Judge-made law and statute – a complex interwoven fabric

Selected decisions from Western Australia

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There are many important ways in which statute law and judge-made law interact within the Australian legal system. This paper addresses an aspect of that complex inter-relationship, by reference to High Court decisions arising out of Western Australian litigation.

Introduction

Western Australia has been the source of many High Court decisions of lasting significance across all areas of law. By way of examples (which could readily be multiplied), consider:

- *Yougarla*[1] and *Marquet*[2] on manner and form (indeed the latter also contains at [81]-[85] a useful summary of prorogation in Australia and the United Kingdom, although not mentioned in *R (on the application of Miller) v The Prime Minister*);[3]

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1 *Yougarla v The State of Western Australia* (2001) 207 CLR 344; [2001] HCA 47.

2 *Attorney-General (WA) v Marquet* (2003) 217 CLR 545; [2003] HCA 67.

3 [2019] UKSC 41.

- *McGinty*[4] on electoral district boundaries;

- *R v Hughes*[5] and *Rizeq*[6] on the way in which state legislation applies to courts exercising federal jurisdiction;

- *Annetts v Australian Stations Pty Ltd*[7] and *Nagle v Rottnest Island Authority*[8] in negligence;

- *Bahr v Nicolay [No 2]*[9] and *Giumelli v Giumelli*[10] in equity, and

- *Mount Bruce Mining*[11] in contract.

To these may be added a rich body of criminal appeals, and the slew of decisions generated by a Londoner who came to Western Australia aged 12. The corporate activities of Mr Alan Bond have led to a series of decisions of first-rate importance, not least of which are *Australian Broadcasting Tribunal v Bond*[12] and *Bond v The Queen*.[13] Indeed, Bond's transfer of funds from Bell Resources to Bond Corporation, to which he pleaded guilty in 1997, led to my appearing in this city for four days commencing in November 1999, as a junior, precisely 20 years ago this month, in the early stages of litigation brought by the Bell Group liquidators.[14] That litigation has had a remarkable impact on equity, corporate law and (in its most recent incarnation in the High Court) constitutional law.[15]

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4 *McGinty v The State of Western Australia* (1996) 186 CLR 140.

5 *R v Hughes* (2000) 202 CLR 535; [2000] HCA 22.

6 *Rizeq v The State of Western Australia* (2017) 262 CLR 1; [2017] HCA 23.

7 *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; [2002] HCA 35.

8 *Nagle v Rottnest Island Authority* (1993) 177 CLR 423.

9 *Bahr v Nicolay [No 2]* (1988) 164 CLR 604.

10 *Giumelli v Giumelli* (1999) 196 CLR 101; [1999] HCA 10.

11 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; [2015] HCA 37.

12 (1990) 170 CLR 321.

13 (2000) 201 CLR 213; [2000] HCA 13.

14 *Bell Group Ltd v Westpac Banking Corporation* (2000) 104 FCR 305; [2000] FCA 439.

15 *Bell Group NV (in liquidation) v Western Australia* (2016) 260 CLR 500; [2016] HCA 21.

It is commonplace to place decisions in pigeon-holes, such as "tort" or "contract" or "corporate law" or "crime". It is less common to fasten attention on the interaction between statute law and judge-made law, even though it underlies most decisions, including most of those mentioned above. All of the constitutional, administrative and criminal decisions are closely tied to statute and the body of law to which statute has given rise. So too are the tort cases – even though they pre-dated the *Civil Liability Act.* It was "significant" for Gummow and Kirby JJ in *Annetts* that Western Australia had *not* enacted legislation corresponding to s 4 of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) (which was intended to overturn the rule that a recovery of pure "nervous shock" was unavailable),[16] while *Nagle* turned in part on the duty of the Authority imposed by statute.[17] The same is true of the equity cases: the disputed interests in land were created by Torrens legislation and regulated by the Statute of Frauds. Cases on contract, turning as they do on the parties' agreement, are a rare example of an area relatively unaffected by statute, but even then, legislation intrudes in numerous specific areas (consider contracts of insurance, or residential building contracts, or contracts for the provision of financial advice, or damages which are subject to proportionate liability). Hence Stephen Gageler's emphasis, in the opening sentence of an influential paper:[18]

> "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."

It is unsurprising, then, that many decisions which give rise to significant points of law either concern the way in which statute impacts existing judge-made law, or else concern the way in which the iterative processes of statutory construction take place. That point was put more

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[16] See at [224]. The complex interaction between statute and judge-made law for more than a century on the recoverability of damages for pure mental harm is traced in chapter 7 of M Leeming, *The Statutory Foundations of Negligence* (Federation Press, 2019).

[17] Thus Brennan J noted that "The analogy is imperfect between the position of a public authority statutorily charged with the duty of controlling and managing premises to which the public has a right of access and the position of a person owning or occupying private premises to which no person has a right of access except by permission. … The source and nature of the public authority's duty *cannot* be ascertained by assimilating its position to that of an owner or occupier of private premises and without reference to the statute." (emphasis added)

[18] S Gageler, "Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process" (2011) 37 *Mon U L Rev* 1.

concisely by Gleeson CJ, Gaudron and Gummow JJ, 20 years ago next month:[19] "Significant elements of what now is regarded as "common law" had their origin in statute or as glosses on statute or as responses to statute." Note the threefold content of that proposition, which identifies two sources of "common law" and (by the words "now is regarded") highlights the transmutation in characterisation of the product of those processes. Even so, the critical role of statute is strangely neglected.

This neglect of statute reflects habits of thought which transcend State boundaries. By way of recent example, the New South Wales Court of Appeal recently determined an appeal straddling tort and crime.[20] One difficulty was how to describe the main issue, which both counsel styled as being on the "common law defence of illegality". I took the view that a more helpful description was whether a statute had denied a duty of care owed by one participant in an illegal enterprise to another, in accordance with the mode of analysis articulated in *Miller v Miller* (incidentally, a Western Australian case) – the issue was how did a particular collocation of statutes interact with a duty of care which would otherwise be owed by driver to passenger and imposed at general law. The point of the example is not to contend for the correctness of the result, but to illustrate the way statute was neglected in the language of "common law defence of illegality". As McHugh J once said in this context:[21]

> "The seriousness of the illegality must be judged by reference to the statute whose terms or policy is contravened. It cannot be assessed in a vacuum. The statute must always be the reference point for determining the seriousness of the illegality."

Illegality is not a monolithic concept, and there is no reason to think that its effects on causes of action will be identical.

The High Court has recently emphasised the way in which statutes give rise to bodies of judge-made law by reference to "common law principles of statutory interpretation".[22] This

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19 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; [1999] HCA 67 at [19].

