

## THEORIES AND PRINCIPLES UNDERLYING THE DEVELOPMENT OF THE COMMON LAW – THE STATUTORY ELEPHANT IN THE ROOM

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Law cannot be treated purely as an intellectual system, a game to be played by scholars whose aim is to produce a perfectly harmonious structure of rules. It is something which operates at a practical level in society, and has to be understood as such.<sup>1</sup>

### I INTRODUCTION

The truth stated by Professor Ibbetson is recognised in the theme of this issue of the University of New South Wales Law Journal: *The Practical Significance of the Theories Guiding the Development of the Common Law*. This article seeks to expose and explain the consequences of two unstated major premises of that theme: what does it mean, in this age of statutes, to speak of the ‘common law’ and what does it mean to speak of its ‘development’?

This article contends that it is unhelpful in this context to speak of ‘common law’ and its ‘development’. It is unhelpful because of the central role of statutes. Most of what is actually occurring in the legal system is the construction and application of statutes. A great deal of what is simplistically described as ‘common law’ is the historical product of, or response to, statutes. And much of the contemporaneous ‘development’ in the day-to-day workings of courts in fact involves a process of harmonisation informed by statutory norms. Even when a court decides *not* to alter the law, the role of statutes can be influential.

In short, statutes are an under-appreciated component in the academic literature on the Australian legal system: their role lies not merely in stating

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1 David Ibbetson, ‘Comparative Legal History: A Methodology’ in Anthony Musson and Chantal Stebbings (eds), *Making Legal History: Approaches and Methodologies* (Cambridge University Press, 2012) 131, 135.

norms of law, but in influencing judge-made law and as a critical driver of change *and* restraint in the Australian legal system. The sooner critical attention is paid to the statutory elephant in the room, the better.<sup>2</sup> The position has long been different in the United States, where ‘[t]he interaction between statutes and the unwritten law has been a constant subject of academic inquiry ... drawing sophisticated commentary from distinguished scholars and jurists alike.’<sup>3</sup> The first half of this article is directed to the role of statutes in the Australian legal system.

As an intellectual exercise, one can ignore statutes and construct various classifications of judge-made rules, and debate their merits, as well as their taxonomy<sup>4</sup> and nomenclature.<sup>5</sup> It can be useful for undergraduates to do so, because it is sensible to teach the simple before the complex, and because the focus on ideas and analogies and themes in judge-made law is far more attractive than the relentless verbalism of statutes. But the Australian legal

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- 2 There are very honourable exceptions in Anglo-Australian literature, notably, Jack Beatson, ‘Has the Common Law a Future?’ (1997) 56 *Cambridge Law Journal* 291; Jack Beatson, ‘The Role of Statute in the Development of Common Law Doctrine’ (2001) 117 *Law Quarterly Review* 247; J F Burrows, ‘The Interrelation Between Common Law and Statute’ (1976) 3 *Otago Law Review* 583; Joachim Dietrich, ‘What is “Lawyering”? The Challenge of Taxonomy’ (2006) 65 *Cambridge Law Journal* 549; Joachim Dietrich and Thomas Middleton, ‘Statutory Remedies and Equitable Remedies’ (2006) 28 *Australian Bar Review* 136; Joachim Dietrich, ‘Teaching Torts in the Age of Statutes and Globalisation’ (2010) 18 *Torts Law Journal* 141; Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013); Stephen Gageler, ‘Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process’ (2011) 37(2) *Monash University Law Review* 1; William Gummow, *Change and Continuity: Statute, Equity and Federalism* (Clarendon Press, 1999) 1–37; Lord Robert Walker, ‘Developing the Common Law: How Far is Too Far?’ (2013) 37(1) *Melbourne University Law Review* 232.
- 3 Caleb Nelson, ‘State and Federal Models of the Interaction between Statutes and Unwritten Law’ (2013) 80 *University of Chicago Law Review* 657, 766. The United States literature is far richer: the starting point is the influential work of Roscoe Pound, ‘Common Law and Legislation’ (1908) 21 *Harvard Law Review* 383 and Harlan F Stone, ‘The Common Law in the United States’ (1936) 50 *Harvard Law Review* 4. Following *Erie Railroad Co v Tompkins*, 304 US 64 (1938) (‘*Erie*’), the existence of separate bodies of state common law and merely residual areas of federal common law, with all of which state and federal statutes interacted, has led to a substantial literature, including H Miles Foy III, ‘Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts’ (1986) 71 *Cornell Law Review* 501; Harvey S Perlman, ‘Thoughts on the Role of Legislation in Tort Cases’ (2000) 36 *Willamette Law Review* 813; Jeffrey A Pojanowski, ‘Statutes in Common Law Courts’ (2013) 91(3) *Texas Law Review* 479 (addressing the different approaches to construction between federal and state courts in the United States, having regard to their different powers); Peter L Strauss, ‘On Resegregating the Worlds of Statute and Common Law’ (1994) *Supreme Court Review* 429; Robert F Williams, ‘Statutes as Sources of Law Beyond their Terms in Common-Law Cases’ (1982) 50 *George Washington Law Review* 554. Aspects of what follow resemble ideas promoted by Traynor CJ, notably in Roger J Traynor ‘Statutes Revolving in Common-Law Orbits’ (1968) 17 *Catholic University Law Review* 401.
- 4 See especially Peter Birks, ‘Equity in the Modern Law: An Exercise in Taxonomy’ (1996) 26 *University of Western Australia Law Review* 1. See also Allan Beever and Charles Rickett, ‘Interpretative Legal Theory and the Academic Lawyer’ (2005) 68 *Modern Law Review* 320; Richard Sutton, ‘“We Just Mislaidd It”: The Great Project and the Problem of Order in Private Law’ (2005) 11 *Otago Law Review* 97.
- 5 Famously, ‘[t]he modern English law of unjust enrichment has been developed as the law of restitution. ... The preference for “restitution” turns out to be unsatisfactory’: Peter Birks and Charles Mitchell, ‘Unjust Enrichment’ in Peter Birks (ed), *English Private Law* (Oxford University Press, 2000) vol 2, 525–6. Cf A Tettenborn, ‘Misnomer: A Response to Professor Birks’ in W R Cornish et al (eds), *Restitution – Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Publishing, 1998) 31.

system operates very differently in practice. In truth the legal system is not and never has been logical or meticulously rational, not least because its practical operation has long been driven by statutes, and increasingly so in recent decades. As it turns out, the processes by which courts respond to statutes, which are aspects of courts' constant striving for coherence – reflecting, to use Chief Justice Traynor's typically Californian metaphor, the 'continuity script of the common law'<sup>6</sup> – are also interesting and intellectually engaging. Although Professor Beatson has described the dominant view in common law systems of the relationship between common law and legislation as the 'oil and water' approach, and 'a form of legal apartheid',<sup>7</sup> the second half of this article seeks to justify a more holistic approach, which better explains what courts are actually doing in the search for coherence.

## II 'COMMON LAW'

'Common law' is a deeply attractive, but also a deeply misleading concept. What is commonly thought of as 'common law',<sup>8</sup> namely, the various bodies of judge-made law, including equity and admiralty,<sup>9</sup> taught in law schools and written about in law books is and always has for the most part been sourced in statute and is unintelligible without reference to statute. *Most of the time*, as Windeyer J said, 'it is misleading to speak glibly of the common law in order to compare and contrast it with a statute'.<sup>10</sup> It is misleading because it distracts attention from what Gummow J called the 'supreme importance of statute law'<sup>11</sup> in *most* areas of conduct (for example, taxation, company law, aviation law, occupational health and safety, industrial law, bills of exchange, family law, crime, consumer protection, migration, partnership, bankruptcy, real and personal property, assignment,

6 Roger J Traynor, 'The Unguarded Affairs of the Semikempt Mistress' (1965) 113 *University of Pennsylvania Law Review* 485, 489–90 ('[J]udges are called upon to interpret all manner of statutes and to fit more and more pieces of statutory law into the continuity script of the common law'); see also, Traynor, above n 3, 401.

7 Beatson, 'Has the Common Law a Future?', above n 2, 308.

8 I am putting to one side for reasons of concision the attractive and powerful notion, not unrelated to the thesis of this article, that the common law is best defined not by reference to its content, but as a 'practised framework of practical reasoning': see H Patrick Glenn, *On Common Laws* (Oxford University Press 2005) 31–2, citing G Postema, 'Philosophy of the Common Law' in J Coleman and S Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 588, 596 and M A Eisenberg, *The Nature of the Common Law* (Harvard University Press, 1988) 154, 156.

9 In this context, where the focus is on judge-made law and enacted law, 'equity is just another form of common law': A W B Simpson, *Legal Theory and Legal History: Essays on the Common Law* (Hambledon Press, 1987) 359–83. At a lower level of abstraction, it makes sense to distinguish separate bodies of common law and equity: see, eg, Mark Leeming, 'What is a Trust?' (2009) 7 *Trusts Quarterly Review* 5, 12–13; Mark Leeming, 'Equity, the Judicature Acts and Restitution' (2011) 5(3) *Journal of Equity* 199, although this article (save for this sentence) follows Lord Walker's approach in respect of 'the "f" word' fusion, and 'do[es] not even think of going there': Walker, above n 2, 234.

10 *Gammage v The Queen* (1969) 122 CLR 444, 462.

11 *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160, 186 [35].

defamation, not to mention civil and criminal procedure). As Finn J has said, ‘we live in an age of statutes and ... it is statute which, more often than not, provides the rights necessary to secure the basic amenities of life in modern society.’<sup>12</sup> That is no new thing. Sir Henry Maine wrote that ‘[t]he capital fact in the mechanism of modern states is the energy of legislatures,’<sup>13</sup> although its impact has taken time to filter through. One example is the dilution of the principle that unmistakable clarity is required before legislation is found to have changed the common law to one that is now of ‘minimal weight’.<sup>14</sup> It is trite to say that *most* of what lawyers advise, counsel argue, and courts decide, is the construction and application of statutes. I am echoing Stephen Gageler’s emphatic opening sentence:

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.<sup>15</sup>

Sometimes it is hinted that those swathes of law are second-rate compared to tort, contract, equity and restitution; the latter are harder or purer or more important, perhaps because they are less influenced by statute. Roscoe Pound said in 1908 that ‘it is fashionable to preach the superiority of judge-made law.’<sup>16</sup> Professor Cheshire wrote in 1935 of the virtue of private international law that ‘it has been only lightly touched by the paralysing hand of the Parliamentary draftsman’.<sup>17</sup> Of the same flavour is Peter Birks’ statement 60 years later that ‘the alphabet serves well for contextual categories, all the law about aviation, banking, construction, dogs, education and so on.’<sup>18</sup> To be sure, Birks was not demeaning the practical importance to litigants or the operation of the legal system, but was instead claiming that the best way to understand the interrelationship across different areas of the law was in areas unaffected by statute, reflecting a long-standing tradition in legal education, commonly associated with Christopher Columbus Langdell’s reign at Harvard.<sup>19</sup>

But the suggestion that select areas of private law have some elite status is triply wrong, in my respectful view. First, a great deal of what is often regarded as ‘common law’ (including equity) either arose in statute or as a

12 *Buck v Comcare* (1996) 66 FCR 359, 364–5.

