
DAN MEAGHER

I Introduction

As someone that has since the age of 10 meticulously crafted lists of my top five albums, usually at six month intervals, the original brief from James Allan to write a piece on ‘My Favourite Law Review’ had an elemental appeal. That original brief, at the behest of Professor Dan Priel, was wisely modified to ‘One of My Favourite Law Review Articles’. That modification was made, ostensibly, for the reason that it may not be easy or appropriate or interesting to write on one’s favourite article. Yet, one suspects that the truth of the matter is that trying to name just one undoubtedly all-time favourite anything (song, film, book, wine, painting, restaurant or law review article) is for many not possible.

It is not only the doctrine of proportionality that is plagued by the intractable problem of incommensurability. Is it fair or even worthwhile to compare, for example, HLA Hart’s iconic ‘Positivism and the Separation of Law and Morals’ with the powerful riposte by Lon Fuller in ‘Positivism and Fidelity to Law’? What are the relevant baselines for comparison? If it is an iconoclastic masterpiece you are after, how does one top JA Griffith’s ‘The Political Constitution’? Yet, on second thoughts, the hand grenade – ‘Common Law and Legislation’ – that Roscoe Pound lobbed into the American legal fraternity (and judicial circles specifically) in 1908 remains not only an iconoclastic masterpiece but a thesis (and charge) whose relevance and power has if anything increased with age. And what if you are looking for an article that captured the zeitgeist and provided a normative and analytical lens through which to view a contemporary (legal) world where the rise of human rights, the explosion in the size of the statute book and the pervasiveness and power of executive governments are its defining characteristics? Then Etienne Mureinik’s brilliant ‘A Bridge to Where? Introducing the Interim Bill of Rights’ and the notion of the ‘culture of justification’ that it spawned must surely fit the bill. Yet, if the truth be told, that article is not even my favourite Mureinik piece!

1 Professor Priel writes for this issue on Oliver Wendell Holmes, ‘The Path of the Law’ (1897) 10 Harvard Law Review 457 – see p57 above.
2 In many fields of human endeavour we have ‘Top 5s’ for good reason and mine (albums) for the record – in alphabetical order only of course! – are, presently, as follows: Black Flag – Damaged; Gonjasufi – Sufi and a Killer; Guided by Voices – Bee Thousand; Tom Waits – Bone Machine; Neil Young – On the Beach.
That position is reserved for ‘Fundamental Rights and Delegated Legislation’.\(^\text{10}\) In that Mureinik urged the South African courts to adopt the rule requiring specific authority:

\[
[L]\text{legislative consent to the destruction of a fundamental right cannot be inferred from a general power: it can be inferred only from an empowering provision that envisages the destruction of that right. In other words, an inferior law that destroys a fundamental right is intra vires its empowering statute only if that statute, whether expressly or impliedly, specifically envisages the destruction of that fundamental right by an inferior law and...acquiesces in that destruction.}\(^\text{11}\)
\]

In terms of legal scholarship, the argument was made with a refreshing brevity, clarity and elegance. And to make it all during the time of the apartheid regime in South Africa – when the destruction of fundamental rights was often undertaken with impunity – was critical (and brave) if judges were to resist the culture of authority and the state-sanctioned brutality that it sustained.\(^\text{12}\) It was, moreover, one of the first coherent, and normatively justified, accounts of how judges might use their common law principles of statutory interpretation to protect fundamental rights from legislative destruction.\(^\text{13}\) In Anglo-antipodean law that approach has evolved into a strong clear statement rule for fundamental rights called the principle of legality.\(^\text{14}\) Significantly, the robust application of that principle (in the construction of statutes) has, arguably, established a quasi-constitutional common law bill of rights that has proven strongly resistant to legislative abrogation\(^\text{15}\) – more on these significant developments a little later.

In any event, the impossibility of choosing a favourite law review article is manifest. But my brief comments above do at the very least record a handful of articles that will, I suspect, always find a place in my all-time top 10. Yet the article I have chosen to write about has a defining characteristic that sets it apart from the other outstanding pieces of scholarship considered in this volume – it is Australian all the way down: written by an Australian on the Australian legal system and published in an Australian law review. I now move to explain why that choice was made both in terms of its (indigenous) origin and content.

\section*{II MY CHOICE (AND WHY)}

Australia remains a constitutional monarchy.\(^\text{16}\) The formal head of our constitutional system of government is a hereditary position presently occupied by the

---

\(^{10}\) (1985) 1 \textit{South African Journal on Human Rights} 111.

\(^{11}\) Ibid 112.


\(^{16}\) \textit{Australian Constitution}, preamble: ‘Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have
Queen of Australia, Elizabeth II. These continuing governmental arrangements may strike one as anachronistic for a mature, prosperous, and existentially independent nation such as Australia. Even more might this be the case when it is understood that our final legal ties with the United Kingdom were cut in 1986. Nevertheless, they are the facts of the matter. It is, however, the case that the independence and distinctiveness of Australian law – in terms of the content of our statutes, common law and constitutional law and the relationship between them – is both a fascinating and still evolving story. That being so, my choice of article for this volume is ‘Statutes and the Common Law’ written in 1992 by then Professor Paul Finn. It provides a snapshot of those legal (and historical) developments at a pivotal moment in Australia’s legal maturation and touches upon a number of themes and issues that remain central to (and controversial in) contemporary Australian law.

Even so, does my choice of article betray an intellectual patriotism that, it may be said, is the last refuge of the academic scoundrel? Absolutely! But there is I maintain high authority for that choice, judicial and literary, both quintessentially Australian of course. Relevantly, it was my good fortune at the time of receiving my brief for this volume to be updating a case book on Australian constitutional law. In the course of doing so I enjoyed re-reading the following passage from the important decision of the High Court of Australia in Attorney-General (WA) v Marquet:

Now, however, it is essential to begin by recognising that constitutional arrangements in this country have changed in fundamental respects from those that applied in 1889. It is not necessary to attempt to give a list of all of those changes. Their consequences find reflection in decisions like Sue v Hill. Two interrelated considerations are central to a proper understanding of the changes that have happened in constitutional structure. First, constitutional norms, whatever may be their historical origins, are now to be traced to Australian sources. Secondly, unlike Britain in the nineteenth century, the constitutional norms which apply in this country are more complex than an unadorned Diceyan precept of parliamentary sovereignty. Those constitutional norms accord an essential place to the obligation of the judicial branch to assess the validity of legislative and executive acts against relevant constitutional requirements. As Fullagar J said, in Australian Communist Party v The Commonwealth, ‘in our system the principle of Marbury v Madison is accepted as axiomatic’. It is the courts, rather than the legislature itself, which have the function of finally deciding whether an Act is or is not within power.