20 *Bevan v Coolahan* [2019] NSWCA 217; an application for special leave has been filed.

21 *Nelson v Nelson* (1995) 184 CLR 538 at 613.

22 See *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123; [2018] HCA 34 at [28] and *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 93 ALJR 252 at [34].

phenomenon of converting statutes to judge-made law seems to occur in all common law jurisdictions. In part this is because, as suggested by Stephen Gageler in the paper mentioned above:[23]

> "The words of [a] statutory text, read against the background of the purpose, object or mischief to which they were directed, establish no more than an essential orientation. The experience of the courts in applying the law to the facts to determine the rights of the parties in a succession of cases has provided the content and that content continues to evolve and to be refined as the cases multiply."

I do not disagree with that account, at least in its application to the most important statutes which impose open-ended norms of conduct (such as those prescribing misleading or deceptive conduct) or generally worded remedies (such as "damages"). Even seemingly blanket prohibitions in statutes require attention to judge-made law; an excellent Western Australian example is the law in relation to part performance.[24] However, like so much in law there is also a countervailing consideration which points in the other direction,[25] namely, the anchoring effect of legislation. This flows from the fact that a statute is embodied in a fixed text, much less susceptible to development than the rules and principles enunciated in judgments of courts, which are more amenable to being given updated readings or emphasis.[26] Problems constantly arise when statutes use nomenclature taken from judge-made law. Does legislation requiring the registration of charges to be enforceable in a winding up apply to a trust which is designed to confer a security interest on a creditor?[27] Does legislation regulating pawnbrokers who run businesses based on pledges of goods apply to a company running the same business using chattel mortgages?[28] Is a person liable under

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23 At page 10.

24 The 1677 Statute of Frauds which was received in the nineteenth century continues to apply (see *Supreme Court Ordinance 1861* (24 Vict 1, c 15), s 4, and thus the part performance exception has no explicit legislative backing; cf *Conveyancing Act 1919* (NSW), s 54A(2).

25 I have in mind familiar dualities such as common law and equity, statute law and judge-made law, form and substance, and rules and principles. See M Leeming, "The Role of Equity in 21st Century Commercial Disputes" (2019) 47 *Aust Bar Rev* 137.

26 This is a theme of Harold Berman's posthumously published work, *Law and Language* (Cambridge University Press, 2013).

27 Cf *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588; [2000] HCA 25.

28 Cf *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249; [2005] HCA 28.

Barnes v Addy a "constructive trustee" for the purposes of a limitation statute enacted before the reformulation (in the United Kingdom) of that form of liability?[29] Once again, examples could be multiplied. Sir Victor Windeyer captured the distinction in an address delivered shortly after his retirement after 14 years on the High Court of Australia:[30]

> "The words and phrases in Acts of Parliament have an intractable stubbornness under our traditional system of statutory interpretation. The dictates of Parliament must be obeyed and applied according to the letter. The words may sometimes take their meaning by an appreciation of the policy and purpose of the statute read against a background knowledge of the mischief it was enacted to remedy. They are not to be glossed, expanded, modified, or explained by a court, in the way that judicial statements of common law may be slowly broadened down from precedent to precedent."

This interaction between legislative text and courts' reasons is very much a phenomenon of common law systems, where "judicial interpretation" predominates. But in, say, the Italian legal system, traditional discussions extend to "doctrinal interpretation" (by scholars) and "authentic interpretation" (directly from the statute), the latter reflected in attempts at codification, notably those by Justinian and Napoleon. The diminished role of the judiciary in those systems is captured by Merryman's aphorism:[31]

> "The great names of the common law are those of judges, but the great names of the civil law are those of scholars".

This interaction of statute and judge-made law probably owes much to the way law is understood by practitioners and taught to undergraduates, to the lasting influence of the "casebook" method pioneered by Langdell and Ames[32] and, underlying both, to the different ways in which language is used in judgments and statutes. Reading judgments is an acquired

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29 Cf *Williams v Central Bank of Nigeria* [2014] AC 1189; [2014] UKSC 10.

30 B Debelle (ed), *Victor Windeyer's Legacy* (Federation Press 2019), 132 at 140-1, originally published as V Windeyer, "History in Law and Law in History" (1973) 11 *Alberta L Rev* 123 at 130-131.

31 J H Merryman, "The Italian Style III: Interpretation" 18 *Stanford L Rev* 583 at 586 (1966).

32 See W P LaPiana, *Logic and Experience: The Origin of Modern American Legal Education* (Oxford University Press, 1994) p 79ff and K Llewellyn, *The Bramble Bush* (Oxford University Press 2008), chapters II, III and IV.

skill, seldom taking place for pleasure, but even the most tedious judgment shines in contrast with most statutes. Ruth Sullivan's description of Canadian legislative drafting applies equally throughout Australia:[33]

> "By convention, drafters use a utilitarian prose that shuns metaphor, irony, wit, embellishment, colloquialism, and rhetorical device of any sort. Another hallmark of legislative style is consistency and uniformity: once an idea is expressed in a particular way, the same language is used to express that idea each time the occasion arises. A variation in wording thus signals a significant variation in the idea. While these stylistic conventions facilitate clarity and certainty, they make for tedious prose."

Take a sentence randomly selected from AustLII's databases. Most practitioners and most students would instantly and reliably recognise whether the sentence is from a statute or from a judgment – in the same way that most native speakers of English could instantly and reliably recognise a Glaswegian as opposed to a Texan accent. Statute and judge-made law are written in distinct dialects of the same language.

It is thus no wonder that reference is made to *Griffiths v Kerkemeyer* damages for gratuitous services and the *Shirt* calculus for breach of duty, rather than to the statutory provisions on which they are based (and which indeed in some cases such as s 5B of the *Civil Liability Acts* supersede the cases). Worse than this is the so-called "*Graywinter* principle" said to be applicable to offsetting claims warranting setting aside a statutory demand. The principle is named after a decision based on a statute which never applied outside the Federal Court, and which has long been repealed.[34] Why does the label stick? At least, references to "modified *Sullivan v Gordon* damages" and the "modified *Bolam* test" are unusual in that the qualifying participle "modified" acknowledges the (critical) role of statute in determining the availability and quantum of this head of damages; it may also remind that the "modification" may not be uniform across Australia.[35]

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[33] R Sullivan, *Statutory Interpretation* (3rd ed, Irwin Law, 2016) pp 12-13.

[34] See *Cenric Group Pty Ltd v Ziegler as trustee for the Doris Gayst Testamentary Trust* [2019] NSWSC 1586 at [55]-[58].