13 Sir Henry Sumner Maine, *The Early History of Institutions* (John Murray, 6<sup>th</sup> ed, 1893) 398, cited in Roscoe Pound, above n 3, 403.

14 *R v Janceski* (2005) 64 NSWLR 10, 23 [62] (Spigelman CJ); *Gumana v Northern Territory* (2007) 158 FCR 349, 374 [96] (French, Finn and Sundberg JJ).

15 Gageler, above n 2, 1.

16 Pound, above n 3, 383–4.

17 Geoffrey G Chevalier, *Cheshire, Private International Law* (Clarendon Press, 1<sup>st</sup> ed, 1935), cited in Jack Beatson, ‘Has the Common Law a Future?’, above n 2, 299 and Peter North, *Essays in Private International Law* (Oxford University Press, 1993) 20–1.

18 Peter Birks, ‘Definition and Division: A Meditation on *Institutes* 3.13’ in Peter Birks (ed), *The Classification of Obligations* (Clarendon Press, 1997) 1, 33.

19 See William P LaPiana, *Logic and Experience: The Origin of Modern American Legal Education* (Oxford University Press, 1994) 79 ff.

response to statute. Consider the law of trusts, or part performance, or defamation, or contributory negligence, or negligence *simpliciter* in a legal environment dominated by civil liability legislation and statutory norms of conduct in workplaces, roads, buildings and most everywhere, such that the existence and breach of duty and causation and damages are often decisively influenced by statute. Because it will serve to illustrate the complexity and dynamism of the legal system discussed further below, an example of the interplay between statute and judge-made law, even in the heartland of contract and equity, is provided below. It would be very easy to multiply examples.<sup>20</sup>

Secondly, no doubt swathes of statutory law lack the complexity brought about by decades or centuries of litigation and analysis, although there is ample scope for analysis and complexity in just as many other areas dominated by statute (consider employers' liability, or admiralty, or civil aviation, or bankruptcy).<sup>21</sup> After all, '[o]nce a statute has been in force for a few years, a cluster of decisions begins to build up around it which bears some resemblance to the common law itself.'<sup>22</sup> But it is far from self-evident that areas of law relatively untouched by statute are more worthy of study and analysis; why is what some call the 'law of obligations' – itself a recent

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20 For example, criminal conspiracy is derived from thirteenth century statutes as explained by McHugh J in *Peters v The Queen* (1998) 192 CLR 493, 513–15; the changing role of duplicity in courts exercising summary jurisdiction following Sir John Jervis' Acts is considered in *Environmental Protection Authority v Truegain Pty Ltd* [2013] NSWCCA 204, [36]–[52]; the law of charity turns upon the preamble to the *Statute of Charitable Uses 1601*, 43 Eliz 1, c 4 by what Lord Macnaghten described in *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] 1 AC 531 as a 'singular construction', and in a sense the whole of the law of trusts is a response to the *Statute of Uses 1535*, 27 Hen 8, c 10: the repeal of the latter (by the *Imperial Acts Application Act 1969* (NSW)) did not destroy the institution developed by equity; cf part performance in the United Kingdom (see Part III below).

21 Lawyers as distinguished as Harold Glass and Michael McHugh chose to write about the body of law created since 1837 on employers' liability in part because it was conceptually challenging: see Harold H Glass and Michael H McHugh, *The Liability of Employers in Damages for Personal Injury* (Law Book, 1966). *CSL Australia Pty Ltd v Formosa* (2009) 261 ALR 441 shows that the starting point for analysis in a slip and fall case on a bulk carrier is that the negligence claim is a general maritime lien, engaging the federal jurisdiction invested by the *Admiralty Act 1988* (Cth). The international character of admiralty and maritime law is demonstrated by James Allsop, 'Maritime Law: The Nature and Importance of its International Character' (2010) 84 *Australian Law Journal* 681. The regulation of civil aviation through the series of multilateral treaties (principally those of Paris, Warsaw, Chicago, Guadalajara and Montreal), the federal, state and territory statutes implementing those treaties, and the body of largely uniform international law construing them is more modern, but is equally worthy of analysis: see, eg, *Povey v Qantas Airways Ltd* (2005) 223 CLR 189, 202–3 [26] (Gleeson CJ, Gummow, Hayne and Heydon JJ). Part of what underlies the term 'jurisdiction in bankruptcy' may be seen in *Meriton Apartments Pty Ltd v Industrial Court of NSW* (2008) 171 FCR 380, 400–8 [88]–[116] (Greenwood J), 422–8 [178]–[197] (Perram J).

22 J F Burrows, 'The Interplay between Common Law and Statute' (1976) 3 *Otago Law Review* 583, 598.

invention, central aspects of which were radically refashioned in the nineteenth and twentieth centuries<sup>23</sup> – qualitatively different and superior?

Thirdly, the notion of a legal system being reduced to a regularly ordered taxonomy is not even close to reflecting reality. Long ago, Frederick Pollock rejected Holmes' attempts to define the duty to keep a contract as meaning 'that you must pay damages if you do not keep it – and nothing else' by reference to the tort of inducing a breach of contract, in revealing language:

Thus *Lumley v Gye*, and your cases as well as ours which have confirmed it, would be all wrong. But this is surely not now arguable except in the Langdellian ether of a super-terrestrial Common Law where authority does not count at all.<sup>24</sup>

The thesis propounded by Brian Simpson, echoing Holmes' famous introduction to *The Common Law*<sup>25</sup> (which in turn derives from an anonymous, hostile, notice he had written of Langdell's contract casebook)<sup>26</sup> has obvious force, or so it seems to me:

How then are we to view the positivists' notion of the common law as a body of rules, forming a system in that the rules satisfy tests of validity? We must start by recognizing what common sense suggests, which is that the common law is more like a muddle than a system, and that it would be difficult to conceive of a less systematic body of law.<sup>27</sup>

All this is a natural consequence of a legal system whose norms are statutes of general application enacted by different levels of government, and by

23 For example, offer and acceptance evolved in the 19<sup>th</sup> century: see A W B Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 *Law Quarterly Review* 247; Vernon V Palmer, *The Paths to Privity: A History of the Third Party Beneficiary Contracts at English Law* (Lawbook Exchange, first published 1992, 2006 ed) 179–80. More generally, the notions of a body of law such as 'contract' or 'tort' or (especially) 'private law' are essentially a relatively modern abstraction. See A W Brian Simpson 'The Elusive Truth About Holmes' (1997) 95 *Michigan Law Review* 2027; H W Arthurs 'Special Courts, Special Law: Legal Pluralism in Nineteenth Century England' in Gerry R Rubin and David Sugarman (eds), *Law, Economy and Society 1750–1914: Essays in the History of English Law* (Professional Books, 1984) 380–411. For Pollock's systematisation of tort law as a unified body see Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford University Press 2004) 262 ff. See generally John Hamilton Baker, *The Law's Two Bodies* (Oxford University Press, 2001).

24 Letter from Sir Frederick Pollock to Oliver Wendell Holmes, 17 September 1897 in Mark DeWolfe Howe (ed), *The Pollock-Holmes Letters: Correspondence of Sir Frederick Pollock and Mr. Justice Holmes 1874–1932* (Cambridge University Press, 1942) vol 1, 80.

25 O W Holmes Jr, *The Common Law* (Macmillan, 1882) 1:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

26 'The life of the law has not been logic: it has been experience ... The form of continuity has been kept up by reasonings purporting to reduce every thing to a logical sequence; but that form is nothing but the evening dress which the newcomer puts on to make itself presentable according to conventional requirements ... [T]he law finds its philosophy not in self-consistency, which it must always fail in so long as it continues to grow, but in history and the nature of human needs.' See G Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford University Press, 1993) 148–51, citing Oliver Wendell Holmes, 'Book Notice' (1880) 14 *American Law Review* 233.

27 A W B Simpson, above n 9, 381.

governments with different policy objectives, and court decisions whose reasons are formulated to resolve particular controversies.

### III PART PERFORMANCE: AN EXAMPLE OF THE INTERPLAY OF STATUTE AND COMMON LAW

An overview of part performance is readily sketched. The *Statute of Frauds* prevented actions on contracts for the sale of lands and other interests in land without writing signed by the person sought to be charged or that person's agent.<sup>28</sup> But '[n]o sooner had the *Statute of Frauds* been enacted in 1677 than the courts set about relieving persons of its effect in cases where it was thought that the legislation could not have been intended to apply.'<sup>29</sup> One of those cases was where there had been 'part performance'. If there were acts unequivocally referable to a contract of the kind alleged, then specific performance might be obtained.<sup>30</sup> Hence the summary by the High Court:

The doctrine of part performance is expressed in three centuries of case law which has the effect of allowing specific performance of a contract which on its face the Statute of Frauds renders unenforceable.<sup>31</sup>

A critic might object that part performance has scarcely been chosen at random: part performance is an exceptional example of judge-made law responding to statute. There is some force in the criticism, but there are two distinct answers to it for the purposes of this article. First, the interplay between statute and judge-made law was and is *far* more complicated than summarised above, and secondly, there is similar interplay even in areas central to contract, tort and restitution. Each is addressed in turn immediately below.

#### A Ongoing Interplay between Statute and Court Decisions

This article is not concerned with the 'immense body of case law', which Professor Simpson said was of 'little intellectual interest' generated by the 1677 Statute.<sup>32</sup> Instead, it makes four observations about the interplay between court decisions and the statute. First, part performance *preceded* the *Statute of*

28 *Statute of Frauds* (1677) 29 Car 2, c 3:

No action shall be brought to charge any person, upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorized ('*Statute of Frauds*').

29 *Last v Rosenfeld* [1972] 2 NSWLR 923, 927 (Hope J), cited with approval in *Theodore v Mistford Pty Ltd* (2005) 221 CLR 612, 623–4 [31] (Gleeson CJ, McHugh, Gummow, Callinan and Heydon J).

30 See *Regent v Millett* (1976) 133 CLR 679, 682–4 (Gibbs J); *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 432 (Brennan J); *Ciaglia v Ciaglia* (2010) 269 ALR 175, 195–8 [86]–[104] (White J); cf *Steadman v Steadman* [1976] 1 AC 536.

31 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, 60 [19] (Gleeson CJ, Gaudron and Gummow JJ).