I am unsure why, but for some reason I have always found this a stirring passage and one that declares and explains (in a gloriously understated way) the fact and significance of the independence of the Australian legal system and the distinctiveness of our constitutional arrangements. It does not seek to deny, diminish or disparage our agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland’.

---

17 Royal Style and Titles Act 1973 (Cth) s 2.
18 Australia Act 1986 (Cth); Australia Act 1986 (UK).
19 (1992) 22 University of Western Australia Law Review 7.
English legal (and political) heritage, but makes equally clear *that that was then and this is now*. In doing so, and once again maybe it is only me, it resonates in a jurisprudential sense in the same way that Australian author David Malouf’s brilliant essay ‘Made in England’ does for the emergence of Australian national and cultural identity.\(^{21}\) The closing parts of that essay observe:

> We may modify and ‘naturalise’ the institutions we brought here, the Westminster system, the Common Law, so that they make a better fit with what we now are, but they have provided so much of the context of what we have created here, and value and would want to preserve, that to abandon them, or allow them to be diluted or to decay, would be an act of national suicide. And there, for the moment, we stand.

This venture we call ‘Australia’ was always an experiment. It has taken us a long time to see it in this light, and even longer to accept the lightness, the freedom, the possibility that offers as a way of being. It keeps us on our toes, as curious observers of ourself. It has made us value quick reflexes and improvisation – lightness in that sense too. It ought to make us sceptical of conclusions, of any belief that where we are now is more than a moment along the way.\(^{22}\)

It is in this spirit that my contribution to the present volume will consider an article that not only details Australia’s distinctive legal and political history, but pinpoints foundational moments in our legal maturation that (continue to) inform the content of Australian (common and statute) law and the relationship which exists between them. That relationship is of the first importance in those jurisdictions (like Australia, Canada, New Zealand, United Kingdom and the United States) where the tradition, framework and ‘attitude of mind’ of the common law is deeply rooted in a system where the predominant legal characteristic, overwhelmingly and increasingly so, is the ubiquity of statutes. To that end the underlying purpose of Professor Finn’s article, as I understand it, was to suggest what the proper relationship of common law to statute might be in the new Australian age of statutes. In order to do so, and to frame his inquiry and analysis, Professor Finn made clear that it was the common law (and the judges that administer it) that must adapt and change to this contemporary legal reality if it were to retain its vitality and efficacy.\(^{23}\)

The article was an early, though certainly not the first, attempt to explain the relationship between common law and statute in an Australian context and how it might be deepened and better integrated. In Part III I will explain why Professor Finn’s contribution was so significant in my view and the ways in which it still speaks to us today. In order to do so Part IV provides an outline of its content. This includes Professor Finn’s identification of the fundamental themes of the common law and statutes and his account of the relationship of the former to the latter in Australian law. Part V then explores that relationship and how these themes presently inform the judicial attitude – constructive and obstructive – to the construction, application and integration of statutes into the wider legal fabric. It does so by reference to two developments of considerable significance to the relationship of common law to statute and on both of which the *Australian Constitution* has emerged as a critical influence: (1) the establishment of a ‘common law Bill of Rights’ which Professor Finn noted in

---

21  David Malouf, ‘Made in England’ in *A First Place* (Knopf, 2014) 252-333.
22  Ibid 332-333.
23  Finn, above n 19, 30.
his article and (2) the reformation of the common law rules of statutory interpretation which began after its publication.

III SIGNIFICANCE

The significance of Professor Finn’s article was that it sought to highlight and explain Australia’s ‘unusual legal tradition’ and the paradox that lies (still) at the heart of the relationship between our common law and statutes. That of course has an historical dimension, but its continuing importance is the explanatory power and insight it provides as we consider those (increasing) instances where our common law and statutes intersect.

Before exploring the nature of Professor Finn’s account, it should be noted that his was not (to the best of my knowledge) the first detailed treatment of what might constitute a proper relationship between common law and statute in contemporary Australian law. That was undertaken in the excellent article ‘The Osmond Case: Common Law and Statute Law’ by then Chairperson of the Law Reform Commission of Victoria David St L. Kelly. As the title suggests, its primary focus was one case: Public Service Board of New South Wales v Osmond. It was decided by the High Court of Australia in 1986 with the result that a decision of the New South Wales Court of Appeal was reversed. What attracted the attention (and critical scrutiny) of Professor Kelly was the misguided (in his view) rejection by Gibbs CJ of the approach taken by Kirby P in the Court of Appeal that used legislative analogies to inform the development of common law principle. The article, through detailed consideration of relevant American authorities and judicial technique, makes a compelling case for the usefulness and desirability of such an approach even (or especially) in a federal system like Australia where legislative analogies will, necessarily, be many and sometimes conflicting.

The use of legislative analogies to inform the development of common law principle was of course one of the ways that Roscoe Pound said the courts might deal with legislative innovation in ‘Common Law and Legislation’. That species of interaction between the common law and statute was the exclusive focus of Professor Kelly’s pioneering (in Australia) article. Its analysis and argument remain essentially sound in my view, even in our post-Lange world where the High Court has confirmed that Australia has one unified system of common law and that it, necessarily, is its prime custodian. But that approach has not commended itself to the Court since 1996 when Lange was decided. The High Court took the view that the constitutional unity of our system of common law in a federal system has diminished the opportunity for and legitimacy of the analogical use of statutes.