[35] See, on the variation across Australia in the peer professional test which derives from *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, C Mah, "A Critical Evaluation of the Professional Practice Defence in the

It is doubtless more convenient to speak of a *Baumgartner* constructive trust, rather than a constructive trust of land available by reason of s 23C(2) of the *Conveyancing Act 1919 (NSW)* or s 34(2) of the *Property Law Act 1969* (WA), although as Lord Briggs recently emphasised, it contributes to making the law inaccessible.[36] But glossing concepts which are creatures of statute by the names of decisions on those statutes also reflects a profound truth about the nature of statutes. The legal meaning of a statute in a common law system is determined by the decisions of courts, such that it can become more transparent and more accurate to refer to the case establishing the relevant construction of the statute, rather than the statute itself. The system of precedent encourages this, for lower courts are bound by constructions of statutes given by higher courts. And then later statutes may recognise or further modify the law as established by the decision (ss 5B and 23C(2)/34(2) are examples of that). The law relating to liability in negligence for pure mental harm mentioned above is an example. Another arises out of the "uniform" defamation legislation. Is the reasonableness of a publisher's conduct as an element of a defence of qualified privilege for the judge or the jury? Section 22(1) of the *Defamation Act 2005* (NSW) and (WA) provides that defences are for the jury, but that is subject to s 22(5):

> "Nothing in this section … requires or permits a jury to determine any issue that, at general law, is an issue to be determined by the judicial officer."

In New South Wales, but *not* in Western Australia, "general law" is defined elaborately including by the following:

> "6(2) This Act does not affect the operation of the general law in relation to the tort of defamation except to the extent that this Act provides otherwise (whether expressly or by necessary implication).

Civil Liability Acts" (2014) 37 *U WA L Rev* 74.

[36] Lord Briggs, "Equity in Business" (2019) 135 *LQR* 567 at 569 ("One of the unfortunate habits of lawyers, which continues to make the law (including equity) impenetrable to anyone other than themelves, is their tendency to label remedies, principles and rules by reference to the reported case in which they were first formulated, or the section of the CPR in which they are laid down. Words and phrases like *Mareva*, *Walsh v* Lonsdale and Pt 36 unlock whole warehouses full of meaning to lawyers, but the doors remain fully bolted to everyone else").

> 6(3) Without limiting subsection (2), the general law as it is from time to time applies for the purposes of this Act as if the following legislation had never been enacted: (a) the *Defamation Act 1958*, (b) the *Defamation Act 1974*."

This gave rise to very large difficulties in *Fairfax Media Publications Pty Ltd v Gayle* [2019] NSWCA 172, when one bears in mind that legislation altering what is now known as the tort of defamation is very ancient indeed. Professor Fleming once described the law of defamation as a "mosaic" of statute and common law,[37] but in fact the interaction is more complex. As noted in *Gayle*:[38]

> "The allocation of responsibility between judge and jury has been the subject of legislative attention since no later than Sir Charles James Fox's *Libel Act* of 1792 (32 Geo III c 60). That Act expanded the powers of juries in criminal trials, but was said by Baron Parke (it must be said, somewhat implausibly) to have been a declaratory act, equally applicable to civil actions: *Parmiter v Coupland* (1840) 6 M & W 105 at 108; 151 ER 340 at 342. Was that a statement about general law or statute?"

I do not pause to speculate whether analogous difficulties might arise under the differently framed Western Australian variant of this "uniform" legislation. It is sufficient to note that for all of those reasons, "[i]t is misleading to speak glibly of the common law in order to compare and contrast it with a statute", as Windeyer J said in *Gammage v The Queen*.[39] "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".[40]

The interaction between statute and judge-made law occurs all the time throughout the legal system. Relatively little is written of this, although an outstanding exception is the volume edited by T Arvind and J Steele, *Tort Law and the Legislature: Common Law, Statute and*

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37 J Fleming, *The Law of Torts* (9th ed, 1998) p 581.

38 [2019] NSWCA 172 at [259].

39 *Gammage v The Queen* (1969) 122 CLR 444 at 462.

40 *Brodie v Singleton Shire Council* (2001) 206 CLR 512; [2001] HCA 29 at [31] (Gleeson CJ).

the Dynamics of Legal Change (Hart Publishing, 2013), and it is the theme of the jarringly-titled *The Statutory Foundations of Negligence* written by me and published earlier this year. But sometimes, judgments speak explicitly to that interaction. Five Western Australian decisions where that occurs are the subject of this paper.

(1) Bropho v Western Australia (1990) 171 CLR 1

Mr Robert Bropho sought a declaration that the Swan Brewery Site was an Aboriginal site within the meaning of s 5 of the *Aboriginal Heritage Act 1972* (WA), and an injunction restraining the Western Australian Development Corporation (an agent of the State) from erecting walls and building on, or digging and tunnelling, the site. His claim was struck out, and a divided Full Court dismissed his appeal. The litigation proceeded on the basis that the land was of sacred, ritual or ceremonial significance, and therefore an "Aboriginal site" as defined. The corporation's activities contravened s 17, if the section applied to it. Section 17 provided:

> "A person who –
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> (a) excavates, destroys, damages, conceals or in any way alters any Aboriginal site; or
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> (b) in any way alters, damages, removes, destroys, conceals, or who deals with in a manner not sanctioned by relevant custom, or assumes the possession, custody or control of, any object on or under an Aboriginal site,
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> commits an offence unless he is acting with the authorization of the Trustees under section 16 or the consent of the Minister under section 18."

The sole issue before the High Court, on Mr Bropho's further appeal, was whether s 17 of the Act applied to employees and agents of the Crown. The Commonwealth, South Australia, New South Wales and (with some reservations) Queensland intervened in support of Western Australia.

The High Court examined the origins and nature of the presumption that a statute does not bind the Crown. Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ, in their joint judgment, noted that while this presumption was once limited to provisions which were derogated from traditional prerogative rights and otherwise subject to broad exceptions, it had become a rule of general application in common law. Their Honours dismissed, as "having no place in the law of this country", the notion that the source of the rule was a prerogative power to override the provisions of a statute.[41] Rather, the rule was one of statutory construction which "[b]eing a judge-made rule of construction…. may be supplemented, modified or reversed by legislative provisions."[42]

The *Aboriginal Heritage Act 1972* (WA) contained no express reference to "the Crown". The common law rule prevailing at the time of *Bropho* was that, in the absence of express words revealing an intention to bind the Crown, the presumption of Crown immunity could be rebutted only by "necessary implication" – that is, where the intention was manifest from the very terms of the statute, or, put another way, the purpose of the statute would be "wholly frustrated" unless the Crown were bound. The respondents accordingly emphasised that the rule did not turn on mere implication.[43]

The joint judgment styled the prevailing approach as "an eye of the needle test".[44] Their Honours referred to the ossification of the words taken from mid-twentieth century judgments (notably, "wholly frustrated") as follows:[45]

> "The problem of principle in relation to the rule lies in judicial statements of its content and operation which have tended to discount the significance of its character as an aid to statutory construction and to treat it as if it were an inflexible principle which, in the absence of express reference to the Crown, precludes a statute from binding the Crown unless a test of 'necessary implication', which 'is not easily satisfied', is applied and satisfied."