32 A W Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford University Press, 1975) 613–14.

*Frauds*.<sup>33</sup> As Bryson JA has shown,<sup>34</sup> there are at least three decisions before 1677 where part performance was considered, and Lord Nottingham's *Prolegomena on Chancery and Equity*, which was probably written before the Statute was enacted, referred to the concept. The editor of Nottingham's cases wrote that '[t]he question probably never came before [Lord Nottingham] because it was a matter of assumption, quite correctly, that the Statute did not apply where the contract had been executed in part.'<sup>35</sup> Ultimately, most legislatures responded to the exception recognised in equity and included it expressly in more modern re-enactments.<sup>36</sup> Even so, the result is complex and nuanced. For in places like Western Australia where the original Statute continues to apply,<sup>37</sup> or Tasmania where it has been re-enacted verbatim,<sup>38</sup> with no part performance exception being added, the judge-made doctrine continues to be available.<sup>39</sup> On the other hand, the part performance exception in section 40(2) of the *Law of Property Act 1925* was not repeated in the *Law of Property (Miscellaneous Provisions) Act 1989*, which has been treated as causing two and a half centuries of law to disappear.<sup>40</sup> Thus, Western Australia and Tasmania share with the United Kingdom a statutory command against enforcing oral contracts for the sale of interests in land, but because of the different legislative history, the court-fashioned exception is available in the former but not the latter. The different legislative history mattered.

Thirdly, the consequences of the 1989 amendment in the United Kingdom go well beyond the doctrine's removal. One is that a deposit of title deeds by way of security no longer creates a valid equitable mortgage, on the footing that the security was contract-based and therefore controlled by the statute.<sup>41</sup> Another is a slew of cases seeking to take advantage of the remaining exception relating to

33 See Edward Burtenshaw Sugden, *A Practical Treatise of the Law of Vendors and Purchasers* (London, 8<sup>th</sup> ed, 1830) 110, dealing with cases in Tothill where 'equity, even before the statute of frauds, would not execute a mere parol agreement not in part performed'. See also Michael R T Macnair, *The Law of Proof in Early Modern Equity* (Duncker and Humblot, 1999) 147–9.

34 *Khoury v Khouri* (2006) 66 NSWLR 241, 262–3 ('*Khoury*').

35 D E C Yale (ed), *Lord Nottingham's Chancery Cases* (Selden Society, 1957) vol 1, ciii (introduction). Bryson JA continued: '[t]he first reported decision which associates part performance with the *Statute of Frauds* is *Butcher v Stapely* where Jeffreys LC (whose place in history does not arise from a reputation as an Equity lawyer) seems to have treated the association as obvious.': *Khoury* (2006) 66 NSWLR 241, 263 [74], citing *Butcher v Stapely* (1685) 1 Vernon 363; 23 ER 524.

36 For the position in the United States, see John Norton Pomeroy and John C Mann, *A Treatise on the Specific Performance of Contracts* (Banks & Co, 2<sup>nd</sup> ed 1926) 234–6.

37 See *Supreme Court Ordinance 1861*, 24 Vict 1, c 15, s 4; *Interpretation Act 1984* (WA) s 73; a slight amendment was made by the *Law Reform (Statute of Frauds) Act 1962* (WA) s 2 but the premise of the latter Act was that the 1677 Statute continued to apply in Western Australia.

38 *Mercantile Law Act 1935* (Tas) s 6.

39 For example, *Lighting by Design (Aust) Pty Ltd v Cannington Nominees Pty Ltd* [2008] WASCA 23, [45]–[51] (Pullin JA, dissenting), [82]–[87] (Buss JA), [194]–[202] (Le Miere JA); *Williams v Coleman* (1936) 31 Tas LR 1, 10 (Clark J).

40 See *Singh v Begg* (1996) 71 P & CR 120. Cf the 30<sup>th</sup> and 31<sup>st</sup> editions of John McGhee (ed) *Snell's Equity* (Sweet & Maxwell, 30<sup>th</sup> ed, 2000) 663–6 and (31<sup>st</sup> ed, 2005) 349.

41 *United Bank of Kuwait plc v Sahib* [1997] Ch 107; cf *Ross v Bank of Commerce (Saint Kitts and Nevis) Trust and Savings Association Ltd* [2012] UKPC 3, [20].



constructive trusts, sourced in estoppel or other forms of unconscientious conduct.<sup>42</sup> Typically of the sort of flow-on effects of statutory change, it is doubtful that they could have been perceived at the time the amendment was made; this is a topic to which this article returns, because it is an important element of the interaction between statute and common law.

Finally, in most Australian states and territories, including New South Wales, the statutory exception endures, and is not only to be found in section 54A(2) of the *Conveyancing Act 1919* (NSW) as a qualification to the modern counterpart to the *Statute of Frauds*, but also in section 23E(d), which deals with the effectiveness of assignments, rather than contracts, and is not confined to interests in land.<sup>43</sup> It is not clear what turns on the proposition that part performance is unaffected in relation to an assignment of personal property.<sup>44</sup> More generally, the relationship between the two gives rise to considerable controversy. It is easy to see that section 23E(d) applies to an equitable charge created by agreement,<sup>45</sup> but more generally the interrelationship remains unclear.<sup>46</sup>

## B Similar Interplay Occurs Throughout the Law

The claim that a similarly complex interplay may be seen even in areas of law, which are relatively untouched by statute is a large one, and obviously the extent of the interplay varies depending on the area. But take a simple *Woolwich*<sup>47</sup> claim for the recovery of an overpaid tax. Analysis in Australia commences with the terms of the statute pursuant to which the tax was levied.<sup>48</sup>

42 See *Yaxley v Gotts* [2000] Ch 162; *Shah v Shah* [2002] QB 35; *Kinane v Mackie-Conteh* [2005] EWCA Civ 45; *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752; *Brightlingsea Haven Ltd v Morris* [2008] EWHC 1928; *Thorner v Major* [2009] 1 WLR 776, which fell within the exception to the *Statute of Frauds* for constructive trusts.

43 As much is illustrated by *Adamson v Hayes* (1973) 130 CLR 276 and *Grey v Inland Revenue Commissioners* [1960] AC 1, as was held in *PT Ltd v Maradona Pty Ltd (No 2)* (1992) 27 NSWLR 241, 250–2 (Giles J); *Warner v Hung (No 2)* [2011] FCA 1123 [129] (Emmett J).

44 *Houry* (2006) 66 NSWLR 241, 268 [90]:

The existence of the doctrine of part performance is expressly recognised in the terms of the *Conveyancing Act*, not only in relation to s 54A which is the successor to s 4 of the *Statute of Frauds*, but also in relation to s 23C, which is the successor of provisions in relation to which part performance appears to have been little discussed, if discussed at all. Part performance of a contract is a subject relating to enforcement of contracts such as s 54A deals with, and less readily can be seen as a subject relating to the effectiveness of assurances; yet if an assurance was given under a contract there seems to be room to remedy any defect by specific performance, and hence for the operation of doctrine of part performance in relation to s 23C.

45 For example, see *Moloney v Coppola* [2012] NSWSC 728 [25]–[41] (Nicholas J).

46 *Baloglow v Konstantinidis* (2001) 11 BPR 20, 721, [162] (Giles JA, Mason P agreeing). Cf *Houry* (2006) 66 NSWLR 241; *Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 229 CLR 545, 562–3 [45] (Gleeson CJ, Gummow, Kirby and Hayne JJ). Justice White has noted in *Ciaglia v Ciaglia* (2010) 269 ALR 175, [55]–[62] that although it has been said that s 54A applies where there is an executory agreement, and s 23C at the stage of performance of an agreement of where there is an assurance without an antecedent agreement, that is difficult to reconcile with *Houry*.

47 *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] 1 AC 70.

48 *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 64–6 (Mason CJ), 84–7 (Brennan J).

Regard to state and territory recovery of imposts legislation will be needed, in relation to limitation periods, defences of passing on and change of position,<sup>49</sup> and, if the claim is in federal jurisdiction, that will require in turn attention to section 79 of the *Judiciary Act 1903* (Cth).<sup>50</sup> Standing behind any such claim against the Commonwealth or a state is the legislative or constitutional provision which removes any immunity from suit.<sup>51</sup> Or take a purely contractual claim. It is possible, but in my experience unlikely, that the whole justiciable controversy of which the claim forms part can be resolved without regard to state and federal laws directed to implying terms into the contract, or special laws relating to particular contracts (such as insurance, or agency, or the provision of credit), or the broad provisions of the *Competition and Consumer Act 2010* (Cth) which may render the pre-contractual dealings misleading or deceptive thereby giving rise to rights to damages and to reformulate or rescind the contract.<sup>52</sup> It is surely unnecessary to state the ways in which most tortious liability has been altered, dramatically, by statute.<sup>53</sup> And obviously the whole of the law of remedies has been fundamentally altered in its practical operation by regulatory and consumer statutes, such that it makes sense to ask whether remedies at general law have been influenced.<sup>54</sup> Considerations like those suggest it is also worth looking more closely at what might be meant by ‘development’.

#### IV DEVELOPMENT

‘Development’, no differently from ‘common law’, is also a deceptively ambiguous word, in law and elsewhere. Property developers have contributed much to the last two centuries of Australian history, but they are on the whole an unloved class of entrepreneurs (their large contribution to private law

49 See for example *Meriton Apartments Pty Limited v Council of the City of Sydney (No 3)* (2011) 80 NSWLR 541, 564–72 [122]–[164] (Pepper J).

50 *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30.

51 See Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2012) 256–63.

52 *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 322 [34]–[36] (French CJ). Contrast Birks' downplaying of an ‘ambiguous statutory jurisdiction’ to give damages in lieu of rescission (referring to Lord Cairns' Act): Birks, ‘Definition and Division’, above n 18, 27; statutory damages in the Australian legal system are regularly at the forefront of a plaintiff's claim.

53 See generally B McDonald, ‘The Impact of the Civil Liability Legislation on Fundamental Policies and Principles of the Common Law of Negligence’ (2006) 14 *Torts Law Journal* 268, 268 (‘[I]t is clear that the law of negligence has, at least temporarily, been made not simpler but even more complex by the overlay of varied and wordy provisions in these ‘tort reform’ statutes’); Peter Handford, ‘Intention, Negligence and the Civil Liability Acts’ (2012) 86 *Australian Law Journal* 100 and see *Department of Housing and Works v Smith (No 2)* (2010), 265 ALR 490 [3]–[20] (Pullin JA) and (where the *Trade Practices Act* adds considerably to the complexity) *Motorcycling Events Group Australia Pty Ltd v Kelly* [2013] NSWCA 361.

54 See Dietrich and Middleton, above n 2. See further Part V below.

notwithstanding),<sup>55</sup> and some of their efforts are bad, or at least arguably bad. When considering development within a legal system, caution is needed for the same reason: how to tell? It is often debatable whether a new statute or a new judicial decision is a ‘forward’ or a ‘retrograde’ step, and not merely because different commentators have different values and different expectations of how a change in law will play out, but also because it is difficult to bring to bear any objective scale against which legal change may be assessed. Take the implied limitations on legislative power identified by majorities in *Kable v DPP (NSW)*<sup>56</sup> and *Australian Capital Television v Commonwealth*<sup>57</sup> and reformulated in *Fardon v Attorney-General (Qld)*<sup>58</sup> and *Lange v Australian Broadcasting Corporation*,<sup>59</sup> as to the wisdom of which serious questions remain two and three decades later.<sup>60</sup> Constitutional examples are probably most familiar, but they may be found in all areas of the law. Is it a good thing that confidential information is seen no longer (in most circumstances) to comprise property,<sup>61</sup> with consequences that it does not engage the first limb *Barnes v Addy*<sup>62</sup> liability?<sup>63</sup> Or that the rules in a choice of law case by which damages are calculated are seen as substantive rather than procedural?<sup>64</sup> Or the recognition that an equitable jurisdiction for the relief against penalties no longer ‘withered on the vine’ after 1873, as had been said in *AMEV-UDC Finance Ltd v Austin*,<sup>65</sup> but continued?<sup>66</sup> Or the expansion of negligence in cases like *Burnie Port Authority v General Jones Pty Ltd*<sup>67</sup> and *Northern Territory v Mengel*,<sup>68</sup> subsuming more specific categories of tortious liability under the ‘imperialistic banner of negligence law’,<sup>69</sup> whilst evidencing ‘inherent indeterminacy’ at least in cases of pure economic loss.<sup>70</sup> There is no canonical way of assessing the wisdom or

55 See, eg, *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 (*‘Farah v Say-Dee’*); *John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1.

