

England as a source of Australian law – for how long?

The Honourable Justice James Douglas

Supreme Court of Queensland

6 October 2011

England as a source of Australian law – the present

England has been the major source of Australian law at least since its reception formally in the Australian colonies, starting with New South Wales and Tasmania in 1828.¹ English common law was normally applied locally and statutes, particularly those dealing with commercial law and legal procedure, were often adopted practically verbatim. Final appeals were taken, often directly, to the Judicial Committee of the Privy Council, even after the creation of the High Court of Australia. The retention of that right of appeal was not part of the federation proposed originally and voted on in the referenda held in the Australian colonies in the 1890s. It always struck me as anomalous that major Australian disputes such as the *Bank Nationalisation Case* were decided finally in London.²

When I was a student in the late 1960s to the mid 1970s the idea that there was now an Australian common law, distinct from English common law, was relatively novel and the source of pride, at least for me, when I first read the High Court's decision in *Parker v The Queen*³ decisively rejecting the approach of the House of Lords in respect of criminal intent in *DPP v Smith*⁴. Apart from the formal reasons for rejecting the House of Lord's view, the anecdotal version of Sir Wilfred Fullagar's reaction to the English decision, that they were "hanging men for manslaughter in England now", was the most telling when I read it much later in Philip Ayres' biography of Sir Owen Dixon⁵.

¹ See B.H. McPherson, *The Reception of English Law Abroad*, Supreme Court of Qld Library (2007), pp. 310-312.

² *Commonwealth of Australia v Bank of New South Wales* (1949) 79 CLR 497.

³ (1963) 111 CLR 610, 632.

⁴ [1961] AC 290.

⁵ Philip Ayres, *Owen Dixon: A Biography*, Miegunyah Press (2003) at p. 276.

The most elegant expression of the new approach came from the pen of Sir Victor Windeyer, a few years after *Parker v The Queen*, in *Skelton v Collins*⁶:

“Our ancestors brought the common law of England to this land. Its doctrines and principles are the inheritance of the British race, and as such they became the common law of Australia.

...

But how far the reasoning of judgments in a particular case in England accords with common law principles that are Australia's inheritance is a matter that this Court may have sometimes to consider for itself. This Court is the guardian for all Australia of the corpus iuris committed to its care by the Imperial Parliament. The Constitution makes its judgments in its appellate jurisdiction final and conclusive. As the Court has said: "According to the ordinary course of the administration of justice in and for the Commonwealth of Australia, the judgment of this Court is final.

...

It is enough I think to say that our inheritance of the law of England does not consist of a number of specific legacies selected from time to time for us by English courts. *We have inherited a body of law. We take it as a universal legatee. We take its method and its spirit as well as its particular rules.* A narrower view than this would put a sad strain upon allegiance. Here, as it is in England, the common law is a body of principles capable of application to new situations, and in some degree of change by development. ... And we, in this Court, need not, in exercising our functions as an appellate tribunal, be deterred by expressions of opinion in their Lordships' House in old cases or new cases. Nevertheless I believe that we must not only give respectful attention to whatever is said there, but that the decision of the majority of their Lordships on questions of common law will ordinarily be followed in this Court, leaving it to the Australian legislatures to correct the result if they think fit. But all judgments of the House of Lords are not equally persuasive and all statements in all speeches of their Lordships are not equally acceptable. This Court must consider the question for itself; and all the more so, it seems to me, if the decision in England was reached after reference only to English decisions, not to the state of the law elsewhere, and seemingly to meet only economic and social conditions prevailing in England. And too what is said is less persuasive when law is as it were fluid and when the conditions which it is being developed to meet are not the same in England and Australia.”

Since then, the passage of the *Privy Council (Appeals from the High Court) Act 1975* (Cth) and the *Australia Acts* in 1986 and further decisions of the High Court have established the notion of an Australian common law, historically rooted in the common law of England, but responsive to our own society, its conditions and circumstances, and influenced not only by English law but also by comparable

⁶ (1966) 115 CLR 94, 134-135, (footnotes omitted and emphasis added).

decisions, especially from other “great” common law jurisdictions.⁷ Many of the significant developments occurred during the period when Sir Anthony Mason was a member of the court; he was a leader in adapting our law to Australian circumstances, needs and values.⁸

There is a useful analysis of the current state of play, if I can call it that, by Michael Kirby in a recent book on the work of the judicial committee of the House of Lords⁹:

“The statements made in the High Court in *Parker v R* and *Skelton v Collins*, and the abolition of appeals to the Privy Council, contributed significantly to the recognition in Australia of the existence of a distinctive ‘Australian’ common law. Since these decisions, the High Court has deviated from the line taken by the House of Lords on a growing number of issues, for example in relation to damages for gratuitous services, the availability of exemplary damages, immunity for barristers’ negligence, the law of resulting trusts, apprehended bias, nervous shock, the liability of local authorities, and many other topics.