---

25 (1986) 159 CLR 656.
26 Kelly, above n 24, 514, 518-520.
27 Ibid 518-520.
28 Pound, above n 7, 385.
29 Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, 564 (per curiam) (‘Lange’).
30 See Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 201 CLR 49, 61-63 (Gleeson CJ, Gaudron and Gummow JJ) (‘Esso’).
Professor Finn also considered this instantiation of the common law relationship to statute. But what makes his article significant, and so the focus of my contribution to this volume, is the attempt to identify the core themes and concerns of Australian statute law and common law respectively in order to explain the nature of their relationship and, most importantly, how it might bear upon three of the major issues which faced the common law in 1992 and, arguably, now: ‘…(1) the relationship of statute and the common law in the development of fair dealing doctrines; (2) the move to a “common law” Bill of Rights; and (3) a re-examination of the common law’s scheme of remedies.’ As noted, the focus of my analysis below in Part V will be the second of those issues and what is, arguably, the related development of common law rules of statutory interpretation. These two common law developments best highlight in my view the ‘paradox’ that Professor Finn identified and suggest that the nature of its relationship to statute in contemporary Australian law is one of continuing (and maybe increasing) unease. Before considering them, it will be necessary and useful to sketch briefly a general (though incomplete) outline of the content of Professor Finn’s article.

IV OUTLINE

A ‘Born to Statutes’ and our ‘English’ common law

Professor Finn began his article with the important observation that ‘we were born to statutes’. In Australia, then, the age of statutes is no contemporary legal phenomenon but a foundational and enduring characteristic of the constitutional system of governance. That from the time of white settlement in Australia ‘our laws were built largely under the umbrella of local statutes’.

The opening up and development of the land, the provision of a governmental infrastructure, the facilitation and regulation of important aspects of economic and business life and much more were pursued by nineteenth century standards, through an ‘orgy of statute making’.

This might be characterized as our first – foundational – wave of statutory activity. However the centrality of statutes in Australia from her first days ‘was only one side of the legal story’. The other was of course the common law as part of which Professor Finn included the principles of equity. That common law, until well into the 20th century in Australia, ‘retained its distinctively English character’. Relevantly, as Justice Gummow observed of that time in his important article ‘The Constitution: Ultimate Foundation of Australian Law?’, ‘the system of precedent applied by the High Court and the Privy Council made it appropriate to consider the common law applied in Australian cases as no different to the common law of England.’

31 Finn, above n 19, 18-22.
32 Ibid 25.
33 Ibid 8.
34 Ibid 7.
35 Ibid.
36 Ibid 8.
37 Ibid.
38 Ibid.
There was in this regard a ‘disjunction between what might be called the Australian orientation of our statutes and, until recently, the British orientation of our common law’.40 Might this explain also why Australian legal scholarship was so late to give serious consideration to the nature of the relationship of ‘our’ common law to statutes especially when compared with our American colleagues?41If the common law administered by Australian courts was, until this time, essentially English and not our own then maybe the lack of sophisticated judicial engagement with the issue and the concomitant dearth of accompanying scholarship are explicable. By way of contrast, from the earliest days of the new republic federal and State judges in the United States had to grapple with the nature and essence of the common law that was operating as a consequence of the many States that had legislatively adopted the common law of England through provisions such as the following: ‘So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States…is adopted and declared to be law within said territory.’42 What of course became a matter of some complexity after the revolution was the meaning (and content) to be ascribed to the ‘common law of England’ operating in these American jurisdictions. For example, in 1903 Roscoe Pound writing as a judge for the Nebraska Supreme Court Commission43 in Williams v Miles asked:

What is the meaning of the term ‘common law of England’…? Does it mean the common law as it stood at the time of the Declaration of Independence, or as it stood when our statute was enacted, or are we to understand the common-law system, in its entirety, including all judicial improvements and modifications in this country and in England, to the present time, so far as applicable to our conditions?44

The important point for present purposes is that these sorts of fundamental questions regarding the essential nature and content of the common law in Australia were answered for most of the 20th century quite simply.45 As Professor Finn observed, ‘until the first stirrings of judicial independence in Parker v The Queen in 1963, our common law told England’s story’.46 That being so, it is not terribly surprising that neither the courts nor the academy showed much inclination to grapple with the proper relationship of our common law to statutes until the legal ties with the motherland began to loosen.

One final (speculative) point before moving to consider the ‘wind-change’ in Australian law which triggered that loosening. The accepted wisdom is that Australian academic literature, especially in comparison to that of our American colleagues, has

40 Finn, above n 19, 9.
43 See Harold Gill Reuschlein, ‘Roscoe Pound – The Judge’ (1942) 90 University of Pennsylvania 292
44 Cited in Pope, above n 42, 20.
45 Finn, above n 19, 8.
46 Ibid 9: In Parker v The Queen (1963) 111 CLR 610 the High Court considered a recent decision of the House of Lords to be wrong and refused to follow it as a matter of precedent.
paid insufficient critical attention to the ‘statutory elephant in the room’ in terms of ‘influencing judge-made law and as a critical driver of change and restraint in the Australian legal system’. Yet, as noted above, that might be explicable when one takes account of the fact that at least until 1963 ‘our common law told England’s story’. Moreover, it is worth noting that Pound’s trailblazing ‘Common Law and Legislation’ was published in 1908. That is 120 years after the founding of the republic and at a time when the United States was comprised of 46 State legislatures and a federal Congress engaged in statute lawmaking. Indeed the opening words in Pound’s salvo were: ‘Not the least notable characteristics of American law today are the excessive output of legislation in all our jurisdictions and the indifference, if not contempt, with which that output is regarded by courts and lawyers.’ In Australia the first scholarly stirrings and critical attention on the relationship began in 1986 – the year in which our legal independence was secured from the United Kingdom with the passage of the Australia Acts 1986 (Cth) – and Professor Finn’s article was published in 1992. That is a shade over 85 years after federation and at a time when (only) the six Australian States and the Commonwealth Parliament were engaged in the statutory enterprise. In comparative terms, then, maybe the academic literature in Australia has not been quite as derelict regarding the ‘statutory elephant in the room’ when full account is taken of these divergent common law and statutory histories and the chronology of each in light of when each nation was founded. It is certainly the case, however, that our body of literature remains small – though growing – but happily, in my view, is of a generally excellent quality.

B Wind-change and the paradox

The ties of our common law to England began to formally loosen, as noted, in 1963. But as Professor Finn pointed out it was a series of developments in our statutes (1970s) and common law (1980s) that constituted ‘[a] great windchange…in our law’. As to the former it was the proliferation of legislation on Australian ‘governmental, commercial and social life’ that until this time were either unregulated or traditionally the province of the common law.