56 (1996) 189 CLR 51 (*‘Kable’*).

57 (1992) 177 CLR 106 (*‘ACTV’*).

58 (2004) 223 CLR 575 (*‘Fardon’*).

59 (1997) 189 CLR 520 (*‘Lange’*).

60 See *Public Service Association and Professional Officers’ Association Amalgamated of NSW v Director of Public Employment* (2012) 293 ALR 450, [62]–[64] (Heydon J); *Monis v The Queen* (2013) 295 ALR 259, 320–322 [242]–[251] (Heydon J).

61 *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414, 438 (Deane J).

62 (1874) LR 9 Ch App 244.

63 *Farah v Say-Dee* (2007) 230 CLR 89, 143–4 [118] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

64 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

65 (1986) 162 CLR 170, 191.

66 *Andrews v Australia and New Zealand Banking Group* (2012) 290 ALR 595 (*‘Andrews’*); cf J W Carter et al, ‘Contractual Penalties: Resurrecting the Equitable Jurisdiction’ (2013) 30 *Journal of Contract Law* 99 who conclude that ‘[s]ince its scope is unclear and its application uncertain, so also is the decision in *Andrews*. That seems to us unacceptable’: at 132.

67 (1994) 179 CLR 520 (*‘Burnie’*).

68 (1995) 185 CLR 307 (*‘Mengel’*).

69 Graeme Orr, ‘Abrogating the *Beaudesert* Aberration: The High Court on Governmental Liability in *Northern Territory v Mengel*’ (1996) 15 *University of Tasmania Law Review* 136, 140.

70 *Burnie* (1994) 179 CLR 520, 593 (McHugh J).

unwisdom of those decisions; a safer course is to follow the approach (wrongly)<sup>71</sup> attributed to Zhou Enlai of the French Revolution – it is too early to say.

The problem of attributing a positive or progressive direction to the changes in the legal system implied by ‘development’ is made *much* worse because of statute. New laws are apt to have an impact upon courts’ decisions, *not merely* directly in construing the new statute itself, but also, as has been hinted above and is emphasised below, indirectly and more broadly in the legal system. Different governments enact laws reflecting different policies, and reacting to different political exigencies. Either, as Traynor CJ put it, ‘statutes are often bad and indifferent as well as good’,<sup>72</sup> or, at the very least, there is no way of knowing whether many or most statutes can be evaluated as progressive or regressive.

There is a much deeper problem too. It is *convenient* for the purposes of legal reasoning to pretend that centuries of past decisions culminate in the answer contended for by counsel or determined by the court, but that mode of reasoning is profoundly un-historic. ‘Whig interpretations may be unsuccessful history, but they are often very successful law.’<sup>73</sup> This is an aspect of the lawyer’s ‘peculiar attitude to the legal past’<sup>74</sup> as Maitland famously put it:

[W]hat is really required of the practising lawyer is not, save in the rarest cases, a knowledge of medieval law as it was in the middle ages, but rather a knowledge of medieval law as interpreted by modern courts to suit modern facts.<sup>75</sup>

This ‘legal embryology’ (to use the phrase coined by Daniel Boorstin),<sup>76</sup> highlights the fact that most lawyers are poor legal historians.

71 President Nixon’s interpreter said that he distinctly remembered the exchange, and said ‘[t]here was a misunderstanding that was too delicious to invite correction’; Zhou Enlai was referring to the 1968 student riots in Paris: see Richard McGregor, ‘Zhou’s Cryptic Comment Lost in Translation’, *Financial Times* (Washington), 10 June 2011.

72 Traynor, above n 3, 425.

73 Martin Krygier, ‘Law as Tradition’ (1986) 5 *Law and Philosophy* 237, 249.

74 *Ibid.*, 248.

75 Fredric William Maitland, ‘Why the History of English Law is Not Written’ in H A L Fisher (ed), *The Collected Papers of Fredric William Maitland* (Cambridge University Press, 1911) vol 1, 490. Hence Justice Windeyer’s observation in *Benning v Wong* (1969) 122 CLR 249, 295 that ‘[t]here is never much to be gained by searching in mediaeval law for presages of modern rules, interesting though such doctrinal genealogy may be.’

76 ‘So obviously has it seemed necessary to adopt the categories of the modern “developed” legal system that much of legal history has become a sort of legal embryology – a search for the rudimentary forms of the “full-grown” legal system. The present becomes the culmination of all the past, and the present forms of institutions seem to be their inevitable forms. The imagination is thus closed to the infinite possibilities of history’: D J Boorstin ‘Tradition and Method in Legal History’ (1941) 54 *Harvard Law Review* 424, 428–9; see also David M Rabban, ‘Methodology in Legal History: From the History of Free Speech to the Role of History in Transatlantic Legal Thought’ in Anthony Musson and Chantal Stebbings (eds), *Making Legal History: Approaches and Methodologies* (Cambridge University Press, 2012) 88, 91–2.

## VI THE SYMBIOTIC RELATIONSHIP BETWEEN STATUTE LAW AND JUDGE-MADE LAW

For all those reasons, there are considerable difficulties in identifying the principles underlying the ‘development’ of the ‘common law’. It is more prudent to speak of ‘change’ rather than ‘development’, and it is highly artificial to exclude statutes from the inquiry. If one is going to analyse the Australian legal system as it operates in practice, statutes need to be front and centre.

Accordingly, it is desirable to reformulate the question. It makes sense to refer, as Professor Atiyah did, to a ‘kind of legal partnership’ between statute law and common law.<sup>77</sup> More recently, Gleeson CJ wrote that:

Legislation and the common law are not separate and independent sources of law; the one the concern of parliaments, and the other the concern of courts. They exist in a symbiotic relationship.<sup>78</sup>

Symbiosis describes the interaction between two dissimilar organisms living in close physical association. Pamela O’Connor, and Lyria Bennett Moses and Brendan Edgeworth have borrowed the Canadian term ‘bijuralism’, which ‘refers to the two different sources of legal norms that provide the sum of rules constituting the system as a whole.’<sup>79</sup> Writing with particular focus on the operation of the Torrens system, Bennett Moses and Edgeworth add that it has been ‘a substantial task, for the judiciary to fit these two systems into a coherent and interlocking whole.’<sup>80</sup>

Real property is a good example: the Torrens legislation introduced a radical change to rules which appeared to be largely judge-made,<sup>81</sup> the full consequences of which are still being worked out.<sup>82</sup> The law of real property is vitally important in practice, as well as being complex and interesting in its own right, and obviously cannot be approached without close attention to statute. *Much the same is true in all areas of the legal system.* That may be seen in a variety of ways, some more obvious than others. It is convenient to start with statutory construction.

77 P S Atiyah, ‘Common Law and Statute Law’ (1985) 48 *Modern Law Review* 1, 6; one example is the trust for sale, invented by conveyancers, recognised by courts and ultimately by Parliament in 1925: see Richard Nolan, ‘Property in a Fund’ (2004) 120 *Law Quarterly Review* 108 at 111-112 and *Seng v Tuang* [2012] SGCA 41 at [22]-[29].

78 *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 532 [31].

79 Lyria Bennett Moses and Brendan Edgeworth, ‘Taking it Personally: Ebb and Flow in the Torrens System’s In Personam Exception to Indefeasibility’ (2013) 35 *Sydney Law Review* 107, 111; Pamela O’Connor, ‘Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems’ (2009) 13 *Edinburgh Law Review* 194.

80 Bennett Moses and Edgeworth, above n 79, 111.

81 Some of those familiar judge-made rules merely reflect the approval of conveyancers’ drafting practices; more generally, what ‘property’ is within the legal system is considered in detail by P G Turner, ‘Degrees of Property’ (Research Paper No 01/2011, University of Cambridge Faculty of Law).

82 For example, *Farah v Say-Dee* (2007) 230 CLR 89, 167-72 [190]-[198] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd* (2013) 247 CLR 149, 160-1 [22]-[25] (Hayne, Crennan, Kiefel and Bell JJ), 168-9 [53]-[56] (Gageler J).

### A The Contextual Approach to Statutory Construction

The task of courts is to give legal meaning to the words and phrases used in statutes (at least, in the Anglo-Australian system);<sup>83</sup> the classic example is Hart's prohibition against vehicles in a park: does it apply to prams, to ambulances, to toy cars, to bicycles, or to motorcycles?<sup>84</sup> That inevitably arises even in simple cases where non-technical words and phrases are used, and produce contestable results, for the language of statutes (no differently from that of novels or newspapers or restaurant menus) is unavoidably open-textured.<sup>85</sup> For example, one recurring issue is the meaning to be given to 'relational terms' such as 'connected with' or 'in respect of' or 'with respect to', giving rise to a particularly restrained approach to construction because of the risk of inconsistency when later cases based on different facts arise.<sup>86</sup> Such words are largely contextual,<sup>87</sup> and one aspect of the context is the surrounding body of statute and judge-made law.

Without seeking to be exhaustive, it is convenient to illustrate some ways in which the contextual aspect of interpretation gives rise to interplay between statute law and courts' decisions.

### B Statutory Language that Already Bears a Legal Meaning

First, and very commonly, legislation uses language which is heavily laden with legal connotation. The *Australian Constitution*, and in particular '[s]ection

83 Three central distinctions between the legal systems in Australia and the United States of America are (a) that there is a single Australian common law, but 51 separate bodies of common law in the United States, (b) 'federal common law' in the United States overrides state statutes, whereas it does not exist in Australia, and (c) United States courts permit the executive to fix legal meaning to laws within reasonable limits: *Chevron v Natural Resources Defense Council*, 467 US 837 (1984), while it is the exclusive function of Australian courts to prescribe legal meaning: *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 151–4 [39]–[44] (Gleeson CJ, Gummow, Kirby and Hayne JJ). See Mark Leeming, 'Common Law Within Three Federations' (2007) 18 *Public Law Review* 186. One consequence of the different approach in the United States is a resistance to the notion that the rules or principles of statutory interpretation are 'law', in turn leading to a reluctance to accept that federal and state legislatures can modify or abrogate those interpretative rules: see Abbe R Gluck, 'The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism' (2010) 119 *Yale Law Journal* 1750, 1794–5.