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41 Cf *Madras Electric Supply Corporation Ltd v Boarland* [1955] AC 667 at 694.

42 (1990) 171 CLR 1 at 15.

43 Thus the submission on behalf of the WADC that "Mere implication is not enough": ibid at 7.

44 Ibid at 17.

45 Ibid at 16.

The joint judgment stated that the changing nature of the executive government meant that it could no longer be assumed that the legislature did not intend for statutory provisions to bind the Crown in the absence of express words or a frustration of their purpose:[46]

> "[T]he historical considerations which gave rise to a presumption that the legislature would not have intended that a statute bind the Crown are largely inapplicable to conditions in this country where the activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavour and where it is a commonplace for governmental commercial, industrial and developmental instrumentalities and their servants and agents, which are covered by the shield of the Crown either by reason of their character as such or by reason of specific statutory provision to that effect, to compete and have commercial dealings on the same basis as private enterprise."

Notwithstanding the weight of authority, the principle could only be regarded in those terms as applicable to the Sovereign personally, and not to "any of the myriad of employees of governmental commercial and industrial instrumentalities covered by the shield of the Crown".[47]

Secondly, both the joint judgment and Brennan J writing separately considered how the strength of the presumption of Crown immunity might vary according to the application of the statute. If a statute were construed in a way which would make the Sovereign, in the right of the Commonwealth or a State, liable for a criminal offence, the presumption in favour of Crown immunity would be "extraordinarily strong". Such a statute was contrasted with s 17, which discloses a legislative intention to bind employees or agents of the Crown, rather than the Sovereign, or Crown instrumentality, directly.

Thirdly, the joint judgment referred to a number of "rules of construction" which required clear and unambiguous words before a statutory provision would be construed as displaying a legislative intent to achieve a particular result. The "rule" in relation to the abolition or modification of fundamental common law principles of rights, which now tends to be labelled

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46 Ibid at 19.

47 Ibid.

the "principle of legality", was but one of these rules of construction. The joint judgment continued:[48]

> "The rationale of all such rules lies in an assumption that the legislature would, if it intended to achieve the particular effect, have made its intention in that regard unambiguously clear. … If such an assumption be shown to be or to have become ill-founded, the foundation upon which the particular presumption rests will necessarily be weakened or removed. Thus, if what was previously accepted as a fundamental principle or fundamental right ceases to be so regarded, the presumption that the legislature would not have intended to depart from that principle or to abolish or modify that right will necessarily be undermined and may well disappear".

Both the fact that what is now commonly invoked as "the principle of legality" is but one instance of a more general rule of statutory construction, and that it is qualified, are often overlooked. In particular, whenever the principle of legality is invoked, it seems to me to be necessary to establish that the premise for its applicability is made out. No differently from the changed circumstances in *Bropho*, what was once regarded as a fundamental right may no longer be so regarded (consider for example the principle of full compensation for personal injury caused by the defendant's negligence; given the statutes imposing various caps and thresholds upon most injured plaintiffs, and the regulation of discount rates and interest, it may be doubted that the principle engages the rule of statutory construction). McHugh J made this point more generally in *Malika Holdings Pty Ltd v Stretton*:[49]

> "Such is the reach of the regulatory state that it is now difficult to assume that the legislature would not infringe rights or interfere with the general system of law."

The principle of legality comes with a catchy title, readily invoked by an advocate who perceives that his or her client's interests are adverse to the ordinary reading of some statute. But it is an unlikely panacea for the resolution of all disputes concerning the interaction between statute and judge-made law. The task of giving legal meaning to statutes is considerably more complicated.

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48 Ibid at 18.

49 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290; [2001] HCA 14 at [29].

Finally, both judgments addressed the effect of the change in the law made by the High Court in *Bropho* itself. The joint judgment said that there would be two approaches to the construction of statutes which might bind the Crown. Legislation enacted prior to *Bropho* might need to be construed in light of the tests which had applied at the time. In contrast, "[i]n the case of legislative provisions enacted subsequent to this decision, the strength of the presumption that the Crown is not bound by the general words of statutory provisions will depend upon the circumstances, including the content and purpose of the particular provision and the identity of the entity in respect of which the question of the applicability of the provision arises".[50]

There was thus an *explicit* recognition that the "common law principles of statutory interpretation" themselves might change, with the consequence that the legal meaning of the statute might also change. Although Brennan J disagreed,[51] it seems moderately clear that the same legislative text can bear a different legal meaning if there has been a material change in the body of judge-made law in the context of which it falls to be considered. One example of this may be contrasted in the materially identical language of legislation in Western Australia and the United Kingdom, dealing with part performance.[52] Another is the suggestion in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*[53] that *Corporate Affairs Commission (NSW) v Yuill*[54] may have been wrongly decided, because of the subsequent recognition that client legal privilege was a substantive right, rather than a rule of evidence inapplicable in a tribunal.

(2) Jacobsen v Rogers (1995) 182 CLR 572

Mr Peter Rogers, the Director of Fisheries for Western Australia, applied to the Federal Court for a declaration that warrants under the *Crimes Act 1914* (Cth) purporting to authorise the Australian Federal Police to seize documents held by the State department were invalid. The documents were returns of rock lobsters, provided confidentially by fishermen for the

50 (1990) 171 CLR 1 at 23.

51 Ibid at 28-9.

52 See *Singh v Begg* (1996) 71 P & C R 120.

53 (2002) 213 CLR 543; [2002] HCA 49 at [35].

54 (1991) 172 CLR 319.

purpose of monitoring the sustainability of the fishery, but which were said to afford evidence of the defrauding the Commonwealth by failing to declare cash payments as income. French J rejected that application, but a Full Court of the Federal Court allowed the Director's appeal. Notwithstanding the intervention of South Australia, Queensland, Victoria and New South Wales in support of the State, the High Court allowed a further appeal by the federal police and restored French J's decision.

The High Court split 5:1:1.[55] The joint judgment of Mason CJ, Deane, Dawson, Toohey and Gaudron JJ proceeded on the basis that the question was whether the Commonwealth statute bound the State of Western Australia. Conscious of the differential test of construction stated in *Bropho*, their Honours noted that the *Crimes Act 1914* preceded the "rigid test laid down by the Privy Council in *Province of Bombay v Municipal Corporation of Bombay*" in 1947, at a time when the rule of construction was understood to be less inflexible, and therefore proceeded on the basis that its construction did not have to proceed as had been noted in *Bropho*.[56] They concluded that it was clear that the legislation must have been intended to apply to States, but that resistance to production on the basis of public interest immunity was available.