---

47 Leeming, above n 41, 1003.
48 Pound, above n 7, 383.
49 See Kelly, above n 24.
50 That said, one manifestation of this concern that persists is the puzzling ‘indifference, if not contempt’ for the centrality of statutes in how many Australian law schools teach fields of (overlapping and inter-related) law the content of which is almost exclusively governed by primary and secondary legislation. This problem is compounded by the ironic fact that the rules and principles of statutory interpretation – an area where the common law still reigns supreme and is very much active in terms of its content and scope, as will be considered – often fail to command sufficient attention in law school curriculums.
52 Finn, above n 19, 10.
53 Ibid 11.
[E]nvironmental and discrimination legislation, investor and creditor protection in corporations legislation and otherwise, in the Commonwealth (and progressively in the States) the creation of the ‘new administrative law’, contract review legislation, de facto relationship statutes, consumer protection laws, regulatory regimes for a wide range of professions and commercial agencies, privacy statutes and many others.54

This second wave of statutory activity during the 1970s had, in Professor Finn’s, view two broad interrelated themes: ‘to protect the citizen from the abuse of such power (de facto or de jure) as another possesses to affect his or her interests’55 and ‘the progressive enlargement of the individual interests to be accorded recognition and legal protection’.56 Yet there was as well, during the 1980s, ‘a reformation of common law doctrines which, in its dimensions and intensity, is unparalleled in our legal history’.57 That, for Professor Finn, evidenced the following paradox: ‘we are witnessing a statutorily induced relegation, and a judicially inspired elevation, of the importance of the common law in the ordering of our affairs.’58 True enough, at least so far as statutes began to increasingly colonize the traditional common law domains. Yet when account is taken of those areas in which the common law was most active during this period – ‘tort, equity, contract, administrative law, criminal procedure and “classic” constitutional law’59 – one might characterize this, not so much as a paradox, as the inevitable and necessary judicial reaction to update, modernize and accommodate relevant common law doctrine to the new reality and centrality of statutory norms to Australia’s ‘governmental, commercial and social life’.60 What in any event is undeniable is that the common law was reawakened and revitalized as it sought to adjust to life in the new Australian age of statutes.

C A common law for Australia

‘The common law in Australia is being transformed into a common law for Australia’61 observed Professor Finn. That transformation occurred, quite rapidly, once Australia was '[n]o longer dependent upon a distant tribunal – the Privy Council – as the ultimate arbiter of our law.'62 As Sir Gerard Brennan has noted, ‘[o]nce the High Court assumed the ultimate responsibility of declaring the common law of Australia, it sought local wellsprings from which to refresh the common law and maintain its serviceability. The contemporary but enduring values of the Australian people were invoked, together with the principles of international law...thus reflecting both Australian custom and Australian membership of the family of nations’.63 This (legal) transformation was part of Australia opening up politically, economically and

54 Ibid.
55 Ibid.
56 Ibid.
57 Ibid 12.
58 Ibid.
59 Ibid.
60 Ibid 11.
62 Ibid.
culturally to the world and the new international relationships and perspectives in trade, politics and rights that this would bring. The overwhelming ‘yes’ vote in the 1967 referendum that addressed foundational injustices in our colonial history by removing aspects of constitutional discrimination against Aboriginal Australians; the fundamental change to our commercial life upon having to seek new (predominantly Asian) trade partners in our part of the world once England entered the European common market in 1973 and the decision of the Australian Government to cut all tariffs by 25% in the same year; and our willingness to ensure our domestic laws were compatible with the International Bill of Rights evidenced by the signing and ratification of the International Covenant of Economic, Social and Cultural Rights (1975) and the International Covenant on Civil and Political Rights (1980).

These changes were profound and enduring. They precipitated both an ‘Australianisation’ and internationalization of our laws and wider commercial and political arrangements. Of these developments Professor Finn observed ‘that whether we wish it or not, we are being caught up in international trends in the law – and no more is this so than in the areas of commercial law… and for the future I would predict, of human rights’. That future came quickly. In the same year in which Professor Finn’s article was published (1992) the High Court delivered its historic judgment in Mabo v Queensland (No 2) where it held that the pre-existing land rights of Aboriginal and Torres Strait Islanders (native title) had survived British colonization and were recognised by the common law of Australia. Importantly, as the leading majority judgment of Brennan J observed: ‘The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.’ In this way, the ‘international trends in the law’ noted by Professor Finn – especially as they pertained to human rights and the principle of non-discrimination – were central to the (common law) reasoning and landmark decision of the High Court in Mabo No 2.

Then in two decisions delivered on 30 September 1992, the High Court discerned from our constitutional system of representative and responsible government an implied constitutional right to freedom of political expression. In doing so the Court demonstrated both a willingness to derive rights from a quintessentially ‘local wellspring’ – the Australian Constitution – as well as a preparedness to use for comparative purposes the decisions, statutes and conventions from a wide range of international jurisdictions to inform the process of legal reasoning undertaken. Moreover in the leading majority judgment in Australian Capital Television, Mason CJ explained the evolving nature of our constitutional arrangements and that ultimate sovereignty rested, now, with the Australian people not the Westminster Parliament.

Despite its initial character as a statute of the Imperial Parliament, the Constitution brought into existence a system of representative government for Australia in which the elected representatives exercise sovereign power on behalf of the Australian people. Hence, the prescribed procedure for amendment of the Constitution hinges upon a referendum at which the proposed amendment is approved by a majority of electors and a majority of

---

64 Finn, above n 19, 13.
65 Ibid.
67 Ibid 42.
electors in a majority of the States. And, most recently, the Australia Act 1986 (UK) marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people.\(^\text{70}\)

The significance of this legal independence and emergent notions of popular sovereignty was confirmed just four years later when the High Court delivered its unanimous judgment in *Lange v Australian Broadcasting Corporation*. That decision drew together a number of threads identified by Professor Finn regarding this transformation into a common law for Australia. Relevantly, upon confirming the existence of the implied constitutional freedom of political expression, the Court made the following important observations as to the unified nature of the Australian legal system and our common law more specifically:

With the establishment of the Commonwealth of Australia, as with that of the United States of America, it became necessary to accommodate basic common law concepts and techniques to a federal system of government embodied in a written and rigid constitution. The outcome in Australia differs from that in the United States. There is but one common law in Australia which is declared by this Court as the final court of appeal. In contrast to the position in the United States, the common law as it exists throughout the Australian States and Territories is not fragmented into different systems of jurisprudence, possessing different content and subject to different authoritative interpretations.