84 See H L A Hart, *The Concept of Law* (Oxford University Press, 2<sup>nd</sup> ed, 1994) 124–9; Frederick Schauer, 'A Critical Guide to Vehicles in the Park' (2008) 83 *New York University Law Review* 1109 for the extensive literature spawned by Hart's example; see also William Twining and David Miers, *How To Do Things With Rules* (Cambridge University Press, 5<sup>th</sup> ed, 2010) 29–31.

85 See Frederick Schauer, 'On the Open Texture of Law' (2013) 87 *Grazer Philosophische Studien* 195 <<http://ssrn.com/abstract=1926855>>. See generally Douglas Hofstadter and Emmanuel Sander, *Surfaces and Essences: Analogy as the Fuel and Fire of Thinking* (Basic Books, 2013) ch 2.

86 See *R v Khazaal* (2012) 246 CLR 601, 613 [31] (French CJ) ('Generally speaking it is not desirable, in construing relational terms, to go further than is necessary to determine their application in a particular case or class of cases. A more comprehensive approach may be confounded by subsequent cases'); *Trustees of the Sydney Grammar School v Winch* [2013] NSWCA 37, [159]–[162] (McColl JA). See, eg, *McCarthy v Commissioner of Taxation* [2013] FCA 715, [62]–[66] (Robertson J).

87 See *Commissioner of Taxation v Scully* (2000) 201 CLR 148, 171 [39] (Gaudron ACJ, McHugh, Gummow and Callinan JJ).

51, teems with such terms: “insurance”, “bills of exchange”, “promissory notes”, “bankruptcy and insolvency”, “copyrights”, “patents of inventions and designs”, “trade marks”, “the acquisition of property” are some of them.<sup>88</sup> Thus, critical to the delineation of federal legislative power is language encrusted with a developed antecedent legal meaning, to which are then applied familiar constitutional concepts, including their ‘inherent scope for expansion’.<sup>89</sup> The remainder of the Constitution is no different: consider for example ‘office of profit under the Crown’ in section 44,<sup>90</sup> ‘mandamus’ and ‘prohibition’ in section 75(v),<sup>91</sup> ‘jury’ in section 80,<sup>92</sup> and ‘customs and excise’ in section 90;<sup>93</sup> the Constitution is framed in accordance with many traditional conceptions.<sup>94</sup>

There are ample non-constitutional examples too. Sometimes the use of a technical legal term is clear. It is clear that ‘sudden provocation’ in section 304 of the *Criminal Code Act 1899* (Qld) ‘was intended to import well-established principles of the common law concerning the partial defence in the law of homicide’.<sup>95</sup> It was much less clear what changes were introduced by the reformulation of the ‘common form criminal appeal provision’ derived from the *Criminal Appeal Act 1907*<sup>96</sup> in Victoria in 2009 in *Baini v The Queen*.<sup>97</sup> Where a building block of the law of property is used in statute, such as ‘charge’ or ‘pawn’ or ‘trust’, it is natural that it bear its legal meaning,<sup>98</sup> although far from inevitable, as the dissents in *Associated Alloys* and *Palgo* as well as the outcome in *Bathurst City Council v PWC Properties Pty Ltd* indicate.<sup>99</sup> ‘[W]hilst statute may appear to have adopted general law principles and institutions as elements in a new regime, in truth the legislature has done so only on particular terms.’<sup>100</sup> But what is undoubtedly clear is that where statute uses the language of basic common law principles, Justice Windeyer’s memorable metaphor determines the approach:

88 See W M C Gummow, ‘The Constitution: Ultimate Foundation of Australian Law?’ (2005) 79 *Australian Law Journal* 167, 172.

89 See *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 491–6 [13]–[23] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

90 See *Sykes v Cleary (No 2)* (1992) 176 CLR 77.

91 See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

92 See *Cheatle v The Queen* (1993) 177 CLR 541.

93 See *Ha v New South Wales* (1997) 189 CLR 465.

94 See, eg, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

95 *Pollock v The Queen* (2010) 242 CLR 233, 245 [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

96 7 Edw 7 c 23, in which an appeal was to be allowed if there was inter alia a miscarriage of justice provided that the court might dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred: see *Weiss v The Queen* (2004) 224 CLR 300, 306–11 [12]–[25] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

97 (2012) 246 CLR 469; See *Criminal Procedure Act 2009* (Vic) s 276, which provided that an appeal was to be allowed ‘if the appellant satisfies the court that ... there has been a substantial miscarriage of justice’.

98 See *Associated Alloys v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588, 595–6 [5]–[6] (trust and charge) (*‘Associated Alloys’*); *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 (mortgage and pledge) (*‘Palgo’*).

99 (1998) 195 CLR 566.

100 *Wik Peoples v Queensland* (1996) 187 CLR 1, 197 (Gummow J).

We cannot interpret its general provisions ... as if they were written on a *tabula rasa*, with all that used to be there removed ... Rather [the statute is] written on a palimpsest, with the old writing still discernible behind.<sup>101</sup>

Nor is this palimpsestic quality confined to the interaction between the statutory text and the common law. ‘Basic legal principles’, such as the notion that a criminal statute does not apply where there was an honest and reasonable mistake, result in an approach to construction which requires very clear language for it to be displaced.<sup>102</sup>

The likely consequence of all this is complexity. Two examples may serve to illustrate that recurring complexity. First, the ‘appeal’ which is created by many modern statutes is most directly derived from the jurisdiction first of the Chancellor and later of the Court of Appeal in Chancery to rehear cases in chancery,<sup>103</sup> yet its meaning in a particular case is, notoriously, highly contestable<sup>104</sup> and it carries with it a raft of judge-made law on fresh evidence, raising new points and appellate review of discretionary judgments.<sup>105</sup> More generally, as Murray Gleeson has observed, there is a tension between the value attributed by the common law to finality following a trial, reflected in doctrines of merger and *autrefois convict* and *autrefois acquit*, and the existence of a statutory appeal, which inevitably detracts from finality.<sup>106</sup> Secondly, new statutory causes of action almost invariably deploy the language of, or language which resembles, pre-existing rules. A host of interpretation questions arise: is the scope of the statute restricted by reference to the earlier law? Does the statute pick up elements of the earlier law (such as causation or remoteness of quantification)? Where statute confers a discretionary power, to what extent does pre-existing law inform the exercise of discretion? All this is familiar, yet there seems to be considerable scope for further analysis, not least so that the legal meaning likely to be given to legislative drafting can be more confidently predicted.<sup>107</sup>

### C Statutory Prohibitions Giving Rise to Causes of Action

More difficult questions arise where statutes are silent as to a cause of action. What if there is a statutory prohibition whose breach is an offence; how and when is there a correlative action for a person who suffers loss by reason of the

101 *Vallance v The Queen* (1961) 108 CLR 56, 76.

102 *CTM v The Queen* (2008) 236 CLR 440, 446–7 [5]–[7] (Gleeson CJ, Gummow, Crennan and Kiefel JJ).

103 See *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 108–9 (Dixon J); *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616, 619–20 (Mason J), 625–8 (Jacobs J).

104 No taxonomy can be established, as the legal meaning in each case will turn on the particular statutory language and context: *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390, 418 [89] (Hayne, Heydon, Crennan and Kiefel JJ). Particular difficulty arises because of the range of expressions which have been used to modify and limit the scope of appeals: *Workers Compensation Nominal Insurer v Al Othmani* [2012] NSWCA 45, [39] (Bathurst CJ).

105 See A M Gleeson, ‘Finality’ [2013] (Winter) *Bar News* 33, 35.

106 *Ibid* 34–7; see also *Montero v R* [2013] NSWCCA 214, [2]–[7] (Leeming JA).

107 See Dietrich and Middleton, above n 2, 138–40.



breach when the statute is otherwise silent? There is Glanville Williams' famously realistic but unattractive answer: 'When [penal legislation] concerns industrial welfare, such legislation results in absolute liability in tort. In all other cases it is ignored.'<sup>108</sup> In truth, the position is less simple. Justice Dixon, equally famously, considered the question long ago:

In the absence of a contrary intention, a duty imposed by statute to take measures for the safety of others seems to be regarded as involving a correlative private right, although the sanction is penal, because it protects an interest recognised by the general principles of the common law.<sup>109</sup>

But it was not always so. As it turns out, 'this elementary question is strangely debatable'.<sup>110</sup> Until around the middle of the nineteenth century – prior to the development of a coherent theory of negligence – Coke's view that 'every Act of Parliament made against any injury, mischief, or grievance doth either expressly, or impliedly give a remedy to the party wronged, or grieved [by any violation of the Act]'<sup>111</sup> prevailed. That is reflected in Chief Justice Holt's statement in *Ashby v White* that '[i]f the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it',<sup>112</sup> and in broad statements such as that of Lord Campbell CJ in *Couch v Steel* that a penal statute did not impliedly take away the 'right to maintain an action in respect of special damage resulting from the breach of a public duty'<sup>113</sup> which traced the right to the *Statute of Westminster*.<sup>114</sup> Indeed, the same reasoning may be seen in the less well-known aspects of *Marbury v Madison*.<sup>115</sup> Professor Foy's work on implied private actions describes the early history and the changes in the second half of the nineteenth century.<sup>116</sup> At around the time negligence was being formalised, these decisions were criticised and replaced by a more nuanced approach to construing the statute, a reluctance to discern a statutory cause of action, and the idea that contravention of the statute was merely 'evidence of negligence',<sup>117</sup> the process may conveniently be seen 20 years later, when *Couch v Steel* was formally

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108 Glanville Williams, 'The Effect of Penal Legislation in the Law of Tort' (1960) 23 *Modern Law Review* 233, 233.

109 *O'Connor v S P Bray Ltd* (1936) 56 CLR 464, 478 (Dixon J). See also *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, 404–5 (Kitto J); *Field v Dettman* [2013] NSWCA 147, [36]–[55] (Preston CJ).

110 Foy, above n 3, 505.

111 See Edward Coke, *The Second Part of the Institutes of the Lawes of England* (Flesher and Young, 1642) 55.

112 (1703) 2 Ld Raym 938, 953; 92 ER 126, 136.

113 (1854) 3 El & Bl 402, 412–13; 118 ER 1193, 1197.

114 *Ibid* 411; 1196: 'The statute of Westm. 2 (1 stat. 13 Ed. 1) c 50, gives a remedy by action on the case to all who are aggrieved by the neglect of any duty created by statute.'

