Harry is undecided about his epitaph, one suggestion might be "More trite!", a reformulation of Goethe's and one that is in keeping with his love of both the sacred and profane.

Murphy J, on the other hand, is a more difficult case. He rendered over 400 judgments in his 11 years on the bench, which is long enough to establish an accurate record of his likes and dislikes.[40] It is safe to say that he had no truck with trite law. Did he actively discourage it? It is unlikely we will ever know for sure, but it would be in keeping with Murphy J's own personal history to eschew the idea of triteness in law. And it is almost as if it were scripted, given that it is Justice Murphy who provides such a strong counterpoint to Justice Gibbs, with the stormy relationship between the two providing a backdrop to Murphy J's final days at the Court.

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34 Ibid at 11.
35 Sir H Gibbs, "The Decline of Federalism" (1994) 18 *U Queensland LJ* 1 at 7.
36 Sir H Gibbs, "Appellate Advocacy" (1986) 60 *ALJ* 496.
37 Ibid.
38 Sir H Gibbs, "Judgment Writing" (1993) 67 *ALJ* 494.
39 Ibid at 498.
40 A search under Lexis revealed approximately 460 judgments rendered by Murphy J. This includes instances where he rendered a decision as a single judge, and others where his judgment may consist of a simple sentence such as "I agree". According to AR Blackshield et al, *The Judgments of Justice Lionel Murphy* (1986) at xix, Murphy J rendered 404 decisions of substance during his 11 years.

Justice Murphy came from a much different background, where triteness could never really gain a foothold. His working class, Irish Catholic roots, instilled in him the sense of both human sanctity and fallibility and the tenuousness of life.[41] He grew up knowing both triumph and tragedy, in winning the Dux of his public school but in losing his oldest brother Keith to tuberculosis. At the least, this would make him suspicious of the idea of trite. Moreover, he was, before studying law, a gifted science student, majoring in chemistry. Written words were not his early tools in trade. And as an early union activist, and sympathiser of the downtrodden and marginalised, it makes some kind of Freudian sense that there would be very little, if anything, trite in his view of the world.

Although both Gibbs and Murphy were exemplary judges, displaying excellent technique, superb powers of reasoning and persuasion and a great sense of fairness, their formative years were so different. A psychoanalyst might rely on these differences to draw out the reason for their different attitudes towards triteness. Justice Murphy was more interested in the grand style and significant gesture, who believed life was fraught with trial and tragedy. Little would be hackneyed or trite in such a Manichaen world. Justice Gibbs, conversely, was more evocative, more interested in the subtleties that make up life's pageantry. For him, there would be much indeed that is trite, as a simple aspect of our existence, situated alongside the majestic and divine. There would be nothing untoward about noticing triteness and referring to it in judgment.

Of Justice Walsh, who like Justice Murphy never developed a body of trite law, the explanation is probably more straightforward. It is most likely that his record at the Court was insufficiently long to establish himself as pro or anti-trite. Given that he did render over 100 judgments, however, it is safe to say that he would not have relished the formulation in the way that others did.[42] Finally, of the current members, both McHugh and Kirby JJ (and perhaps Hayne J, although it is too early to reach a conclusion as yet) seem to show a fondness for the term, and it will be interesting to keep an eye on their progress in the future.

This leads to the last derived item, referred to as the Triteness Index: a percentage figure arrived at by dividing the number of uses by a judge of "trite" into the total number of judgments rendered by that specific judge. Table 5 is a selection of the Triteness Index of the top 13 judges, and shows a more refined picture. Not including Hayne J, whose top ranking may be somewhat premature given his short tenure on the bench, Kirby J has the highest triteness index, at 3.67 per cent. As expected, Gibbs also has a high frequency rate, as does Aickin J, whose seven references in 261 decisions rendered left him slightly lower at 2.68 per cent.

41 J Hocking, *Lionel Murphy: A Political Biography* (1997) especially chs 1-3.

42 Walsh J rendered only 142 judgments in his 4 years at the Court; however, this is ample time to establish one's talent for triteness—compare with Kirby and Hayne JJ, who in 109 and 27 judgments, respectively, have already confirmed a trend.