...

Today, at least in the High Court of Australia, it is never assumed that the judges will defer to House of Lords authority. Nevertheless, as Chief Justice Gleeson recently observed, ‘[t]he influence of English decisions, although no longer formal, remains strong.’ Just as in recent times the House of Lords has increased its use of authority from Commonwealth courts, the antipodean courts have repaid the compliment. There has actually been an increase in the citation of House of Lords decisions by the High Court in recent years. The High Court sometimes applies House of Lords decisions where the House of Lords has considered a particular issue first, such as the cases concerning rape in marriage and the statutory abrogation of legal professional privilege. Justice William Gummow has reckoned that the extent of the interchange in decision-making by the High Court and House of Lords is possibly greater than before, although this interchange ‘does not necessarily yield to concurrence of outcome’. The link is now one of rational persuasion in a context of substantially shared basic legal doctrine. It is no longer a relationship of obedience or subservience.”

The figures for citation of authority by the highest courts in each jurisdiction support the view that there continues to be a reasonable degree of reference by each to the

⁷ *Viro v The Queen* (1976) 141 CLR 88, 93-94, 118-122, 129-132, 135-137, 150-151, 159-167, 172-176; *Cook v Cook* (1986) 162 CLR 376, 389-390 and *Lipohar v The Queen* (1999) 200 CLR 485, 505-510.

⁸ A Mason, *Australian Contract Law* (1988) 1 JCL 1, 2, discussed by Paul Finn in *Internationalization or Isolation: The Australian Cul De Sac? The Case of Contract Law* in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) at p. 45.

⁹ Louis Blom-Cooper and ors (eds), *The Judicial House of Lords, 1876-2009* (OUP, 2009) at pp. 343-345 (footnotes omitted).

other,¹⁰ although I suspect from some of my own recent experience that English reference to Australian authority will be more likely if English counsel refer to Australian authorities in their submissions. The High Court expects counsel to refer to the law of other common law jurisdictions, including the law of England, more than appears to be the case in the Supreme Court of the United Kingdom. Reference to English authority in intermediate courts of appeal here is, in my experience, less frequent but still useful in the absence of binding local decisions and less common again at the trial level than when I commenced in practice. I still subscribe to the Law Reports and the Weekly Law Reports, but few of the current English reported decisions that come across my desk have much bearing on the sorts of issues that I deal with normally. The statutory background in each country has become different in very many respects.

So the systems have diverged but that does not mean that English law does not continue to influence ours. One has to be wary too of giving too much weight to the examples where the expression of the common law has differed. Any deeper analysis of a leading Australian decision, textbook or encyclopaedic work on the core subjects of our common law, namely criminal law, torts, contracts, restitution, property law, commercial law, equity, trusts and succession, corporations and partnership law, administrative law, evidence and procedure, will reveal the English underpinnings of the system, conceptual, analytical and cultural. As Brennan J said in *Mabo v Queensland (No 2)*¹¹:

“In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. Australian law is not only the historical successor of, but is an organic development from, the law of England.”

Some topics will differ markedly because of statutory accretions to or substitutions for the common law. Others, notably administrative law and restitution, may be at different stages of development or of popularity in the higher courts, but no competent lawyer trained in one country will have a significant problem in coming to grips with

¹⁰ See the attached schedule prepared by my associate, Dominique Mayo.

¹¹ (1992) 175 CLR 1, 29.

the equivalent subject in the other. The conceptual landscape will be familiar or as Sir Victor Windeyer, again, said, perhaps controversially, of Tasmania's version of the Griffith *Criminal Code*¹²:

“...[I]t was enacted when it could be said of the criminal law that it was ‘governed by established principles of criminal responsibility.’ And for that reason we cannot interpret its general provisions concerning such basic principles as if they were written on a tabula rasa, with all that used to be there removed and forgotten. Rather is ch. iv of the Code written on a palimpsest, with the old writing still discernible behind.”