115 5 US 137, 153–73 (1 Cranch, 1803),

116 Foy, above n 3, 524–48.

117 See especially *Blamires v Lancashire and Yorkshire Railway Co* (1873) 8 LR Ex 283; *Atkinson v Newcastle & Gateshead Waterworks Co* (1877) 2 Ex D 441.

overruled.<sup>118</sup> For present purposes, it suffices to mention the transitional difficulties as described by Professor Foy:

[*Blamires*] reflected the law in transition, illustrating the analytic and semantic confusion produced by the collision of two very different ideas: the old idea that neglect of legal duty, including statutory duty, was actionable negligence, and the new idea that negligence was conduct that a jury found to be unreasonable.<sup>119</sup>

Notwithstanding the underlying change in the prevailing paradigm, under *both* the earlier approach *and* that which replaced it, questions of coherence were involved. That basal concern continues to this day: when a plaintiff sues another for damages sustained in the course of or as a result of illegal conduct of the plaintiff, ‘the central policy consideration at stake is the coherence of the law.’<sup>120</sup> That means that the analysis is wide-ranging.<sup>121</sup> As Neil Foster has written, the courts will consider:

Does the statute itself prescribe a penalty, or not? Is the statutory provision designed for the benefit of a limited class of persons, or is it meant for the benefit of the public at large? Is the obligation concerned a specific and confined obligation, or is it more general and ill-defined? Does the provision occur in a statutory context where other obligations are likely to be actionable, or not? Has this obligation, or an obligation analogous to this in previous legislation, been already held by the courts to give rise to a civil action?<sup>122</sup>

That process turns on *both* judge-made and statute law. In the words of Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ in *Sullivan v Moody*, to conclude that the law of negligence creates a duty in the particular circumstances of that appeal ‘would subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms.’<sup>123</sup> In short, whether breach of a penal statute gives rise to a cause of

118 *Saunders v Holborn District Board of Works* [1895] 1 QB 64. ‘The result of [the decisions of the 1870s] is plain. It is that ... it must be shewn that the legislature has used language indicating an intention that this liability shall be imposed, and unless such an intention on the part of the legislature is clearly disclosed no action will lie.’: at 68.

119 Foy, above n 3, 544.

120 *Miller v Miller* (2011) 242 CLR 446, 454 [15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Equiscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 513 [23], 518 [34] (Gummow, Heydon and Crennan JJ).

121 ‘[T]he task is one that requires consideration of the whole range of circumstances relevant upon a question of statutory interpretation, including the nature, scope and terms of the statute, the nature of the evil against which it is directed, the nature of the conduct prescribed and the pre-existing state of the law’: *Miller v Miller* (2011) 242 CLR 446, 459–60 [29] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), citing *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 460–1 (Gummow J).

122 Neil Foster, ‘The Merits of the Civil Action for Breach of Statutory Duty’ (2011) 33 *Sydney Law Review* 67, 74. In the United States of America, significantly different approaches have been adopted: see *J I Case Co v Borak*, 377 US 426 (1964); *Cort v Ash*, 422 US 66 (1975); *Touche Ross & Co v Redington*, 442 US 560 (1979). The changing approach of the courts to construction led in turn to the question (answered negatively) whether a different approach ought be adopted depending on when the statute was enacted: *Alexander v Sordova*, 1 532 US 275 (2001). Most recently, Scalia J has urged a similarly narrow approach for implying constitutional causes of action: *Minneci v Pollard*, 132 S Ct 617 (2012). The literature is vast, but see further Williams, above n 3, 576–80.

123 (2001) 207 CLR 562, 576 [42].

action is a question of construction, an element of which is the body of statutory law.

The High Court's decision in *Miller v Miller* emphasises that 'coherence' is not a policy consideration which applies exclusively to judge-made law. The question was whether a passenger injured in a car, stolen by her and her relatives in a joint criminal enterprise, could recover in negligence. The joint judgment of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ emphasised that not only was coherence 'the central policy consideration at stake'<sup>124</sup> but also that it applied at two levels:

[The coherence of the law] is a consideration that is important at two levels. First, the principles applied in relation to the tort of negligence must be congruent with those applied in other areas of the civil law (most notably contract and trusts).

Secondly, *and more fundamentally*, the issue that is presented by observing that a plaintiff was acting illegally when injured as a result of the defendant's negligence is whether there is some relevant intersection between the law that made the plaintiff's conduct unlawful and the legal principles that determine whether the plaintiff should have a cause of action for negligence against the defendant. Ultimately, the question is: would it be incongruous for the law to proscribe the plaintiff's conduct and yet allow recovery in negligence for damage suffered in the course, or as a result, of that unlawful conduct?<sup>125</sup>

It is clear that the second and more fundamental aspect of the analysis turns on statute. Their Honours concluded:

If a statute has been contravened, careful attention must be paid to the purposes of that statute. It will be by reference to the relevant statute, and identification of its purposes, that any incongruity, contrariety or lack of coherence denying the existence of a duty of care will be found. That is the path that was taken in *Henwood*. It is the same as the path that has been taken in relation to illegality in contract and trusts. The same path should be taken in cases where the plaintiff sues the defendant for damages for the negligent infliction of injury suffered in the course of, or as a result of, the pursuit of a joint illegal enterprise.<sup>126</sup>

A similar approach may be seen in other High Court decisions.<sup>127</sup>

#### **D Other Examples of Legislative Interaction with Judge-Made Law**

Sometimes legislation uses language which more elaborately picks up the dynamism of judge-made law: 'A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from

124 (2011) 242 CLR 446, 454 [15].

125 *Ibid* 454–5 [15]–[16] (emphasis added).

126 *Ibid* 473 [74].

127 See *CAL No 14 Pty Ltd (t/as Tandara Motor Inn) v Motor Accidents Insurance Board* (2009) 239 CLR 390, 406–9 [39]–[41] (Gummow, Heydon and Crennan JJ), where the legal incoherence was assessed against tort, crimes, bailment, s 45 of the *Criminal Code (Tas)* and the enacted law governing the service of alcohol in Tasmania. In *Equiscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 514 [25] (French CJ, Crennan and Kiefel JJ), it was said that:

'The requirement of coherence in this area of the law is not satisfied by the mere exclusion of an implied legislative intention to render unenforceable a contract made in furtherance of a contravening purpose. Unenforceability flows from the application of the common law informed, inter alia, by the scope and purpose of the relevant statute.'

time to time'<sup>128</sup> or '[s]ubject to this Act, the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth';<sup>129</sup> these present particular problems.<sup>130</sup> In the United Kingdom, the *Human Rights Act 1998* (UK) c 42 has (controversially) been construed as imposing a duty on courts to mould and extend the common law to ensure that decisions are compatible with human rights,<sup>131</sup> but its different history and constitutional context has led to a different approach to similar language in the *Charter of Human Rights and Responsibilities Act 2006* (Vic).<sup>132</sup>

## VI THE TEMPORAL DIMENSION: THE ROLE OF LEGISLATIVE AND JUDICIAL CHANGE

An analysis of the impact of statutes on judge-made law which confined attention to the statute book in its present form would be incomplete. Laws are constantly enacted, amended and repealed. The fact of legislative change, or the absence of change, is itself an influence on judge-made law, and the fact of judicial change can produce both predictable and unlikely consequences on statute law.

### A Legislative Activity

There are at least three ways in which legislative activity alters judge-made law. One is that legislative change may operate as a catalyst to prompt changes in judge-made law. A well-known example is the nineteenth century married women's statutes, whose impact was described by Dean Landis:

The statutes themselves were quite terse ... [T]heir terms did not directly control numerous allied questions. ... There has been general recognition that the married women's acts embodied principles which were of wider import than the statutes in terms expressed and thus necessitated remoulding common-law doctrines to fit the statutory aims.<sup>133</sup>

Another is the use of limitation statutes in a range of areas, including their application to equitable claims by analogy, and their extension to easements by

128 *Australian Consumer Law* (Cth) s 20(1); formerly *Trade Practices Act 1974* (Cth) s 51AA.

129 *Native Title Act 1993* (Cth) s 12 (repealed).

130 See *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51; *Western Australia v Commonwealth* (1995) 183 CLR 373.

131 *A v B plc* [2003] QB 195, 202 [4] (Lord Woolf CJ). See Anthony Lester, 'The Magnetism of the Human Rights Act 1998' (2002) 33 *Victoria University of Wellington Law Review* 447 and Duxbury, above n 2, 233-40.

132 See *Momcilovic v The Queen* (2011) 245 CLR 1, 49-50 [49]-[50] (French CJ), 89-90 [155]-[160] (Gummow J).

133 James McCauley Landis, 'Statutes and the Sources of Law' in Morton Carlisle Campbell and Zechariah Chafee (eds) *Harvard Legal Essays* (Harvard University Press, 1934) 213, 223. See *Brown v Holloway* (1909) 10 CLR 89; *PGA v The Queen* (2012) 245 CLR 355, 373-4 [31] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

prescription.<sup>134</sup> A likely third is the expansion of rescission in equity seen in *Vadasz v Pioneer Concrete (SA) Pty Ltd*.<sup>135</sup> The limits to such an approach in a federation with a single common law may be seen in the attempts to rely on the Federal and New South Wales *Evidence Acts* which had not elsewhere been implemented to alter the test for legal professional privilege at common law.<sup>136</sup> All these developments (and non-developments) are driven by considerations of coherence.

A second way is that legislative change may force litigation in a different direction, as seems to have occurred in constructive trusts in England following the abolition of part performance.<sup>137</sup> In Australia it is easy to see how the Commonwealth Parliament's sustained (and bipartisan) attempts to restrict or deny judicial review of decisions under the *Migration Act 1958* (Cth) has led to an expansion of jurisdictional error (decisions affected by which cannot be excluded from section 75(v) review). That in turn gives rise to different questions of coherence, for, as John Basten has noted,<sup>138</sup> ought it necessarily follow that the same considerations govern jurisdictional error where executive power has granted a licence or a planning approval?

Thirdly, the fact that some ordinary legislation has been regularly amended is a factor *against* giving an expanded or strained meaning to the text. *Roadshow Films Pty Ltd v iiNet Ltd* is a recent example.<sup>139</sup>

## B Legislative Inertia

Conversely, the *absence* of legislation may inform change in judge-made law. The High Court has noted that it is one thing for the common law to develop by analogy to the enacted law, and another for the common law to stand still because the legislature has not moved; nevertheless, the High Court observed that legislative inertia 'might have some attraction if this Court were contemplating the reformulation of basic doctrine'.<sup>140</sup> Conversely, it may be argued that the growing social acceptance of long term unmarried relationships led in this

134 See Sir William Holdsworth, *A History of English Law* (Sweet and Maxwell, 5th ed, 1942) vol 3, 169–70.

135 (1995) 184 CLR 102. See Dominic O'Sullivan, Steven Ballantyne Elliott and Rafal Zakrzewski, *The Law of Rescission* (Oxford University Press, 2008) 464–70.

136 See *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49, 61–2 [22]–[23] (Gleeson CJ, Gaudron and Gummow JJ), rejecting the reasoning in *Adelaide Steamship Co Ltd v Spalvins* (1998) 152 ALR 418, 428 (Olney, Kiefel and Finn JJ). Justice Beaumont described this with a 'gravitational pull' metaphor reminiscent of Chief Justice Traynor: *South Pacific Air Motive Pty Ltd v Magnus* (1998) 87 FCR 301, 317.

137 See Part III above.

138 J Basten, 'Identifying the Limits of Executive Power: Tiers of Scrutiny or Tears of Frustration?' (Paper presented at Continuing Professional Development Programme, Constitutional and Administrative Law Section, New South Wales Bar Association, 14 May 2013).