Brennan J agreed that the appeal should be allowed, but on a different basis. Noting that the warrant afforded a defence to what would otherwise amount to a trespass, his Honour rejected the principle that the question was whether the State was "bound" by the federal statute. Instead the question was whether the extent of the power conferred was one which affected the State, and rejected submissions based on public interest immunity and *Melbourne Corporation* seeking to impose limits on the section.

McHugh J dissented, agreeing with Brennan J that the question was whether the Crown was affected, not bound, and holding that the presumption that legislation did not affect the Crown, whether in right of the Commonwealth or of the State, had not been displaced.

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[55] The judgments, and those in *SASB* considered below, are analysed in more detail that the limits of this paper permits in G Taylor, "*Commonwealth v Western Australia* and the Operation in Federal Systems of the Presumption That Statutes Do Not Apply to the Crown" (2000) 24 *Melb U L Rev* 77 at 107-118.

[56] (1995) 182 CLR 572 at 586**.**

Both Brennan J and McHugh J rejected the submission that whether the Crown in right of Western Australia was "bound" was a sufficient answer to the appeal. This reflects a difference of views in the scope of the common law rules of statutory interpretation (on one view, it reflects the difference between a statute imposing an obligation as opposed to subjecting a person to a liability).[57] The latter judgment anticipated the difference approaches seen in the third decision, which also involved litigation between two polities within the Australian federation.

(3) State Authorities Superannuation Board v Commissioner of State Taxation for the State of Western Australia (1996) 189 CLR 253

SASB was a New South Wales statutory corporation constituted by the *Superannuation Administration Act 1987* (NSW), and defined by that Act to be a statutory body representing the Crown. In 1991, SASB entered into an agreement to purchase an undivided one half interest in real property located in Perth (a private company was the purchaser of the other half). The Commissioner of State Taxation for Western Australia assessed duty pursuant to s 16(1) of the *Stamp Act 1921* (WA). SASB paid the amount, but objected to the assessment on the basis that the *Stamp Act* did not apply to SASB, as it was entitled to the immunities and exemptions of the Crown.

SASB commenced two proceedings seeking a refund of the duty paid, interest, and declaratory relief – one by way of appeal, the other an action in the High Court's original jurisdiction,[58] which was remitted to the Supreme Court. Nicholson J heard both proceedings and dismissed them.[59] SASB's further appeal was referred to the High Court as of right pursuant to s 40(1) of the *Judiciary Act*, and South Australia and the Commonwealth intervened in support of New South Wales. Nonetheless, both appeals were dismissed. There were two joint judgments: that of Brennan CJ, Dawson, Toohey and Gaudron JJ, and that of

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57 The formulation of the rule predated the clarity injected by Hohfeld into legal concepts.

58 Section 38(b) of the *Judiciary Act 1903* (Cth) provided that a suit between two States was within the exclusive jurisdiction of the High Court, which might have the consequence (ultimately accepted by McHugh and Gummow JJ, but doubted by Brennan CJ, Dawson, Toohey and Gaudron JJ) that the original appeal from the Commissioner's rejection of the objection was not within the jurisdiction of the Supreme Court of Western Australia.

59 *State Authorities Superannuation Board of New South Wales v Commissioner of State Taxation for the State of Western Australia* [1994] WASC 318.

McHugh and Gummow JJ. They took quite different approaches in order to resolve the same pure question of law: did the *Stamp Act* apply to the SASB?

Brennan CJ, Dawson, Toohey and Gaudron JJ treated the question as one of Crown immunity. Their Honours noted the settled position since *Bropho* that the presumption of Crown immunity did not prevail against a statutory intention to the contrary, even if the intention was not manifest from the very terms of the statute or would not wholly frustrate its purpose. Section 119 of the *Stamps Act* provided for *qualified* exemptions from duty where the Crown was a party to a stampable instrument. They held this was only explicable if there was an intention to bind the Crown, which was liable to pay duty in all cases not falling within the s 119 exemptions. It followed that s 16(1) applied to the Crown in the right of NSW. Responding to SASB's submissions based on a concession from Western Australia that at least parts of the statute (notably, the offence-creating provisions) did not bind the Crown, their Honours confirmed Dixon J's reasoning that there was "the strongest presumption against attaching to a statutory provision a meaning which would amount to an attempt to impose upon the Crown a liability of a criminal nature" due to an inherent unlikelihood that the legislature would have intended to make the Crown criminally liable,[60] but did not accept that it followed that the other provisions did not apply:[61] "There is no difficulty in reaching that conclusion and at the same time concluding that the Act otherwise does bind the Crown".

McHugh and Gummow JJ said that an analysis of the mutual legal and constitutional relationships involved was not decisively assisted by asking whether, for the purposes of New South Wales legislation, the 1987 Act rendered the SASB a body entitled to the privileges and immunities of the Crown or whether it "represented" the Crown.[62] They started with a consideration of whether SASB was, for constitutional purposes, the State of New South Wales, and concluded that it was. Part of the reason for this was the threshold question of

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60 *Cain v Doyle* (1946) 72 CLR 409 at 424

61 (1996) 189 CLR 253 at 270.

62 The common New South Wales drafting technique of providing that a statutory authority represented the Crown was reviewed in *McNamara v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646; [2005] HCA 55, leading in turn to a new s 13A of the *Interpretation Act 1987* (NSW) inserted in 2006, with retrospective effect: see S Churches, "The shield of the Crown in England and Australia: The need for statutory interpretation that applies the principle of legality" (2011) 22 *PLR* 182 at 199.

jurisdiction. Their Honours implicitly treated the question of jurisdiction at the outset and on a final basis (in contrast, the other judgment, which dismissed the appeal, did not find it necessary to express a concluded view on the question of jurisdiction). But more importantly, McHugh and Gummow JJ considered that the right way of answering the question of construction was to ask *not* whether the statute bound the *Crown*, but whether it bound another *State* in the Australian federation.

McHugh and Gummow JJ noted Latham CJ's observation that the notion of an "indivisible" Crown was a "verbally impressive mysticism".[63] The best approach was to ask whether SASB was a State within the framework established by Ch III of the Constitution. This accorded with what had been said in *Deputy Commissioner of Taxation v State Bank (NSW)* (a clash between Commonwealth and State):[64]

> "The 'shield of the Crown' doctrine has evolved as a means of ascertaining whether an agency or instrumentality 'represents' the Crown for the purpose of determining whether that agency or instrumentality is bound by a statute enacted by the legislature. … The question which arises here is not to be answered by reference to a doctrine which has evolved with the object of answering questions of a different kind."