Those considerations make it relatively easy for students, practitioners and academics trained in one country to study, work or teach in the other, sometimes in a way that spans both. In fact that seems easier now, or at least more common, than it was a generation or more ago when the law seemed to be a profession linked much more closely to the jurisdiction where one trained. The forces of globalisation have assisted and, to my mind, are likely to continue to have a significant effect on the development of English law.

Home-grown differences and exotic influences

Before I proceed to expand on that, however, let me apply a little corrective finish to the picture I have painted of an Australia steeped in the English common law. Of course it is not the complete picture. The most obvious discrepancy is our system of government, a federation based on the American model of division of powers between the federal government and the States and among the three branches of government, legislature, executive and judiciary. It gives our judicial branch of government the self-confidence to declare unconstitutional statutes of any of our parliaments.¹³ Perhaps that confidence was a residue of the experience before federation when our colonial courts became familiar with the concept of striking down “repugnant” legislation not enacted in accordance with the “manner and form” required for colonial law-making authority.¹⁴ The English courts still struggle to come to grips with such a power to declare legislation invalid.¹⁵

¹² *Vallance v The Queen* (1961) 108 CLR 56, 76.

¹³ See, e.g., *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270; applying the same approach as in *Marbury v Madison* 5 US 137 (1803) at 174.

¹⁴ See A C Castles, *An Australian Legal History* (LBC, 1982) at pp. 450-451.

¹⁵ See, e.g., *Madzimbamuto v Lardner Burke* [1969] 1 AC 645, 723 and cf *Jackson v Attorney-General* [2006] 1 AC 262, 302-303 [102], 304 [107], 308 [120] and see the references by Gummow J in *Momcilovic v The Queen* [2011] HCA 34 at [146](ii), [152], [156]-[158].

Of some significance, also, is our history of adopting novel legislative solutions to practical problems. The most notable local example is the passage of the *Criminal Code* drafted by Sir Samuel Griffith in Queensland in 1901 and derived partly from Sir James Stephen's code, Zanardelli's Italian Penal Code of 1889 and the New York Penal Code of 1881. It was adopted later in Western Australia and adapted in Tasmania and the Northern Territory. Sir Harry Gibbs examined its origins and influence in other parts of the common law world including Africa, some Pacific island nations and Israel in a lecture delivered in this Banco Court in 2002.¹⁶ It replaced the "hotchpotch of judge-made rules and statute law" that existed under English law and which other Australian states have made varying efforts to modernise by statute.¹⁷

The Commonwealth's attempt at modernisation in its *Criminal Code* 1995 has been less successful. Its organising concepts, unfortunately for a judge required to sum up to an Australian jury, were based on superficially complex ideas developed by the American Law Institute which lack the simplicity needed for a clear summing up to an Australian jury.¹⁸

Another obvious early example of local statutory innovation is the Torrens system of registration of title to land, first developed in South Australia, which itself has been used or adapted in other jurisdictions here and overseas, again including Israel, as I discovered to my surprise when I visited there recently on sabbatical. It was developed because of the inefficiency of English methods of proving title to land and their lack of suitability to local conditions.

Our early systems of administration were markedly different in structure and responsibilities from those in Britain.¹⁹ General legislation permitting claims against

¹⁶ See, e.g., Rt Hon Sir Harry Gibbs, "Queensland Criminal Code: From Italy to Zanzibar" (2003) 77 ALJ 232 and at: http://www.sclqld.org.au/schp/exhibitions/crimcode/20020719_Harry%20Gibbs.pdf

¹⁷ See A C Castles, *op. cit.* at pp. 445-446.

¹⁸ See the paper delivered by Peter Lowe, *Challenges for the Jury System and a Fair Trial in the 21st Century* pp. 18-20 at the AIJA Criminal Justice Conference 2011; <http://aija.org.au/Criminal%20Justice%202011/Papers/Lowe.pdf>

¹⁹ Paul Finn, *Law and the Government in Colonial Australia* (Oxford University Press 1987 at pp. 5-6.

the government arrived here close to a century earlier than in England no doubt as a reaction to the fact that government in Australia was the provider of much that would have been provided by private enterprise in England.²⁰ So too our laws relating to pastoral and mining leases were developed to suit local conditions including the 19th century struggles between squatters and selectors. Our mining laws generally reflected local experience particularly on the goldfields of Victoria. They included the innovation, for company law, of the no liability company instead of the limited liability company, an idea beloved of mining entrepreneurs. Australian laws dealing with water resources, effectively nationalising surface water, were influenced by the law of the American state of Colorado, following the report of a Royal Commission headed by a young Alfred Deakin which visited the western United States as part of its inquiries.²¹ We were early to grant female suffrage and to abolish the death penalty, particularly in Queensland, which also had a notable experiment with state-run enterprises in the 1920s.