139 (2012) 286 ALR 466 ('*iiNet*'). 'The history of the Act since 1968 shows that the parliament is more responsive to pressures for change to accommodate new circumstances than in the past. Those pressures are best resolved by legislative processes rather than by any extreme exercise in statutory interpretation by judicial decisions.': at 494 [120] (Gummow and Hayne JJ).

140 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 46 [59] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

country to decisions such as *Baumgartner v Baumgartner*,<sup>141</sup> where a remedial constructive trust was crafted so as to confer 45% of the beneficial ownership of a home upon the former de facto partner of the man who owned it at law (notwithstanding ‘equity is equality’ and the domestic character of the relationship). That tension with settled equitable principle was substantially removed, first by reason of state and territory de facto relationships legislation, and then by a referral of power to the Commonwealth and new Part VIIIAB to the *Family Law Act 1975* (Cth). In contrast, in England the difficulties in the absence of legislation have been described by Lord Walker.<sup>142</sup> Neither the Australian nor English decisions are easy to reconcile with established principle, but it is equally easy to see how legislative inertia led to those court decisions.<sup>143</sup>

### C Judicial Change

Considerations of that nature suggest that the willingness of courts to change the law depends in part on the operation of statute. Lord Walker has observed that although ‘a lot seems to depend on judicial intuition’, the nature of the legal rule influences the extent to which courts are prepared to modify it.

But the cases suggest that it is common law rules which might be described as ‘lawyer’s law’ – such as witness immunity or mistake of law – that the judges are most ready to develop. Lord Goff had passionately-held views about mistake of law, but it is not a topic that is much talked about on the Clapham bus or the Glen Iris tram. Conversely, issues which potentially have large social and economic consequences, such as causation in clinical negligence and industrial diseases, are generally best left to Parliament.<sup>144</sup>

Although it is difficult to predict let alone analyse when courts reformulate legal doctrine, there are statutory consequences. Some are obvious. The most prominent examples are constitutional developments: for example, the identification of implied restrictions on power, such as those associated with *R v*

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141 (1987) 164 CLR 137.

142 Lord Walker, above n 2, 251:

In England, the Law Commission has considered this issue at length but has failed to find a solution that Parliament will accept. Parliament has therefore done nothing. In these circumstances, the court has had no option but to try to develop trust law concepts to provide a solution. The problems of trying to balance fairness of outcome with predictability of outcome are formidable. The latest case is the decision of the Supreme Court in *Jones* [2012] 1 AC 776. Our efforts have met with less than universal approbation (to say the least) from legal scholars, but it is not open to judges, faced with a difficult question, to say ‘pass’.

143 In Australia, see Julie Dodds, ‘The New Constructive Trust: An Analysis of its Nature and Scope’ (1988) 16 *Melbourne University Law Review* 482; A J Oakley ‘The Development of the Constructive Trust as a Remedy in Australia’ (1989) 5 *Queensland University of Technology Law Journal* 19, 32 (‘That is not to say that this new principle is wrong – in fact, it seems eminently sensible – but that its creation amounts to an act of judicial legislation for which the High Court may not be the most appropriate forum’). Walker, above n 2, 251 n 89 cites Simon Gardner and Katharine Davidson, ‘The Supreme Court on Family Homes’ (2012) 128 *Law Quarterly Review* 178; Adrian Briggs, ‘Co-Ownership and an Equitable Non Sequitur’ (2012) 128 *Law Quarterly Review* 183 and John Mee, ‘Ambulation, Severance, and the Common Intention Constructive Trust’ (2012) 128 *Law Quarterly Review* 500.

144 Walker, above n 2, 250.

*Kirby; Ex parte Boilermakers' Society of Australia*,<sup>145</sup> *Kable*,<sup>146</sup> *Lange*,<sup>147</sup> *Re Wakim; Ex parte McNally*,<sup>148</sup> *Plaintiff S157/2002 v Commonwealth*<sup>149</sup> and *Kirk v Industrial Court (NSW)*.<sup>150</sup> Sometimes a reformulation of doctrine occurs in an area that is less closely connected with statute. Examples are the recognition of native title in *Mabo v Queensland [No 2]*<sup>151</sup> and that legal professional privilege is a common law right. Every time that happens, there is a cascade of consequences, including in statute law. *Mabo* led to the *Native Title Act 1993* (Cth) and its amendment under successive governments. Another point emerges from *iiNet*, namely, the danger of looking backwards with the dubious benefit of hindsight. There was of course a substantial legislative response to *University of New South Wales v Moorhouse*,<sup>152</sup> but during the hearing, Gummow J said '[t]he lesson of *Moorhouse* is that it achieved a situation which had to be solved by legislation and *Moorhouse* is treated as if it is some revelation from Mount Sinai, but it is not really.'<sup>153</sup>

There are subtle relationships between the processes by which judge-made law is created and modified over time, and the way in which legal meaning is fixed to statute law. Stephen Gageler emphasised this in an important recent paper:

Although the enactment of the text occurs by or under the authority of a legislature at a point in time, that enactment occurs in a broader structural and temporal context where the enacted text becomes part of the law that is to be applied by courts, on and from the time of its enactment, to determine rights and resolve disputes in individual cases. The meaning of a statutory text in that broader structural and temporal context is informed by the experience of the courts in the process of application of the law to the facts in those individual cases. Over time, the meaning of a statutory text is reformed by the accumulated experience of courts in the application of the law to the facts in a succession of cases. The meaning of a statutory text is also informed, and reformed, by the need for the courts to apply the text each time, not in isolation, but as part of the totality of the common law and statute law as it then exists.

The attribution of meaning by courts to the statutory text in this way resembles the declaration and development by courts of the common law. The common law and statute law as applied by courts are, to a significant degree, products of the same inherently dynamic legal process.<sup>154</sup>

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145 (1956) 94 CLR 254 (*'Boilermakers'*).

146 (1996) 189 CLR 51.

147 (1997) 189 CLR 520.

148 (1991) 198 CLR 511.

149 (2003) 211 CLR 426.

150 (2010) 239 CLR 531.

151 (1992) 175 CLR 1 (*'Mabo'*).

152 (1975) 133 CLR 1 (*'Moorhouse'*). *Copyright Act 1968* (Cth) s 39A provides a defence for libraries and archives with photocopiers if a prescribed notice is on display nearby, and subsequently a scheme operated by CAL, the Copyright Agency Limited collecting society, in pt 5B was put in place.

153 See Transcript of Proceedings, *Roadshow Films Pty Ltd v iiNet Ltd* [2011] HCATrans 324 (1 December 2011).

154 Gageler, above n 2, 1–2.

Consequently, the legal meaning of the same statutory language can and will change depending upon the contextual change in the judge-made law in which the statute operates. Three examples must suffice. One is the signal change in legal professional privilege effected by *Baker v Campbell*<sup>155</sup> in 1983. Prior to 1983, legal professional privilege was seen as an evidentiary rule, and therefore not available in non-curial proceedings where the rules of evidence did not apply.<sup>156</sup> Legislation enacted prior to 1983 dealing with compulsive production by executive agencies, such as the corporate and trade practices regulators, made non-compliance an offence unless there was a ‘reasonable excuse’. Plainly enough, prior to 1983, the legal meaning of the exception could not comprehend a claim of legal professional privilege, nor did any question arise as to whether there were clear words abrogating it; those questions simply did not arise, because the privilege was not available.

The legal meaning of the statute changed after 1983, when privilege came to be regarded as a deeply entrenched common law ‘right’, capable of being removed by statute but only by, *Potter v Minahan* (1908) 7 CLR 277, words of unmistakable clarity. The High Court divided 3:2 in *Corporate Affairs Commission (NSW) v Yuill*<sup>157</sup> in 1991, with the dissentients (Gaudron and McHugh JJ) reasoning that the fact that there was an express qualification of ‘reasonable excuse’ to the compulsive order accommodated the newly available claim of privilege, and confirmed that it was not abrogated.<sup>158</sup> More recently, in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*,<sup>159</sup> a majority of the High Court indicated a preference for the reasoning of the dissentients in *Yuill*.<sup>160</sup> Accepting that they are right, there has been a substantive change in legal meaning of the same statutory text, consequent upon the working through of a change in the characterisation of the nature of the privilege to which the statute was directed.

Secondly, consider the (radically) different meanings given to ‘arising under’ in the delineation of federal judicial power in the *United States Constitution* Article III (‘arising under this Constitution, the Laws of the United States and Treaties’) and the same words in 28 USC §1331, (‘The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or

155 (1983) 153 CLR 52.

156 See *O’Reilly v Commissioners of the State Bank of Victoria* (1983) 153 CLR 1; *Testro Bros Pty Ltd v Tait* (1963) 109 CLR 353. The history is described by Lockhart J in *Arno v Forsyth* (1986) 9 FCR 576, 585–8.

157 (1991) 172 CLR 319 (‘*Yuill*’).

158 The majority pointed to the fact that at the time the law was enacted, no privilege could be asserted, and the intention to be imputed was that no privilege would be available, coupled with a detailed analysis of the statute: at 323 (Brennan J), 336 (Dawson J).

159 (2002) 213 CLR 543.

160 ‘Given the above considerations and, given also, that it is far from obvious that the retention of legal professional privilege would significantly impair the ACCC’s functions under the Act, s 155 cannot be construed, consistently with the rule expressed in *Potter v Minahan*, as impliedly abrogating legal professional privilege. As earlier indicated, that does not mean that *Pyneboard* was wrongly decided. However, it may be that *Yuill* would now be decided differently.’: at 560–1 [35] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).



treaties of the United States'). The constitutional words are satisfied by any case or controversy which *might* call for the application of federal law, but the statutory grant of jurisdiction requires the question of federal law to appear on the face of the *plaintiff's* originating process, and for it to be 'direct' or 'central', and for it to be 'substantial'.<sup>161</sup> Predictably there is a formidable amount of criticism, for why should a substantially narrower meaning be given to the same words in essentially the same context?<sup>162</sup>

Thirdly, there is the remarkable and formidably argued thesis of Professor Nelson to the effect that in the United States, federal statutes are construed more broadly than identically worded state statutes, for a variety of reasons including the substantial absence of federal common law (notably, of choice of law and of crimes).<sup>163</sup> That thesis reflects a remarkable aspect of the architecture of the United States legal system and the working out, ultimately, of what flows from *Erie*.<sup>164</sup>

One could multiply examples, but it is hoped that the foregoing suffice to confirm Martin Krygier's conclusion that statutes are 'situated in and deeply affected by contexts which they presuppose, from which they cannot escape, and which make it possible for them to have such effects as they do'.<sup>165</sup>

## VII THE LIMITED UTILITY OF BIRKSEAN TAXONOMY

One corollary of the foregoing is the difficulty of formulating a taxonomy of the legal system which reflects its practical operation. For example, Professor Birks wrote that *Spring v Guardian Assurance plc*<sup>166</sup> was a 'species of problem which disfigures the law' and that it was 'discreditably elementary',<sup>167</sup> when it was held that an employer was liable in negligence for erroneous statements in a reference, which caused pure economic loss; what made the decision so egregious to Birks was that the reference was a communication which was subject to qualified privilege and the employer could not have been liable in defamation without proof of malice. He added:

It is enough that we see the makings of an intellectual disaster. The whole law of tort is bedevilled by the same essentially trivial problem. The law cannot tolerate,

161 The constitutional text is established by *Verlinden BV v Central Bank of Nigeria*, 461 US 480 (1983); the 'well pleaded complaint' rule may be seen in *Rivet v Regions Bank of Louisiana* 522 US 470, 475 (1998) and derives from *Louisville & Nashville Railroad Co v Mottley*, 211 US 149 (1908). For the 'direct' or 'central' requirement see *Grable & Sons Metal Products Inc v Darue Engineering & Manufacturing* 545 US 308 (2005), and for the 'substantial' requirement see *Arbaugh v Y & H Corporation*, 546 US 500, 513 (2006). See also Leeming, above n 51, 111–13, 204–5.