Referring to the issue in *Commonwealth v Cigamatic* as to whether State legislative power extended to control or abolish a federal fiscal right belonging to the Commonwealth as a government, their Honours said that "to speak of the Crown in right of the Commonwealth is to give inadequate recognition to the structure of the Constitution."[65] It followed that asking whether SASB was the Crown in right of NSW for the purposes of determining the operation of the Western Australian statute was the wrong question. Their Honours said that SASB was the State for constitutional purposes, and that there was no broad presumption that a Western Australian law should not bind the State of New South Wales. There was nothing in the legislation to displace that presumption.

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63 *Minister for Works (WA) v Gulson* (1944) 69 CLR 338 at 350-351.

64 (1992) 174 CLR 219 at 230.

65 (1996) 189 CLR 253 at 291.

The different approaches reflect different ways in which a common law rule of statutory construction has been reviewed in light of the different statutory regime in the modern Australian federation. Three years later, in *Commonwealth v Western Australia*, one aspect of which asked whether the *Mining Act 1978* (WA) applied to land owned by the Commonwealth, Gleeson CJ and Gaudron J said that it would be preferable to rephrase the presumption about the Crown being "bound" in terms of whether the staute "applied" to the executive government and authorities intended to be of the same status as the executive government.[66] Similarly, Gummow J wrote:[67]

> "In the joint judgment in *Bropho v Western Australia*, reference was made to the development from "the Crown" as encompassing little more than the Sovereign, the monarch's direct representatives and the basic organs of government to the situation in Australia where "the activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavour" and statutory instrumentalities operate on the same basis as private enterprise. In *Bropho v Western Australia*, the Court approached from this starting point the meaning now to be given to the presumption that statute does not "bind the Crown" and to the doctrine of the "shield of the Crown". Thus, the phrase "the Crown" is used here to identify the operations of the executive government and its statutory instrumentalities. Where, as in the present case, title to land or other assets is vested in "the Crown", the body politic itself may be identified as owner, and the expression "bind the Crown" will indicate that the enjoyment of the rights otherwise enjoyed as owner is qualified in some way."

The litigation also shows, incidentally, how complicated it would be to remove references to the Crown from the statute book, as is suggested from time to time.

Bropho, *Jacobsen* and *SASB* reflect an appreciation that the judge-made law underpinning a maxim of statutory construction as to whether a statute bound "the Crown" is itself susceptible to change in different circumstances, namely, the expansion of activities of the Crown through its agents and authorities, and when that concept is used in a federal system.

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66 (1999) 196 CLR 392; [1999] HCA 5 at [33]; see also at [240] per Hayne J, with whom McHugh J agreed.

67 (1999) 196 CLR 392; [1999] HCA 5 at [105].

The interplay between judge-made law and statute is quite complex. The focus is on the common law principles of statutory interpretation, and in particular *on when those principles themselves change* in the light of changing circumstances. The candid recognition that the change in those principles might affect the legal meaning of the same statutory language, depending on whether it was enacted before or after 1990 (which continues to this day),[68] reflects an appreciation of the ongoing interplay.

Finally, submissions had also been addressed in *SASB* to s 114 of the Constitution and s 64 of the *Judiciary Act*. Section 64 of the *Judiciary Act* was also relied upon in *Commonwealth v Western Australia*. That section provides that "[i]n any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject." It was contended that s 64 required substantive and procedural laws to be applied to a State as though it were a subject, thus leaving no room for notions of Crown immunity. It was also said that if s 64 had the effect of causing SASB to pay tax, that would be contrary to the Commonwealth Constitution. Ultimately, it was not necessary to address s 64 as the Court held that there the Western Australian statute applied to SASB directly. However, the impact of s 64 on Crown immunity was raised some 7 years later.

(4) British American Tobacco Australia Ltd v State of Western Australia (2003) 217 CLR 30; [2003] HCA 47

British American Tobacco Australia Ltd, a tobacco wholesaler, paid licence fees pursuant to the *Business Franchise Licences (Tobacco) Act 1975* (WA) ("WA Franchise Act"), part of a scheme of State and Territory legislation. On 5 August 1997, in *Ha v New South Wale*s, the High Court held that provisions of the New South Wales counterpart were invalid as they imposed duties of excise contrary to s 90 of the Constitution. It thus became clear that the payments of Western Australian licence fees – of many millions of dollars – had been made pursuant to an unlawful demand.

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[68] See for example *Commissioner of Taxation v Tomaras* [2018] HCA 62; 93 ALJR 118 at [2] (Kiefel CJ and Keane J), [50] (Gordon J) and [105]-[109] (Edelman J).

No earlier than mid April 1998, BAT provided notice of its action against the State of Western Australia and the Commissioner of Taxation to recover a payment made by it in July 1997 (this represented one month's licence fees, which controversially fell between the cracks of federal provisions to extract the same fees from tobacco wholesalers). Similar proceedings were commenced, but not progressed, in other jurisdictions. After 2 years, Western Australia moved to strike out the proceeding. This brought the issue to a head, leading to a constitutional case of immense significance.

The High Court's decision is perhaps best known for establishing that in matters in federal jurisdiction, the Constitution removes any immunity from suit which would have been enjoyed by the State, in the same way that it removes all immunity which would have been enjoyed by the Commonwealth.[69] But this paper focusses on the interplay between statute and judge-made law.

While s 5 *Crown Suits Act 1947* (WA) provided that the Crown "may sue and be sued in any Court … in the same manner as a subject", s 6 provided that no right of action lay against the Crown unless the party taking action gave notice to the Crown solicitor as soon as practicable, or within 3 months (whichever was longer) after the action accrued. On settled rules of construction, the generality of s 5 was subject to the specific obligation of prompt notification in s 6. Special leave to appeal to the High Court was granted. One question was whether section 79 *Judiciary Act 1903* (Cth) "picked up" s 6(1) so that it applied, including on the basis that s 64 of the *Judiciary Act* otherwise provided.

It was held by the Full Court of the Supreme Court of Western Australia and not challenged on further appeal that BAT had been able to formulate a writ in February 1998, and so had not complied with s 6(1). But BAT submitted that to apply s 6(1) would be to put the Crown in a special position, as the notice requirement was only applicable for actions brought against the Crown. This would deny the requirement in s 64 that, as far as possible, the rights of BAT and the State be the same as those between subjects.

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69 See M Leeming, *Authority to Decide* (Federation Press, 2012), pp 261-263.

First, the reference in s 64 to "suits" should not distract from its generality. "Suit" was defined, somewhat counter-intuitively, to include "any action or original proceeding between parties"; it is clearly not limited to claims in equity.