The New South Wales amendment of the law relating to defamation in 1847²² abolishing the distinction between libel and slander and requiring truth to be linked with public benefit, to allow the defence of justification, was a brave step towards the recognition of what we might now regard as a right of privacy and which had failed to be passed in the British Parliament. That useful limitation on the defence of truth was also adopted in Queensland and Tasmania but was lost in the compromise uniform defamation legislation passed nationally in 2005. The loss of what became a distinctively Australian adaptation of the law of defamation was significant. As Paul Mitchell concluded in a perceptive article, *The Foundations of Australian Defamation Law*:²³

“The story of the 1847 Act is a powerful illustration of the complexities of colonial conditions. While all the hard work was done in England, the proposals ultimately failed not because they were inherently defective, but because the topic had been stagnant for too long, and there was the distraction of other options. In the streamlined, new legislative system of New South Wales, legislators could make a point of avoiding English mistakes. The New South Wales judiciary then shaped the effect of the Act with a boldness that

²⁰ Paul Finn, op. cit., pp. 141-159.

²¹ See A C Castles, op. cit. at pp. 465-466 and generally at pp. 452-492.

²² *Injury to Character Act 1847* (NSW). See Paul Mitchell, *The Foundations of Australian Defamation Law* (2006) 28 Syd L Rev 477.

²³ Paul Mitchell, op. cit., at p. 504 (footnotes omitted).

would have surprised their English counterparts. And the success of the 1847 Act underlined the opportunity that the English had missed. In particular, English law still labours under the distinction between libel and slander, an area which Frederick Pollock, grandson of the Attorney-General who opposed its reform, described as ‘perplexed with minute and barren distinctions’. The defence of truth remains absolute, although there is a specific exception for the publication of spent offences. Perhaps more importantly, the protection of privacy, which was the real motivation behind the 1843 proposals, is only now being recognised as an important cause of action. Had Parliament acted in 1843, or earlier, there would have been wider support for an implicit privacy right — which might, in turn, have expedited recognition of a freestanding right to privacy. It is a pity, in others words, that the foundations of Australian defamation law were to remain so distinctively Australian.”

Paul Finn has also expressed the view that Victorian judges in the 19th century were more willing than those in other colonies to accommodate the common law to local conditions.²⁴ Perhaps that less deferential attitude to the English common law also influenced one of the interesting footnotes of Australian legal history, the movement for codification of the substantive law in Victoria led by Professor Hearn in the 1880s. It seemed at one stage to have been likely to succeed politically, Hearn having been in a good position to promote that cause as a member of the Legislative Council, but the legal profession and others rallied support against it.²⁵

Codification was popular in England in the late 19th century for particular aspects of commercial law, shown by the passage of the *Bills of Exchange Act* 1882 (UK) and the *Sale of Goods Act* 1893 (UK). The *Partnership Act* 1890(UK) also codified the law in that area and the *Companies Act* 1862 (UK), although not really a code, did make general provision for the establishment, registration and regulation of companies. Commercial legislation of this type was adopted generally in the Australian colonies. The 19th century Field codes adopted by many American States were another example of a positivist approach to the statement of the law systematically. They did not attract support in Australia on the civil side although the New York Penal Code, as I have mentioned, had some influence on the Griffith *Criminal Code*.

²⁴ Paul Finn, *Internationalization or Isolation: The Australian Cul De Sac? The Case of Contract Law* in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) at p. 43 and Paul Finn, *Law and the Government in Colonial Australia* (Oxford University Press 1987 at pp. 5-6, 164-165.

²⁵ See A C Castles, *op. cit.*, at pp. 480-484.

From the late 19th century our industrial laws developed a distinctive local character enhanced in the 20th century by the creation of specialist tribunals by the Commonwealth in reliance on the industrial conciliation and arbitration power in the *Constitution*. One can multiply examples through the 20th century of home-grown or exotic influences on our statute books.