Table 5: Triteness Index

Judge	Total Decisions[43]	Uses of "Trite"	Triteness Index (%)
Hayne	27	1	3.70
Kirby	109	4	3.67
Gibbs	620	17	2.74
Aickin	261	7	2.68
Windeyer	592	10	1.69
McHugh	411	6	1.46
Brennan	901	8	0.89
Fullagar	552	4	0.72
Deane	704	3	0.43
Kitto	947	4	0.42
Barwick	728	3	0.41
Mason	1004	4	0.40
Dawson	760	3	0.39

Given the raw data on trite, it is now time to look at its deeper implications.

The five principles of trite law

Based on the above information, five main points can be drawn about the use of "trite" in law: the robustness of the common law; inadequacies of contemporary lawyers; triteness as an ideal; its use as an argumentative device; and its emergence as a legal principle. These are discussed in order below.

1 The common law is alive and well (in part)

The original idea of a common law system—that like cases should be decided in like fashion, that cases would form one of the major sources of law, and that precedent and *stare decisis* must be slavishly followed—were novel inventions of the English courts of the 13th century.[44] At first, it was strongly believed that the common law was simply declared by judges. This idea reached its apotheosis in the formalism of the nineteenth century, where the strict doctrine of precedent meant that lower courts were obliged to follow the *ratio decidendi* of cases from higher courts.[45]

It was only with the advent of the Realist movement, and perhaps also the growth of a legal academy, that a reaction against this strict formalism was triggered. It happened first in the United States, as judges began to accept their roles as both

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43 Source: Lexis. Does not include unreported decisions, or reasons given for leave applications, etc.

44 R Cross and JW Harris, *Precedent in English Law* (4th ed, 1991).

45 See, for example, Sir E Coke, *First Part of the Institutes of the Laws of England* (1628); Sir W Blackstone, *Commentaries on the Laws of England*, vol 1 (reprinted 1982). A good overview is provided by J Evans, "Change in the Doctrine of Precedent During the Nineteenth Century" in L Goldstein (ed), *Precedent in Law* (1987) ch 2.

declarers of the law and makers of it.[46] The idea then developed in other common law countries.

In Australia, legal realism is now, dare it be said, a trite philosophy, but vestiges of a kind of unhappy coupling of the formalist with the activist remain. For example, McHugh J's conservative approach regarding the nature of common law is exemplified in *Burnie Port Authority v General Jones Pty Ltd*[47] where he stated:

> To incorporate the rule in *Rylands v Fletcher* into the law of negligence by judicial decision would be a far reaching step, going beyond previous developments of the common law by this Court. Here the Court is dealing with a rule which has been explained and applied by this Court on numerous occasions. It is a fixed rule of law, as imperative as a statutory command. It has been applied in this country for more than one hundred years... A judge-made rule is legitimate only when it can be effectively integrated into the mass of principles, rules and standards which constitute the common law and equity. A rule which will not "fit" into the general body of the established law cannot be the subject of judge-made law.[48]

Compare this with an extra-judicial speech rendered six years prior to *Burnie Port Authority* where he noted that the High Court "judiciary should not be composed exclusively of those who are masters of a strict and complete legalism" as judges understand that "policy factors are decisive in hard cases."[49] Sir Anthony Mason echoed this same tension in his judgments and writings.[50]

Trite law exemplifies both these seemingly contradictory stances: the hidebound traditionalism and the radical reformism of the common law. Each time the word is used, it is as if a judge is saying "I am simply declaring the obvious. This is a rule that cannot and will not vary with circumstance." At the same time, however, as we have seen, the very nature of trite law expands and evolves to include new ideas and concerns. In the 50-odd years covered by this survey, trite law has covered such diverse areas as statutory construction, excise tax, the duty of a court in construing a contract and the role of the judge and jury in criminal matters.

The evidence also points to some of the benefits of the common law system, and proves that it is still functioning largely according to the inspirational vision of its founders. Trite law, once relatively unknown and scarce, has grown since 1947 in Australia. Areas of law that were once in dispute and unclear, have been "solved" and become trite. Thus, the idea that the common law evolves over time and that judicial activism is solely a product of novelty in the law is borne out simply by tracking the usage of trite. Instead of exploding in complexity through sheer untrammelled growth of cases, the common law acts in a much more subtle and refined way. True, the gross numbers of decided cases does increase over time, but instead of simply becoming an unmanageable miasma of precedent, some doctrines become superfluous through use. They enter the common parlance of trite law, which can then be effectively discarded

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46 For a good overview, see K Llewellyn, *The Common Law Tradition* (1960). Of course, this mutated into even more radical movements such as Critical Legal Studies—see R Unger, "The Critical Legal Studies Movement" (1983) 96 *Harvard LR* 563.