…The Constitution, the federal, State and territorial laws, and the common law in Australia together constitute the law of this country and form ‘one system of jurisprudence’. Covering cl 5 of the Constitution renders the Constitution ‘binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State’. Within that single system of jurisprudence, the basic law of the Constitution provides the authority for the enactment of valid statute law and may have effect on the content of the common law. Conversely, the Constitution itself is informed by the common law…[I]n *Cheatle v The Queen*, this Court said: ‘It is well settled that the interpretation of a constitution such as ours is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of the common law's history’.\(^\text{71}\)

This led the Court in *Lange* to reform the common law of defamation because

[o]f necessity, the common law must conform with the Constitution. The development of the common law in Australia cannot run counter to constitutional imperatives…The common law of libel and slander could not be developed inconsistently with the Constitution, for the common law’s protection of personal reputation must admit as an exception that qualified

\(^{70}\) (1992) 177 CLR 106, 138 (footnotes omitted).

\(^{71}\) *Lange* (1997) 189 CLR 520, 562-564 (per curiam).
freedom to discuss government and politics which is required by the Constitution.72

Moreover, in terms of the transformation into a common law for Australia Professor Finn asked ‘to what extent should it openly look for inspiration and guidance in its development to the social goals, interests and values apparently expressed in our domestic legislation?’ 73 And he ruminated also on the proper (limited) role and occasion for judicial law making in the new Australian age of statutes by reference to Mason J’s well-known passage in Trigwell.74 What may not have not been fully perceived at this time, however, was the central role the Australian Constitution was to play in informing both these critical aspects of the common law relationship to statute and others as well. These will be considered in more detail below in Part V. Importantly, the High Court in Lange identified that the unity of the Australian legal system had a constitutional foundation and that a symbiotic relationship exists between our Constitution, common law and statutes. That being so, the contemporary relationship of common law to statute in Australia cannot be fully explained or understood in my view unless account is taken of this constitutional dimension.75

D The fundamental themes of Australian common law and its relationship to statute

Professor Finn considered that two fundamental and interrelated themes animated Australia’s unparalleled common law reformation in the 1980s: ‘the one is to curtail the abuse of power (de jure or de facto) possessed over another, be it possessed by the State or by a private individual or corporation; the other is an insistence upon reasonable standards of fairness or fair dealing in our relationships and dealings with others.’76 The emergence of these themes is consistent with the view, noted above, that what occurred in this period was the inevitable and necessary judicial updating, modernizing and accommodating of relevant common law doctrine to the new Australian age (and ubiquity) of statutes. The rapid colonization of traditional common law domains by statute and the establishment of complex frameworks to regulate commercial, social, family and personal life increased, necessarily, the likelihood of legislative interference with rights and interests of traditional concern to the common law (eg. liberty, property, natural justice, fair trial, court access). The proclivity of the common law to protect so far as possible the freedom and dignity of the individual underpins, then, the ‘abuse of power’ and ‘fairness’ themes. In this way, whilst the supremacy of (valid) statute law must of course be acknowledged and respected, the common law insisted that any interference with or deprivation of individual rights and interests must occur only through lawful and fair processes. And those concerns (and themes) extended to the private law context where the development of ‘unconscionability based doctrines of estoppel, unconscionable dealing, relief against forfeiture and the like’77 may be characterized as ‘the tempering of the exercise of one’s rights and powers because of the effect their exercise may have on another’s interests and expectations’.78

Professor Finn then moved on to consider the contemporary Australian relationship of common law to statute through the prism of Roscoe Pound’s famous
and provocative taxonomy (provided in 1908) of how the common law may deal with legislative innovation.\textsuperscript{79} Professor Finn’s judgment was that the ‘judicial treatment of statutes in this country falls into Pound’s third and fourth categories (liberal interpretation but without analogical use, and strict and narrow interpretation).’\textsuperscript{80} The suggestion is then made – through a selection of instructive case examples – ‘that all four of Pound’s categories have an appropriate place in our law, but that no one has any claim to exclusive sway.’\textsuperscript{81} That analysis, though interesting and considered, is not what in my view makes Professor Finn’s account of the relationship of our common law to statute important and still of considerable relevance (and controversy) in contemporary Australian law. That relationship he described in the following two broad propositions:

1. Where a statute or statutory provision is consonant with or else builds upon a fundamental theme in the common law, then -
   (a) it should be interpreted liberally and in disregard of common law doctrines which would narrow its effect;
   (b) it may (subject to the Trigwell principle) be used analogically in the common law itself in its own development; but
   (c) where it is cast in broad and general terms, it may nonetheless be interpreted in the light of limiting considerations to be found within apposite common law doctrines, where such considerations are conducive to the attainment of justice in individual cases.

2. Where a statute or statutory provision is antithetical to (or else possibly inconsistent with) a fundamental theme in the common law, then –
   (a) it will be interpreted strictly (or so as to avoid that inconsistency);
   (b) it will not be used analogically in the common law itself in its own development; and
   (c) will be subjected, presumptively, to common law doctrines which serve either to protect individual rights, interests, etc from untoward affection, or to prevent unfairness in dealings.\textsuperscript{82}

It is the second proposition and Professor Finn’s characterization (which is entirely correct in my view) that properly explains ‘[t]he emergence of what can appropriately be called a “common law Bill of Rights”’ that will be my focus in Part V. What is both fascinating (and controversial) is the extent to which the High Court has (maybe increasingly) resisted legislative attempts to curtail or abrogate rights, freedoms and principles considered fundamental at common law and the (interpretive) manner in which it has done so. That this has occurred during a period in which Australian legislatures themselves have enacted important rights legislation in the areas of privacy, non-discrimination, disability support, freedom of information and administrative and judicial review makes it doubly so.\textsuperscript{83}

\textsuperscript{79} Ibid 18-22.
\textsuperscript{80} Ibid 19.
\textsuperscript{81} Ibid 20.
\textsuperscript{82} Ibid 23-24.
\textsuperscript{83} At the Commonwealth level see for example \textit{Privacy Act} 1988 (Cth); \textit{Racial Discrimination Act} 1975 (Cth); \textit{Sex Discrimination Act} 1984 (Cth); \textit{Disability Discrimination Act} 1992 (Cth); \textit{Age
V RELEVANCE

A The common law Bill of Rights and the Constitution

The normative core of Professor Finn’s above two propositions – and so his account of the proper relationship of common law to statute in Australia – are the fundamental themes of the common law outlined in Part IV. Relevantly, he considers that ‘we should make ready use (both in interpretation and in analogical development) of statutes which promote those ends, but that, until openly compelled or corrected by the legislature, we should (in interpretation and otherwise) inhibit statutory derogation from those ends’. That position is not ‘uncontroversial’ as Professor Finn expressly acknowledged. But it is predicated upon the judges themselves remaining the masters of the values and the ends [of] the common law.  