A useful final example of more recent local divergence from English law comes from the law of contract and, more specifically, the rejuvenation of the principles preventing an unconscionable insistence on strict legal rights exemplified by the decision in *Commercial Bank of Australia Pty Ltd v Amadio*²⁶ and the introduction of a range of discretionary remedies for misleading and deceptive conduct and unconscionable dealing in the *Trade Practices Act 1975* (Cth). English law does not possess the flexible remedies available here under Part VI of the renamed *Competition and Consumer Act 2010* (Cth) for misleading and deceptive conduct or misrepresentation and unconscionable conduct, something that makes our law relating to remedies for such conduct significantly different now from English law. Australian contract law is, however, a subject to which I shall return, particularly in respect of its possible future development.

Before addressing further the question of for how long England will continue to be a source of Australian law, let me try to paint a bird's eye view of some recent developments in English law, focussing on the process of harmonisation of European law and attempts to re-conceptualise the structure or taxonomy of English law, notably by the late Professor Peter Birks. Or, to put the issue in terms popular with some members of our High Court: is the genius of the common law expressed in its propensity for bottom-up reasoning in danger of being replaced by a form of procrustean top-down reasoning? To take the image a little further: are the untidy bits of the common law, including equity, at risk of being lopped off or stretched to fit an *a priori* concept of an ideal legal system?

²⁶ (1983) 151 CLR 447. See also Paul Finn, *Internationalization or Isolation: The Australian Cul De Sac? The Case of Contract Law* in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) at pp. 41-66.

Harmonisation of European Law

In 2003 Professor Birks, as the general editor, published three ambitious volumes which sought to state the essential principles of English private law in two large volumes and of public law in another.²⁷ The structure of the works is systematic, using a taxonomy that would be familiar to European scholars and lawyers. Since his death the work has been continued under the editorship of Professor Andrew Burrows. It seeks to provide an overview of the rules and principles that constitute English private law. Under the heading “Sources of Law” there is identified a hierarchy of norms commencing with European Union law, then the European Convention on Human Rights, then the British “constitution” (written and unwritten). Fourth comes the common law and fifth is custom. The other sources of law include statutes and their interpretation, these days for most of us the starting point for many of the issues with which we have to deal, then precedent and finally treaties and doctrinal legal writing.²⁸

Existing European influences on the common law

One does not have to be too astute to realise then the significance of European law, including, but certainly not limited to human rights law, in modern England. Apart from those European instruments to which I have referred, there are many areas of the law in Europe, particularly in the field of commercial law with international ramifications, including competition law, intellectual property law, employment law, product liability and others, where harmonisation has occurred and continues to drive changes in the laws of the member States. The European Court of Justice is the ultimate body responsible for the interpretation of EU law but courts of the member states also have a role. The number of such cases dealing with European Union law in the House of Lords, before it was replaced by the Supreme Court, has increased over the years, covering areas such as intellectual property, employment, tax law and the European arrest warrant.²⁹

European law has affected directly some areas of the substantive law in England such as the grant of injunctive relief against the Crown, the recoverability of money paid to

²⁷ P Birks (ed), *English Private Law* and *English Public Law* (Oxford University Press, 2003).

²⁸ A Burrows (ed), *English Private Law* (Oxford University Press, 2nd ed, 2007).

²⁹ Blom-Cooper, *op. cit.*, at pp. 486-487.

a public authority pursuant to a demand made *ultra vires*, the overruling of previous decisions only with prospective effect and the recoverability of compound interest.³⁰ There is also a suggestion that it has influenced indirectly a more purposive approach to statutory interpretation of domestic law. In the field of administrative law there have been European influences on the development of the concept of a “legitimate expectation” although its influence on public law generally has not been as marked. One view is that:³¹

“Some of the progressive developments in English public law, for example in relation to standing and defendants’ duty of disclosure, were in areas where European law has remained conservative by comparison. The rapid development of public law principles in Commonwealth jurisdictions whose judges and lawyers have had little exposure to European law is also a warning against attributing exclusively to Europe an influence that may have been felt just as strongly outside it.”

There seems to be a greater popular concern within England about the effect of decisions of the European Court of Human Rights at Strasbourg on the common law than on those of the Court of Justice. The most notable recent controversy stemmed from a decision about prisoners’ voting rights. This was similar to the result reached without significant debate by our High Court in 2007, namely that to disqualify all those serving any period of imprisonment from voting was invalid as not reasonably appropriate and adapted for an end consistent or compatible with the maintenance of the constitutionally prescribed system of representative government.³²

Some of the ECHR’s decisions have been criticised trenchantly on several occasions by Lord Hoffmann, particularly since his retirement as a Law Lord. More significantly, for present purposes, there was an interesting speech given last year by the Lord Chief Justice, Lord Judge, where he said this, in the context of criticising the overuse by counsel of non-binding precedents from the ECHR in their submissions:³³

“The primary responsibility for saving the common law system of proceeding by precedent is primarily a matter for us as judges. And while we are about it, perhaps we should reflect on the way in which I detect that our Australian colleagues (and those from other common law countries) seem to be claiming bragging rights as the custodians of the common law. Do they have a point?”