47 (1994) 179 CLR 520.

48 Ibid at 592-593.

49 Justice M McHugh, "The Law-Making Function of the Judicial Process" (1988) 62 *ALJ* 116 at 124.

50 Compare, for example, *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 633-634 with "Changing Law in a Changing Society" (1993) 67 *ALJ* 568 at 572.

because they represent matters of absolute certainty. Triteness functions like a snake shedding its skin, casting off the old in order to further growth of the new.

This can be seen in the very rare reappearance of trite doctrines. Once the High Court has pronounced an area of law to be trite, it is rarely referred to again. So far, the only direct repetition of a trite law proposition is in the area of constitutional law. On two separate occasions, in *University of Wollongong v Metwally*[51] and *Polyukhovich v Commonwealth*,[52] the High Court quoted a passage from its previous decision of *Nelungaloo* relating to the trite law principle of Parliament's plenary powers. Both these subsequent decisions relied on the statements in *Nelungaloo* to affirm Parliament's power to enact retrospective laws; thus both used a general decision on triteness in one area of constitutional law to extend an argument relating to a more specific use. As the other 71 examples of trite usage are *sui generis*, this is the exception that proves the rule.

2 *Concern over litigation-happy lawyers*

There is little doubt that litigation is growing throughout the common law world at a rate greater than the population growth. In the United States, total civil filings in the federal courts grew from 59,284 in 1960 to 273,670 in 1985. Original proceedings in the High Courts in England and Wales increased from 140,003 in 1963 to 262,761 in 1988, and in the county courts from 1,521,594 to 2,285,125.[53] Although exact figures in Australia are not available, anecdotal evidence implies a similar trend here.[54] A number of reasons have been posited for this increase, but it is clear that one contributing factor relates to a more atomised society, with fewer mechanisms of social control to resolve disputes informally. Lawyers, it is contended, contribute to this growing sense of discontinuity, and are frequently chided for rushing into litigation where alternatives may be better.

What can an analysis of trite law add to this debate? Some tentative conclusions can be drawn from the data obtained. Increasing references to trite law at the High Court may indicate inadequate performance by lawyers. This is especially true where triteness is directly related to an issue in dispute. If something is patently obvious, or trite law, it should not have been argued in court. Support for this can be found in the dissenting judgment of Barwick CJ in *Smith v Bagias*[55] who, noting the triteness of the fact that a judge's suppositions are not the same as evidence, had this to say about the case in general:

> In my opinion, this case is illustrative of the disadvantage the administration of justice suffers by the overturning of findings of fact arrived at reasonably and without error of law by a tribunal of fact. Here a simple...situation...has reached this court after the lapse of seven years from the event which gave rise to liability. The time and energies of two appellate courts... have been engaged. No matter of great legal concern has been in issue: at best, no more is involved than the propriety of making what is sometimes called a "value judgment" as to whether in the particular circumstances a pedestrian has taken reasonable care for her own safety. No precedent has been created, but encouragement has been given to the possible advantage of a challenge before an appellate court to a

51 (1984) 158 CLR 447 at 484 per Dawson J.
52 (1991) 172 CLR 501 at 718 per McHugh J.
53 M Galanter, "Law Abounding: Legalisation Around the North Atlantic" (1992) 55 *MLR* 1.
54 D Weisbrot, *Australian Lawyers* (1990).
55 (1978) 21 ALR 435.