It seems to me that where there is an underlying compatibility between the purpose of a statute and the common law’s fundamental themes the relationship will be harmonious and the position stated without controversy. But tension will inevitably arise in the circumstances of his second proposition – where a court must interpret and apply a statute that in its judgment ‘is antithetical to (or else possibly inconsistent with) a fundamental theme in the common law’. Interestingly, Professor Finn claimed that his position and “explanation does not proceed from any presumed antipathy between statute and the common law”. Maybe so, yet that proposition is difficult to square with how Australian judges have in fact deployed and reformed their common law interpretive powers to resist various legislative ‘innovations’ antithetical to (if not destructive) of fundamental common law rights. To be fair, however, Professor Finn wrote before or on the cusp of the many statutory developments (and common law rejoinders) that occurred in Australia and in the Commonwealth more generally that triggered (or at least have hastened) the emergence of the ‘common law Bill of Rights’ in Australia. 

Those developments included, for example and as noted, the ratification in the 1980s of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In doing so it provided the courts with an international human rights touchstone – and ‘updated set of values’ – from which to renovate common law rules and develop more rights – sensitive principles of statutory interpretation. In the same period – just after the 1983 federal election – the newly elected Prime Minister Bob Hawke held a National Crimes Conference to consider and tackle the new challenges posed by organized and
sophisticated forms of crime. It led to the establishment of Australia’s first standing crime commission in 1984 – the National Crime Authority – which was charged with the responsibility to investigate and gather intelligence on serious tax evasion and organized crime for prosecuting authorities. \(^9\) There were similar (sometimes ad hoc) bodies established also in the States during this time. \(^9\) In order to undertake their statutory functions these national and State crime commissions were given by statute extraordinary investigative powers including the power to compel persons to answer questions on oath on pain of penalty even when those answers might incriminate them. \(^9\) As Justice Mark Weinberg recently noted, ‘[t]hese powers greatly exceed[ed] those generally available to the police’. \(^9\) Whilst this legislation and the powers they conferred was controversial, the absence of formally entrenched rights guarantees in the Australian Constitution – such as the 5\(^{th}\) Amendment – made it largely unproblematic from a constitutional perspective. \(^9\)

However in a trio of cases decided between 1987 and 1992 – the timing of which was, arguably, far from coincidental – the High Court began to react. \(^9\) First, it revived and applied the following old interpretive presumption (with American roots \(^9\)) outlined in an early decision of the High Court at a time when common law ‘judges approached legislation as some kind of foreign intrusion’. \(^9\)

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used. \(^9\)

The presumption was applied in these cases to protect from legislative encroachment the fundamental common law rights to liberty and property. \(^9\) The High Court then refashioned the content of the presumption (and its normative

---

94 See Justice Mark Weinberg, *The Impact of Special Commissions of Inquiry/Crime Commissions on Criminal Trials* 2-6 (paper delivered at the Supreme Court of New South Wales Annual Conference, Supreme Court of New South Wales, 1 August 2014).
95 See Donaghue, above n 92, 59-72.
96 Weinberg, above n 94, 2-3.
98 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 (‘Re Bolton’); *Bropho v Western Australia* (1990) 171 CLR 1; *Coco v The Queen* (1994) 179 CLR 427 (‘Coco’).
100 *R v Janceski* (2005) 64 NSWLR 10, 23 (Spigelman CJ).
101 *Potter v Minihan* (1908) 7 CLR 277, 304 (O’Connor J) (footnotes omitted).
justification as will be detailed below) in its now seminal decision in Coco decided two years after the publication of Professor Finn’s article.\(^{104}\)

The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.\(^{105}\)

Second, and even more significantly from a contemporary perspective, the Court began (as Professor Finn predicted) to use the international law of human rights to expand the catalogue of rights and freedoms it would seek to protect through the application of the above presumption beyond the common law’s holy trinity of life, liberty and property to include, for example, religious equality\(^{106}\) and freedom of speech.\(^{107}\) It was suggested also by then Chief Justice Spigelman that the analogical use of non-discrimination statutes ‘could well lead to a [common law] presumption that Parliament did not intend to legislate with such an effect’.\(^{108}\) In doing so, senior appellate judges in Australia were aligning themselves with important (common law) developments in the protection of rights occurring in the United Kingdom, another common law jurisdiction without a Bill of Rights or even (most famously) a written Constitution.\(^{109}\)

It would do so in response (and if truth be told in resistance) to another tranche of federal legislation that seriously infringed fundamental rights. Since the early 1990s (and continuing to this day) migration policy in Australia has been characterized by the successive and ongoing legislative attempts of Australian Governments to seriously limit and sometimes exclude the rights to liberty, natural justice and access to the courts of persons seeking asylum, especially those arriving by boat.\(^{110}\) This has triggered a steady flow of migration cases (now something of a flood) to the Australian High Court. The continuing judicial ‘dilemma’ – if that’s the appropriate term – is whether it is interpretively possible (consistent with the judicial role under our constitutional separation of powers) to protect these most basic of common law rights and freedoms when the ordinary meaning of (federal migration) legislation clearly