Secondly, McHugh, Gummow and Hayne JJ emphasised, by reference to a statement by Isaacs J in *Commonwealth v Miller*,[70] that the true force of s 64 was to be appreciated if one contemplated a case whether the litigants were the Commonwealth and a State (such as *Jacobsen v Rogers*), or two States (such as the *SASB* case). Their Honours said:[71]

> "[Isaacs J's] remark emphasised the importance of s 64 in the structure of federal jurisdiction which provided for species of litigation unknown at common law and in the Colonies before federation. The present litigation, a matter arising under the Constitution or involving its interpretation, is an example. For this reason, the progenitors in various of the Colonies, including Western Australia, of the Crown Suits Act and decisions such as *Farnell v Bowman*, whilst important, should not obscure the particular significance of s 64 in the federal constitutional system."

It may be noted that here the High Court was denying that the force of s 64, although it originated in legislation to permit claims against the Crown, was limited to addressing that mischief, and pointing to the more fundamental conception underlying the Constitution that the constituent polities of the federation were conceived as legal persons amenable to the jurisdiction of courts.

Thirdly, their Honours turned to the words "as nearly as possible" in s 64. Those words are problematic. That is scarcely surprising. The rights are not the same; the statute expressly proceeds on the basis that they will be different. How then are those differences to be determined? The statute provides scant guidance, and thus it is to judge-made law that recourse must be had to determine a question of immense importance: what are the rights and liabilities of a State government in proceedings with an ordinary person?

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70 (1910) 10 CLR 752 at 753.

71 (2003) 217 CLR 30; [2003] HCA 47 at [72].

It is also unsurprising that judge-made law on this issue has varied based on the types of rights in issue before the court. As Stephen Gageler observed, "[e]xperience teaches that the possibilities of meaning rarely emerge divorced from the necessities of application".[72] The chequered history of the interpretation of "as far as possible" was outlined in the judgment of McHugh, Gummow and Hayne JJ at [79] to [84]. In *The Commonwealth v Miller,*[73] it was held that that the phrase "as far as possible" did not affect the Commonwealth's obligation to give discovery. In *Asiatic Steam Navigation Co Ltd v The Commonwealth*, Kitto J stressed that s 64 must be interpreted as taking up law affecting substantive rights in a suit to which the Commonwealth or State was a party.[74] But this position was doubted in the decision of *South Australia v Commonwealth*, with Dixon CJ stating:[75]

> "[I]t is one thing to find legislative authority for applying the law as between subject and subject to a cause concerning the rights and obligations of governments; it is another thing to say how and with what effect the principles of that law do apply in substance. For the subject matters of private and public law are necessarily different."

In Dixon CJ's view, governmental matters, particularly financial ones involving the exercise of political power, could not fall within the operation of s 64.

The position changed yet again with the decision of *Maguire v Simpson*,[76] which was affirmed in *The Commonwealth v Evans Deakin*.[77] In *Maguire v Simpson*, Barwick CJ emphasised that s 64 "must be determined in light of the tradition already established by 1900 in the Australian colonies with respect to the liability of the Crown to be sued and to suffer judgement in respect of any cause of action for which a citizen in like circumstance was

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72 S Gageler, "Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process" (2011) 37 *Mon U L Rev* 1 at 2.

73 (1910) 10 CLR 742.

74 (1956) 96 CLR 397 at 427.

75 (1962) 108 CLR 130 at 140.

76 (1977) 139 CLR 362.

77 (1986) 161 CLR 254.

liable."[78] Further, in *Farnell v Bowman,*[79] the Privy Council held that 39 Vic No 38 (1876) (NSW), which contained similar wording to s 64 Judiciary Act, referred to substantive rights.[80] Having regard to this context, Barwick CJ held that s 64 operated with respect to substantive rights rather than merely procedural laws. He described this as "a situation brought about by statute and judicial decision".

But the crux of the reasoning of McHugh, Gummow and Hayne JJ focussed upon the submission, made "particularly" by New South Wales based on Dixon CJ's statements about the special governmental interest recognised in the qualifying words "as nearly as possible" in s 64. Their Honours said, in effect, that this was quite wrong. The basic constitutional principle as that courts determined the legislative authority of governments, and money exacted without legislative authority was recoverable. See especially at [83]:

> "The truth of the matter is to the contrary. *Auckland Harbour Board* reflects the fundamental constitutional principle prohibiting the Executive Goverment from spending public funds except under legislative authority. Further, that authority of the legislature, in Australia, will be absent where the legislation relied upon is invalid, here by reason of the operation of s 90 of the Constitution. The action by BAT is in furtherance of rather than in opposition to the operation of basic constitutional principle."

It followed that there was no special governmental interest which engaged the words "as nearly as possible" thereby permitting the special requirement of prompt notice to continue to apply as a summary answer to BAT's claim. It will be seen that this involved deploying basal notions of constitutional law, concerning the amenability of governments to courts and the requirement that taxation be supported by valid legislation,[81] in order to give legal meaning to quite open-ended legislative language "as nearly as possible". More generally, s 64 has a

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78 (1977) 139 CLR 362 at 371. See also P Finn, *Law and Government in Colonial Australia* (Oxford University Press, Melbourne, 1987) pp 141-159.

79 (1887) 12 App Cas 643.

80 Section 3 provided that the citizen could sue the colonial government "at law or in equity in any competent Court and every case shall be commenced in the same way and the proceedings and rights of the parties therein shall as nearly as possible be the same and judgment and costs shall follow… as in an ordinary case between subject and subject."

81 Is this a result of judge-made law or of s 4 of the *Bill of Rights 1689*, or is it merely another example of a principal theme of this paper?

particular ancestry, being a response to a perceived limitation on the ability to sue the Crown (itself an immunity sourced in judge-made law) but has been construed by reference to other constitutional principles of judge-made law.

(5) State of Western Australia v Commonwealth (1995) 183 CLR 373

One aspect of the *Native Title Act case* especially touches upon the interaction between judge-made law and statute, namely, the enactment by reference of judge-made law as a law of the Commonwealth.

On 3 June 1992, the High Court delivered judgment in *Mabo v Queensland [No 2]* recognising native title at common law. On 2 December 1993, the *Land (Titles and Traditional Usage) Act 1993* (WA) commenced. The WA Act purported to extinguish native title and establish a scheme of traditional usage with associated statutory rights. Some four weeks later, on 1 January 1994, operative provisions of the *Native Title Act 1993* (Cth) commenced. The *Native Title Act* prescribed conditions by which native title could be extinguished from 1 July 1993 (which conditions were not satisfied under the WA Act). Plainly enough, both statutes were swift legislative responses to the change in the common law made by the High Court.