> finding of fact by a tribunal of fact... [O]ur system of resolving disputes is by trial, that is to say, by the trial process and not by the appellate process which should be reserved for the correction of errors.[56]

Of course, not all uses of trite law relate to issues raised by legal counsel. Judges may rely on trite law as a rhetorical device, or as a simple generality leading in to the specific matters at hand, and its appearance in a judgment may not relate to substantive issues between the parties. Nevertheless, there can be little doubt that there exist many instances of lawyers wasting the court's time on trite matters. Without further research into this area, the only assistance is offered by the words of Windeyer J in *Jones v Dunkel*:[57]

> It has often been said that to examine a summing-up, sentence by sentence, in search for a fault, is not the right way to see whether the judge put the case to the jury fairly and adequately.... I say this, trite though it all is, because in the present case counsel for the appellant picked out passages and sentences from the summing up of the learned trial judge, subjected them to some detailed textual criticism, and contended that the summing-up as a whole was inadequate and so unfavourable to the plaintiff as to make it unjust.[58]

3 Maintaining the nobility of triteness

Two basic mechanisms in the High Court's use of trite are revealed in the cases cited. In 29 of the 66 cases where trite is used directly and not quoted from some other source, the trite legal proposition is stated, then closely followed up with a reference to a previous decision. In percentage terms, this reflects 43.9 per cent of the total. In 37, or 56.1 per cent of the cases, the trite doctrine is simply asserted without further comment.

The latter approach must surely be the only acceptable usage. By its very definition, something is not trite if it needs proof. Judges should not be creating trite doctrines out of thin air, but should be more aware of the evolution, from disputed legal issue, to substantive principle, to established doctrine, to dogma, to trite law. At this final stage the need for authority is not required. Conversely, however, if authority is required, if there is any ambiguity or uncertainty, a matter cannot be trite.

A quick scan of the Supreme Court of Canada cases shows a much better understanding of this principle of triteness. In virtually all of the Canadian judgments where trite is used, there is no citation of authority. The High Court justices would do well to heed this example in the future. To paraphrase Mark Twain, it's not the size of the law in the trite, it's the size of the trite in the law that matters.

4 A rhetorical device?

As often as not, when judges state that a proposition is trite, the reverse is true. Sometimes triteness is used arrogantly, to stifle debate and gloss over the complexities involved. Take the following two examples. In *Cunliffe v Commonwealth*[59] Brennan J made the following statement:

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56 Ibid at 443-444.
57 (1959) 101 CLR 298.
58 Ibid at 314-315.
59 (1994) 182 CLR 272.

> To determine the true operation of a law, it is necessary not only to examine its text, but to take into account its practical effect by ascertaining its application to the circumstances in which the law operates... All of this is established, if not trite, constitutional law.[60]

The second example comes from Kitto J in *Perpetual Trustee Co Ltd v Morley*.[61]

> Since, as is trite law, "the habendum of a lease can only be considered as marking the duration of" (the lessee's) "interest, and its operation as a grant is merely prospective": *Wyburd v Tuck; Shaw v Kay*".[62]

There is little that is trite about either of these statements. The first is not trite because it is an unresolved constitutional principle. Even today, the practice of examining the practical effect of a law is used when the judges find it convenient to do so, but not where a strict literalism produces consistent answers. For example, in cases relating to the Constitution's s 51(xx), the corporations power and s 92, the free trade provision, practical effects are examined; on the other hand, where s 90 excise duties are involved, the Court has been at loggerheads for years as to whether the practical effect of legislation should be assessed.[63] The second statement is not trite because it is hardly commonplace. It relies on archaic, legalistic words (habendum) and two references to very old English cases. Both judges are employing trite to cut off opposition and debate on the issue, in a manner akin to the sometimes ostentatious taking of judicial notice, or wild leaps of inductive logic.[64] This leads into the final point, which is linked directly with the idea of trite as rhetoric.

5 *Too trite for repetition?*

As noted already, there is a question as to when a doctrine can become trite. As Lord Atkin's words in *Hepworth Manufacturing* have been held to be trite,[65] it would be logical to find this case, or these words, cited or referred to on a number of prior occasions. Strangely, the High Court has only referred to *Hepworth Manufacturing* three times in total, once prior to the trite reference made in *Buckley v Tutty*—in *Peters American Delicacy Co Ltd v Patricia's Chocolates and Candies Pty Ltd*[66]—and once subsequently—in *Re Phillip Adamson and NSW Rugby League Ltd*.[67] In fact, the reference to *Hepworth* made in *Peters* is not even a reference to Lord Atkin's judgment at all, but to Lord Astbury's. In other words, no reference to Lord Atkin's words had been made in the High Court prior to that made in *Buckley v Tutty*. Similarly, Lord Halsbury's observation in *Quinn v Leathem*[68] regarding the need to confine an authority to its particular facts was referred to as trite in 1947 by Rich J in *Burns Philp and Co Ltd v Gillespie Brothers Pty Ltd*.[69] However, a review of the *Australian Case Citator*[70] reveals no