162 The corresponding words 'arising under' in ch III of the *Australian Constitution* and in ss 39B(1A)(b) and (c) of the *Judiciary Act 1903* (Cth) bear the same broad meaning: *Australian Solar Mesh Sales Pty Ltd v Anderson* (2000) 101 FCR 1, 5–7 [11] (Burchett J, Wilcox and Tamberlin JJ agreeing).

163 Nelson, above n 3.

164 304 US 64 (1938).

165 Martin Krygier, 'The Traditionality of Statutes' (1988) 1 *Ratio Juris* 20, 27.

166 [1995] 2 AC 296.

167 Birks, above n 4, 6.

or should not be able to tolerate, torts named so as to intersect. It is symptomatic of the common law's worrying indifference to system that academic literature has not eliminated this kind of intellectual trap. But the same problem which bedevils tort bedevils the whole law.<sup>168</sup>

Although far from original,<sup>169</sup> in my view this is badly wrong. The criticisms of Birks' taxonomic project are familiar, not least those persuasively advanced by Joachim Dietrich,<sup>170</sup> and they go beyond considerations of statutes. There is nothing *per se* wrong with overlapping causes of action,<sup>171</sup> which in part reflects the historical rivalry between courts and explains much of the growth of the royal courts, and many legal fictions. As Professor Horwitz has put it, legal architecture has an historically contingent character.<sup>172</sup> The notion that there can be no antinomy in the legal system is exploded once one considers the common injunction issued by chancery, or the prohibitions directed by common law courts to their admiralty and ecclesiastical competitors.<sup>173</sup> Chief Justice Spigelman has said that '[t]he common law has never had the fascination for consistency apparent in the civil law, which operates on the assumption that all relevant legal rules can be written down in a comprehensive manner'<sup>174</sup> echoing Lord Goff's understatement that 'the common law is not antipathetic to concurrent

168 Ibid. See also Darryn Jensen, 'The Problem of Classification in Private Law' (2007) 31 *Melbourne University Law Review* 516.

169 Cf F Hilliard's criticisms in 1859 of treatises which lacked a 'scientific basis' and failed 'to present a connected, systematic or complete view of any one of the somewhat heterogeneous topics of which they promiscuously treat': F Hilliard, *The Law of Torts* (Little, Brown 1859) iv, quoted in Morton J Horwitz, *The Transformation of American Law 1870-1960* (Oxford University Press, 1992) 12.

170 Dietrich, 'What is "Lawyering"?', above n 2; Joachim Dietrich 'The Third Restatement of Restitution, the Role of Unjust Enrichment and Australian Law' (2011) 35 *Australian Bar Review* 160, 165-7, 174-5; see also Kevin Low, 'The Use and Abuse of Taxonomy' (2009) 29 *Legal Studies* 355; G Samuel, 'The Division of Wrongs: A Historical Comparative Study. By Eric Descheemaeker' (2012) 71 *Cambridge Law Journal* 441.

171 The same conduct may (and often will) give rise to actions for conversion and detainee; likewise, what is a nuisance may also be negligent. And a plaintiff may succeed in one tort and fail on another: see, eg, *Volman t/a Volman Engineering v Lobb* [2005] NSWCA 348. More generally, the same conduct may (and notoriously, often is) both a tort and a breach of an express or implied contractual term to take reasonable care. That difference was critical when contributory negligence was a complete defence, and when, prior to amendments made in Australia following *Astley v Austrust Ltd* (1999) 197 CLR 1, the statutory reformulation of contributory negligence applied only to negligence, giving rise to divergent outcomes when the same harm was caused by persons who were and were not in contractual relations: see Gary Davis and Jane Knowler, 'Astley v Austrust Ltd: Down but not Out: Contributory Negligence, Contract, Statute and Common Law' (1999) 23 *Melbourne University Law Review* 795, 812-13. None of this is to deny that it is highly relevant as a matter of coherence that the elements of, or defences to, one source of tortious liability diverge from another, and indeed it seems doubtful (to say the least) whether the expanded approach in *Spring v Guardian Assurance plc* itself applies in Australia: see *Sullivan v Moody* (2001) 207 CLR 562, 580-1 [54]-[55] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Stewart v Ronalds* (2009) 76 NSWLR 99, 120-1 [104] (Hodgson JA).

172 Morton J Horwitz, *The Transformation of American Law 1870-1960*, (Oxford University Press, 1992) 14.

173 Justices Gaudron and Gummow referred to the 'judicial strife' between those courts in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 96 [31]; see also Leeming, above n 51, 224.

174 J J Spigelman, 'From Text to Context: Contemporary Contractual Interpretation' (2007) 81 *Australian Law Journal* 322.

liability.<sup>175</sup> More generally, of course, the High Court has rejected the utility of ‘all-embracing theories’, particularly because they fail to have regard to well-settled equitable doctrines and remedies.<sup>176</sup>

However, the impact and dominance of statute is one of the most fundamental of all weaknesses in the taxonomic project. As Dietrich says:

The law is a chaotic jumble of (surviving) common law rules and piecemeal, inconsistent and unsystematic statutory incursions, whether we like it or not. ... We could of course ignore the legislation and carry on with our taxonomy regardless, but to what end? Given the piecemeal nature of statutory intervention, those parts of the common law remaining are even less likely to be capable of systematic ordering, one would imagine.<sup>177</sup>

Peter Birks’ article fills 99 pages, which is very long by Anglo-Australian law review standards, but mentions one statute.<sup>178</sup> Statute has substantially altered most tortious causes of action, and creates many new ones.<sup>179</sup> There will inevitably be overlap; indeed, perhaps the easiest way home for the former employee in *Spring v Guardian Assurance* would be, assuming events took place in Australia, to allege that the reference was misleading or deceptive and made in trade or commerce. Once again, prior to statutory amendments, there was no just and equitable reduction for plaintiffs whose fault contributed to the loss suffered by reason of misleading or deceptive conduct.

Moreover, the taxonomic project ignores the dynamic aspects of the legal system. Constantly laws are made, construed, amended and repealed; judge-made law is deeply affected by this, as I have sought to emphasise in this article. The temporal dimension of the legal system is wholly absent from taxonomies, at least in the forms in which they are traditionally propounded.<sup>180</sup> But that dynamism is central to the practical operation of the legal system. Indeed, it is why it is a *system*. Once the dynamic aspects of the legal system are borne in mind, the force of Professor Williams’ contention may be seen:

[T]he common law [should be understood] not as a body of law whose change is impeded or blocked by a static body of statutory rules, but as a process best served by the rational integration of judge-made and legislative law.<sup>181</sup>

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175 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 193.

176 See, eg, *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 300–1 [91]–[93] (Gummow, Hayne, Heydon, Kiefel and Bell JJ); see further Mark Leeming, ‘Subrogation, Equity and Unjust Enrichment’, in Jamie Glistler and Pauline Ridge (eds), *Fault Lines in Equity* (Hart Publishing, 2012) 27–43.

177 Dietrich, ‘What is “Lawyering”?’ above n 2, 573. See also Dietrich and Middleton, above n 2, 170 (‘the debate about the taxonomy of the law of “obligations” would be seen to be of little interest or relevance to understanding how law in fact works’).

178 *Sale of Goods Act 1979* (UK) c 54, s 52, which deals with specific performance.

179 See Robert S French, ‘Statutory Modelling of Tort’ in Nicholas J Mullany (ed), *Torts in the Nineties* (LBC Information Services, 1997) ch 7.

180 See, eg, the examples in Emily Sherwin, ‘Legal Taxonomy’ (2009) 15 *Legal Theory* 25. There is some acknowledgement of the issue by Jensen, above n 168, at 537–538, suggesting that mapping the law does not deny the law’s complexity and dynamism, but merely assists with managing that complexity.

181 Williams, above n 3, 599.

## VIII CONCLUSION

As Learned Hand J observed (in a very different context), history teaches scepticism about any easy explanations.<sup>182</sup> The reality of the Australian legal system is that it is highly complex. There are intersecting Commonwealth and State laws, each of which interacts with judge-made law in complex ways. Indeed, the same dispute between the same parties may be adjudicated in different courts within Australia and be subject to different procedural rules and different substantive outcomes.<sup>183</sup> It should come as little surprise that there is little practical utility in pretending that statutes are not there, and seeking to arrange what remains into an orderly whole. So to do removes a central element of the system, and obscures the dynamic reality of how that system operates in the real world. That such a project has any attraction at all is a consequence of the persuasiveness of its advocates and ‘the temptation, which is so apt to assail us, to import a meretricious symmetry into the law.’<sup>184</sup> This article has sought to demonstrate that considering the legal system in all its parts has the advantage of engaging with the real world, rather than the ‘Langdellian ether of a super-terrestrial Common Law’,<sup>185</sup> as well as being an intrinsically interesting area of analysis.

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182 Testimony to the Senate Committee on Labor and Public Welfare, 28 June 1951, in Irving Dilliard (ed), *The Spirit of Liberty: Papers and Addresses of Learned Hand* (Knopf, 1952) 225–52, 249.

183 ‘It inevitably follows from [the fact that a State court may take jurisdiction in a personal action when its originating process is served on the defendant within the bounds of its territorial jurisdiction] that there can be cases in which similar, even identical, issues can be raised in the courts of two States between the same or related parties. It is inevitable, therefore, that there can be overlapping, even conflicting, procedures and judgments of the courts concerned.’: *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 36–7 [58] (Gaudron, Gummow and Hayne JJ).

184 *A-G (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237, 285 (Fullagar J).

185 See letter from Sir Frederick Pollock to Oliver Wendell Holmes, 17 September 1897 in Howe (ed), above n 24, 80. Coincidentally, many years later, a youthful Felix Frankfurter wrote to Holmes for advice, having been invited to join the Harvard faculty to teach a series of courses ‘largely to be determined by Pound’, and referred to the fact that Pound’s sociological work which might ‘be a help to save me and the students from Langdellian sterilization’: Letter from Felix Frankfurter to Oliver Wendell Holmes, 4 July 1913, in Robert M Mennel and Christine L Compston (eds), *Holmes & Frankfurter: Their Correspondence, 1912–1934* (University Press of New England, 1996) 10–11.