The State of Western Australia sued the Commonwealth seeking declarations that at the time the *Native Title Act* came into force, no native title rights as defined under that Act existed, and that the *Native Title Act* had no operation in Western Australia. Alternatively, the State of Western Australia sought a declaration that the *Native Title Act* was invalid. The Commonwealth submitted that the WA Act was inconsistent with provisions of the *Racial Discrimination Act 1975* (Cth) and the *Native Title Act* and invalid as a result of section 109 of the Constitution.

The aspect of the decision relevant to this paper concerns the finding that s 12 of the *Native Title Act* was invalid. Section 12 stated:

> "Subject 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."

The section took the recently created judge-made law as to native title, and gave it the force of federal law so as to engage s 109 of the Constitution. There is no necessary obstacle in a federal statute enacting a norm of judge-made law and creating novel remedies for its breach. An example is s 20(1) of the *Australian Consumer Law* which prohibits a person from "in trade or commerce, engag[ing] in conduct that is unconscionable, within the meaning of the unwritten law from time to time", thereby picking up a norm of equity, for which a range of statutory remedies (including damages) is made available. French J rejected a submission that the precursor to s 20 was invalid in *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd (No 2)*,[82] and his Honour's reasons were cited with approval in *Aid/Watch Incorporated v Commissioner of Taxation*.[83]

But s 12 was more ambitious. It made provision in general terms, and it did so in relation to what was, at least in Australia, a novel and innovative creation of judge-made law, which was not well-defined and which was evidently to be the subject of further case-by-case refinement in accordance with the traditional processes of the common law. The nuanced submissions made by Western Australia as to its validity are summarised over 2 pages of the Commonwealth Law Reports[84] but the gravamen might be summarised by the proposition that:

> "Section 12 is intended to enable the continued development and evolution of the common law in respect of native title while at the same time giving the common law legislative force."

The joint judgment of Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ said of this:[85]

> "[T]he "common law" must be understood either as a body of law created and defined by the courts or as a body of law which, having been declared by the courts at a particular time, may in truth be – and be subsequently declared to be – different. …

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82 (2000) 96 FCR 491; [2000] FCA 2 at [29]-[43].

83 (2010) 241 CLR 539; [2010] HCA 42 at [20].

84 (1995) 183 CLR 373 at 385-387.

85 Ibid at 485-6.

> If the "common law" in s 12 is understood to be the body of law which the courts create and define, s 12 attempts to confer legislative power upon the judicial branch of government. …
>
> If one construes s 12 as importing the common law as an organic developing but unwritten body of law, a further objection to validity arises. The Commonwealth relies on s 51(xxvi) and s (xxix) to support s 12. It is common ground that s 51(xxvi) can support a law only if that law is one which the Parliament has deemed necessary for the people of a race. … *Ex hypothesi*, when a court declares a change in the common law, the Parliament has not considered whether it is necessary to make that change as a special law for the people of a race. … If s 51(xxix) is relied on no different conclusion is reached. The municipal law relating to native title has no external element which might attract the support of the external affairs power."

I find aspects of this reasoning to be difficult. One difficulty flows from the legislative reference to "common law"; the gravamen of this paper is, as I hope is clear, that it is difficult to distinguish statute law and judge-made law. A similar problem occurs in the *Evidence Acts*.[86] Another is that the judgment does not give a meaning to "common law" in s 12, but rather identifies two possible meanings and states that either way the provision is invalid. The distinction between "common law" meaning "the body of law which the courts create and define" and "an organic developing but unwritten body of law" is, to my mind and with the greatest of respect, a difficult one.

Settled principles of constitutional litigation favour a construction to be given to statutes which leads to their validity. If attention is given to the first meaning of "common law" proposed by the High Court, namely, "the body of law which courts create and define", then it might be asked how is there a constitutionally significant difference between this aspect of judge-made law being given the force of statute, and any other aspect? After all, the ordinary processes of the law will give a changing legal meaning to every statute, as it becomes encrusted with a body of judicial decisions, in the manner indicated by Stephen Gageler to which reference has been made. This has of course now happened to the *Native Title Act*

[86] See *Evidence Act 1995* (Cth), s 7; *Evidence Act 1995* (NSW), s 7; *Evidence Act 1906* (WA), s 5, and M Leeming, "The subtleties and complexities of the Evidence Acts, and the role of intermediate courts of appeal" available at http://ssrn.com/abstract=2733899.

itself, as well as to the *Corporations Act*, the *Civil Liability* legislation and the *Crimes Acts* and *Criminal Codes*. Indeed, it is very difficult for any statute to be enacted in terms which do not pick up concepts of judge-made law.

I take a deal of comfort in respectfully offering those comments in light of the fact that my criticism is shared by one of the judgment's authors. In his article "The interaction of state law and common law",[87] Sir Anthony Mason said, on reflection, that he doubted whether giving the common law the force of a law of the Commonwealth involved a delegation of legislative power, citing the following passage from *Aid/Watch Incorporated v Commissioner of Taxation*:[88]

> "A law of the Commonwealth may exclude or confirm the operation of the common law of Australia upon a subject or, as in the present case, employ as an integer in its operation a term with a content given by the common law as established from time to time."

Sir Anthony added that when statute picks up a body of the general law, then, in the absence of a contrary indication, the statute speaks continuously to the present and picks up the case law as it stands from time to time. Neither he nor I see any large difficulty with the Parliament of either the Commonwealth or of a State passing such a law, once the interrelationship between judge-made law and statute is fully appreciated. Happily, the issue no longer arises, because s 12 was repealed in 1998.

Conclusion

I have elsewhere described the inter-relationship between statute and judge-made law as one of entanglement".[89] This comes about in a number of ways. The Western Australian cases

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87 (2016) 90 *ALJ* 324.

88 (2010) CLR 539 at [20].

89 See M Leeming, *The Statutory Foundations of Negligence* (The Federation Press, 2019) pp 1-6, 164-167.

noted above illustrate this, and in fact do so as clearly as any decisions I can think of in the Australian legal system.

Much of the reasoning which has been highlighted in this paper is subtle and complex. I have occasionally thought that lawyers, litigants and judges regularly under-appreciate the daily complexity in the legal system, when legal meaning is given to statutes whose text is often based on rules and principles identified in the judgments of courts, and which themselves have previously been construed by decisions of courts applying common law principles of statutory interpretation. Much of the time, lawyers and judges do this as easily as M Jourdain spoke prose. It is an aspect of the legal system that has a distinctively common law flavour, and is largely absent from civil law systems. Its complexity is perhaps best seen when statutes explicitly make reference to judge-made law, and when courts explicitly make reference to the effect their decisions have on statute law.

Chambers,

10 November 2019