\(^{104}\) Ibid 437 (Mason CJ, Brennan, Gaudron and McHugh JJ), 446 (Deane and Dawson JJ).
\(^{105}\) Ibid 437 (Mason CJ, Brennan, Gaudron and McHugh JJ) (footnotes omitted), endorsed at 446 (Deane and Dawson JJ).
\(^{108}\) Spigelman, above n 15, 29.
\(^{110}\) See Jane McAdam and Fiona Chong, Refugees: Why Seeking Asylum is Legal and Australia’s Policies Are Not (University of New South Wales Press, 2014).
seeks their diminution or destruction? Professor Finn was very much alive to the issue and his general observation as to judicial response still holds:

Though the common law alone is incapable of entrenching basic individual rights against State legislative innovation, what is now becoming clearer, particularly in case law involving criminal procedure and investigative agencies, is the protective stance our courts will take in the face of legislation. This stance is strongly evidenced in the second of the two explanatory principles I earlier proposed.\(^{111}\)

The 2003 decision of the High Court in *Plaintiff S157/2002 v Commonwealth* was the game-changer in terms of the relationship of common law to statute in the domain of fundamental rights.\(^{112}\) The Court read down a provision that expressly sought to oust its review powers of migration decisions. In the course of doing so Gleeson CJ stated that section 75(v) of the *Constitution* ‘secures a basic element of the rule of law. The jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament.’\(^{113}\) Parliament may of course change the content of statute law subject to the *Constitution.* ‘But the executive government must obey the law. That is what the rule of law means.’\(^{114}\) And as to whether the relevant legislation authorized the Australian Government to make migration decisions without according natural justice to those persons affected, the Chief Justice was emphatic:

What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. As Lord Hoffmann recently pointed out in the United Kingdom, for Parliament squarely to confront such an issue may involve a political cost, but in the absence of express language or necessary implication, even the most general words are taken to be ‘subject to the basic rights of the individual’.

…The principles of statutory construction stated above lead to the conclusion that Parliament has not evinced an intention that a decision by the Tribunal to confirm a refusal of a protection visa, made unfairly, and in contravention of the requirements of natural justice, shall stand so long as it was a bona fide attempt to decide whether or not such a visa should be granted. Decision-makers, judicial or administrative, may be found to have acted unfairly even though their good faith is not in question. People whose fundamental rights are at stake are ordinarily entitled to expect more than good faith. They are ordinarily entitled to expect fairness. If Parliament intends to provide that decisions of the Tribunal, although reached by an unfair procedure, are valid and binding, and that the law does not require fairness on the part of the Tribunal in order for its decisions to be effective under the Act, then s 474 does not suffice to manifest such an intention.

---

\(^{111}\) Finn, above n 19, 27.

\(^{112}\) (2003) 211 CLR 476 (‘*Plaintiff S157*’).

\(^{113}\) Ibid 482 (Gleeson CJ).

In the teeth of federal migration legislation the ordinary meaning of which clearly and intentionally infringed upon rights, the High Court deployed the Constitution and the revitalized (old) common law rights presumption now called the principle of legality to protect the fundamental rights of asylum seekers to natural justice and access to the courts. The normative and doctrinal parallels with Mureinik’s rule requiring specific authority will be apparent. And it was an interpretive approach that was evident through a line of later High Court cases where legislation sought to curtail or abrogate rights, freedoms and principles considered fundamental at common law. So in the absence of an entrenched Bill of Rights – and faced with new kinds of rights-infringing legislation – the High Court during this period turned to alternative legal sources (international law, common law and constitutional law) to develop a set of rules and interpretive principles that could provide more robust protection of fundamental rights.

In this way the ‘common law Bill of Rights’ in Australia has emerged through the aggressive judicial use of the interpretive tools available to read down statutes that facially operated to seriously infringe fundamental rights. And significantly, the Constitution has been central to these developments. It has buttressed – if not inspired – the strengthening of the common law rights to fair trial, procedural fairness and court access making them strongly resistant to legislative encroachment. And whilst it remains doctrinally true that ‘the common law alone is incapable of entrenching basic individual rights against State legislative invasion’ as Professor Finn observed, in conjunction with the Constitution those rights possess an enhanced durability and potency in the new Australian age of statutes. This explains the extra-curial observation of Chief Justice French that ‘the [principle of legality] can be regarded as “constitutional” in character even if the rights and freedoms which it protects are not.’ It may not, then, be an exaggeration to suggest that the ‘common law Bill of Rights’ in Australia is now quasi-constitutional in strength.

B The common law rules of statutory interpretation and the Constitution

In terms of the common law principle of legality considered above, the High Court has also, arguably, reformed its normative justification away from authentic notions of legislative intention towards the enhancement of core constitutional values such as the rule of law and representative democracy. So much is clear from the

---

115 Plaintiff S157 (2003) 211 CLR 476, 482 (Gleeson CJ), 505-519 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), 520 (Callinan J). See Willis, above n 13, 272-281 for pre-Charter interpretive developments in Canada where the courts used (and developed) principles of statutory interpretation to secure the right to access the courts in the teeth of legislation whose aim was clearly to the contrary.


117 See Spigelman, ‘The Application of Quasi-Constitutional Laws’, above n 15, 86-97. It is fascinating to note, here, that in 1939 Professor Willis outlined strikingly similar interpretive (and constitutional) developments occurring in Canada where the courts, in the absence of a bill of rights or even a constitutional separation of powers, ‘used their power of statutory interpretation and their control of the prerogative writs to establish a common-law Bill of Rights.’ See also, Willis, above n 13, 274.

118 Finn, above n 19, 27.


120 See Spigelman, above n 15, 86-90.

statement of Gleeson CJ in *Plaintiff S157* outlined above and his now celebrated observation made a year later in *Electrolux Home Products Pty Ltd v Australian Workers Union*:

> The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.122

This reformation of the principle of legality – effectively dispensing with legislative intention as its normative justification123 and providing it with a constitutional dimension – reflects common law developments in statutory interpretation more generally. It is in, what is arguably, the most fundamental aspect of the relationship of common law to statute in contemporary Australian law that our judges have decisively asserted their control: the rules and principles of statutory interpretation. And, once again, constitutional values and principles appear to have exerted an important influence on these developments. This may well provide the signature contemporary example of what Professor Finn perceived in 1992 as the paradox of ‘a statutorily induced relegation, and a judicially inspired elevation, of the common law in the ordering of our affairs.’124 To that end, the High Court has recently stated that ‘legislative intention…is a fiction which serves no useful purpose.’125 Judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and applications of laws.126 Of which Richard Ekins and Jeffrey Goldsworthy have (critically) observed:

> This suggests that legislative intention is not something that exists before judicial interpretation, but instead, is a product or construct of interpretation; or in other words, that it is not the object that the process of statutory interpretation aims to discover, but rather is whatever that process produces.127

The High Court has in any event highlighted the centrality of the separation of powers to the interpretive role of Australian courts and firmly located that task within that constitutional framework. This underlines the recent extra-judicial observation of Basten J that ‘[i]f statutory interpretation is at the core of the judicial function, the Commonwealth Parliament must be constrained in its ability either to expand or diminish that function.’128 If so, the common law rules of statutory interpretation –

---

123 See Lim, above n 121, 389-394.  
124 Finn, above n 19, 12.  
125 Lacey (2011) 242 CLR 573, 592 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).  
which lie at the core of the relationship of common law to statute in Australia and of which the principle of legality is an important part – now have a constitutional dimension. That is fascinating, controversial and question-begging.

Moreover, these common law interpretive developments suggest the need to expand or at least refashion the fourth way in Pound’s taxonomy and Professor Finn’s second proposition when statutes also implicate the Constitution. Specifically, if judges consider that a statute is antithetical to principles, freedoms and values shared by the common law and the Constitution then the relevant (preferred) construction will protect them from legislative encroachment if interpretively possible. In Poundian terms, then, it would appear that in this species of interaction between the common law and statute the Constitution compels the strictest and narrowest construction of the relevant (and from the common law perspective deleterious) statutory innovation. In this domain the reality and controversy of Australian ‘judges themselves remaining the masters of the values and the ends of the common law’¹²⁹ as they apply to the rules of statutory interpretation is manifest.

VI CONCLUSION

In an important paper published in 2011 – ‘Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process’ – then Solicitor-General of Australia Stephen Gageler began with the following observation:

Most cases in most courts in Australia are cases in which all or most of the substantive and procedural law that is applied by the court to determine the rights of the parties who are in dispute has its source in the text of a statute. In every one of those cases, the attribution of some meaning to that statutory text forms a necessary element in the court’s identification of the substantive or procedural law it applies to determine the rights of the parties so as to resolve their dispute.¹³⁰

That being so the relationship of common law to statute in its various manifestations is of the very first importance. Professor Finn’s article was not the first scholarly attempt to essay how common law judges might secure the fuller integration of statutes into the Australian legal system. But ‘Statutes and the Common Law’ was significant then (1992) and even more so now for at least two reasons in my view. Firstly, the article took a wide-screen view of the emergent issues that increasingly attended the relationship of common law to statute in Australian law. This gave a sense of the breadth and complexity of those interactions and how the fundamental themes of each species of law might inform the manner in which that relationship would develop (and hopefully deepen) in the new Australian age of statutes. Secondly, Professor Finn identified what he considered the paradox of a ‘statutorily induced relegation, and a judicially inspired elevation, of the importance of the common law in the ordering of our affairs’.¹³¹ In 1992 that observation was perceptive. In 2016 it has the look of understatement when account is taken of the emergence in Australia of the quasi-constitutional ‘common law Bill of Rights’ and the reformation of the common law rules of statutory interpretation discussed in Part V. Professor Finn rightly anticipated how Australian judges would (indeed should in his view) react to legislative developments that were antithetical to if not destructive of rights, freedoms and

¹²⁹ Finn, above n 19, 24.
¹³⁰ Gageler, above n 51, 1.
¹³¹ Finn, above n 19, 12.
principles considered fundamental at common law. Yet the strength of that resistance and the deterioration of the relationship of common law to statute that it has arguably evidenced is as significant as it is controversial.

However it was the confirmation in Lange of the one unified system of Australian common law – and that it must of necessity conform to the Constitution – that was the post-1992 judicial development that has fundamentally re-shaped how (and why) the common law interacts with statute in Australia. The constitutional unity of our system of common law in a federal system has diminished the opportunity for and legitimacy of the analogical use of statutes. There is also an important – and still evolving – constitutional dimension to the ‘common law Bill of Rights’ in Australia. The Constitution has inspired the recognition of certain common law rights and freedoms, buttressed the strength of others and is increasingly seen to provide the normative justification for the principle of legality, the Australian species of a strong, clear statement rule for fundamental rights. Yet it may prove that in what is, arguably, the most important manifestation of the relationship of common law to statute in contemporary Australian law – common law rules of statutory interpretation – that the Constitution will cast the longest shadow. It seems likely that the High Court will increasingly turn to the inherently contested principles of the Constitution to anchor and inform an interpretive process that considers legislative intention to be the product not the lodestar of statutory interpretation.

In 2005 the (by then) Justice Finn of the Federal Court of Australia wrote a sequel to his seminal article titled ‘Statutes and the Common Law: The Continuing Story’. The emergence of the Constitution as a decisive force on the shaping and development of the common law – and so its consequent relationship to statute – was noted with interest and a degree of concern.

Yet maybe this turn to the Constitution was inevitable once the truth (and consequences) of Sir Owen Dixon’s proposition that ‘[i]n Australia we begin with the common law’ was judicially accepted and worked through. Relevantly, ‘in the working of our Australian system of government we are able to avail ourselves of the common law as a jurisprudence antecedently existing into which our system came and in which it operates.’ That is, the common law backdrop against which the Constitution was enacted grounds a juristic relationship between them that cuts both

---

133 Finn, above n 51. Paul Finn was appointed to the Federal Court of Australia in 1995.
134 Ibid 62.
136 Ibid 204.
ways. The common law often supplies the relevant meaning to our constitutional text and structure and the Constitution informs the content and development of common law doctrine. In this way it is our judges that possess the interpretive and so doctrinal monopoly over both bodies of Australian law and, ultimately, maybe at the expense of statute. It should come as no surprise, then, that resort is increasingly had to the principles and values of the Constitution to mediate the relationship of common law to statute and to resist legislative developments considered deleterious by the courts. And if the judicial reaction in the United States to the contemporary age of statutes proves instructive – and my sense is that it already does\textsuperscript{137} – then the deployment of the Constitution in Australia to underpin the common law thrust and parry with statutes may well increase proportionately with the ubiquity of statutes.