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60 Ibid at 315 (footnote omitted).
61 (1968) 121 CLR 659.
62 Ibid at 662 (footnotes omitted).
63 See, for example, the various opinions rendered in such cases as *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529, *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 and *Ha v New South Wales* (1997) 189 CLR 465 and the whole debate surrounding the "criterion of liability" test first formulated by Kitto J in *Dennis Hotels*.
64 A MacAdam and J Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (1998).
65 See above text at nn 25-26.
66 (1947) 77 CLR 574.
67 (1991) 100 ALR 479.
68 (1901) AC 495 at 506.
69 (1947) 74 CLR 148 at 179.

instances of the High Court citing *Quinn v Leathem* prior to Rich J's pronouncement. Conversely, the neighbour principle from *Donoghue v Stevenson*,[71] a doctrine that has never been referred to as trite, has been cited by the High Court 61 times since 1947.

It is difficult to make sense of this. Obviously, a trite principle is not entirely dependent on repetitiveness, but if it were being deployed honestly, there should be some kind of correlation between a trite doctrine and the number of times it has been relied upon by a court. I do not wish to posit a hard and fast rule here, but it is nonsensical to speak of a trite law that has received only a cursory mention in previous domestic decisions. At a minimum, triteness should be used cautiously, in situations where there is no doubt: perhaps the same strict controls to which a judge is subject when properly applying the test of judicial notice.

CONCLUSION

The word "trite" does not appear in any famous quotation or passage from English literature. Shakespeare probably never used it. As far as can be determined, neither did that lover of the intricacies of English, Herman Melville. Nor have the philosophers Plato, Aristotle, Hobbes, Kant, Nietzsche or Descartes.[72] Neither does trite appear in any judicial dictionaries, or legal reference books such as words and phrases legally defined.[73] And yet, it appears in cases regularly.

Although it is now debated, most of us believe that we still live in the postmodern era, a time when the "status of knowledge is altered."[74] Trite law reflects this change. It has joined in the endless replay of irony and self-mocking that postmodernists love. For the last twenty years, almost every realm of law within the High Court's jurisdiction has been trapped in its own loop of self-reference, returning over time in the form of trite law. We might expect, therefore, in another century, to hear such statements as "it is trite law that Aborigines have traditional rights to land under native title." As law becomes trite, it moves into the background, becomes habit.

The idea behind this project is to point out that a growing body of law has gone largely unnoticed. My initial effort is modest—to bring to the attention of lawyers and legal academics the importance of this area to the new scholarship. Many questions remain unanswered. For example, is trite law simply a subset of other similar formulations used by the courts: an example might be "it is of course by now well-established that..."? Or is triteness deserving of its own class of jurisprudence, with its

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70 *Australian Case Citator: 1825-1959 Vol M-Z* (1989).

71 [1932] AC 562.

72 Again, the wonders of the internet and electronic searching make this observation possible. For the complete works of Shakespeare on the internet, see http://www.library.upenn.edu/etext/furness; for Melville see http://www.melville.org or gopher://spinaltap.micro.umn.edu:70/11/Gutenberg. For classical writers and other philosophers, see http://www.msu.org or http://classics.mit.edu.

73 The following sources were reviewed without success: JS James, *Stroud's Judicial Dictionary* (5th ed 1986); PE Nygh and P Butt (eds), *Butterworths Australian Legal Dictionary* (1997); J Nolan and J Nolan-Haley, *Black's Law Dictionary* (6th ed 1990); *Australian Legal Words and Phrases* (1996); J Saunders (ed), *Words and Phrases Legally Defined* (3rd ed 1990); *A Dictionary of Legal Quotations* (1987); D Walker, *Oxford Companion to Law* (1980); and JA Ballentine, *Ballentine's Law Dictionary* (3rd ed 1969).

74 J-F Lyotard, *The Postmodern Condition: A Report on Knowledge* (1984) at 3.