³⁰ Blom-Cooper, *op. cit.*, at pp. 495-497.

³¹ Blom-Cooper, *op. cit.*, at pp. 498 (footnotes omitted).

³² *Roach v Electoral Commissioner* (2007) 233 CLR 162.

³³ Rt Hon Lord Judge, *The Judicial Studies Board Lecture 2010*, 17 March 2010 at p. 8: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj-jsb-lecture-2010.pdf>

Are we becoming so focussed on Strasbourg and the Convention that instead of incorporating Convention principles within and developing the common law accordingly as a single coherent unit, we are allowing the Convention to assume an unspoken priority over the common law. Or is it that we are just still on honeymoon with the Convention? We must beware. It would be a sad day if the home of the common law lost its standing as a common law authority.”

The *Human Rights Act* 1998 (UK) is domestic legislation that has had a great effect on the jurisprudence of the higher courts in the United Kingdom. Between 2002 and 2008 it averaged 37.5 per cent of the House of Lords’ case load.³⁴ The general rule applied in its interpretation is that clear and consistent decisions of the ECHR are followed.³⁵ There have been significant changes to public law as a result and one view is that this developing jurisprudence may come to affect private law also, perhaps qualifying the “common law’s traditional commitments to absolute proprietary and contractual rights.”³⁶ An interesting development affecting private law is the use of the right to respect for private life in conjunction with the existing rules of the common law regarding breach of confidence to stimulate the development of a tort of misuse of private information.³⁷

Australia is well behind the United Kingdom and most other nations in developing a coherent jurisprudence of human rights because of the absence of general constitutional or statutory instruments in that area. There is recent, circumscribed legislation in Victoria and the Australian Capital Territory. If we ever pass more comprehensive national legislation it is likely that the English jurisprudence will be useful as a comparison in the development of our own approach to this area of law, although unlikely to be determinative, something I shall say more about later.

So there is significant existing European and English legislation affecting the rules of the common law. If those rules fade from view at the source the likelihood that England will continue to influence our common law, at least in those areas, will decrease. Let me go on to mention some of the future possibilities.

³⁴ Blom-Cooper, op.cit.,p 546.

³⁵ See *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264, 305 [33] and *R (Countryside Alliance) v Attorney General* [2008] 1 AC 719, 777 [125] discussed by French CJ in *Momcilovic v The Queen* [2011] HCA 34 at [47]-[51].

³⁶ Blom-Cooper, op.cit.,pp 572-573.

³⁷ *Campbell v MGN Ltd* [2004] 2 AC 457; Blom-Cooper op. cit. p.571.

Future possible influences

One of the more interesting developments in recent times is the creation of the “Common Frame of Reference” (“CFR”) for European private law generally but, particularly at this stage, for the law of contract. The project is a massive one, with significant support from the European Commission in Brussels. The argument behind it has been summarised by Professor Hector MacQueen of the University of Edinburgh and the Scottish Law Commission. After referring to the background history, commencing with the Lando Commission on European contract law leading to the formation of a text, the *Principles of European Contract Law* (“PECL”), a text mixing civil law and common law elements, and the creation of a study group on a *European Civil Code* he said:³⁸

“Whether or not coincidentally, the European Commission shortly afterwards began public consultation on a project which has become known as the Common Frame of Reference (CFR). In simple terms, the argument was this. The European Union is fundamentally about the creation of a single market in Europe, in which the movement of goods, persons, services and capital is unimpeded by the borders of its Member States. To that end the European Union has always engaged in law-making activities, either imposing Europe-wide regulation on a range of matters (e.g., competition law or many aspects of intellectual property), or directing the Member States to harmonize their different laws on particular topics so as to ensure consistency of result across the market – that is to say, aiming to prevent national laws becoming means, conscious or otherwise, of dividing the market.

To take an example of the latter of importance for this Article, consumers should not have variable rights according to where they happen to be domiciled or active within the European Union. Yet the European interventions were not themselves consistent or mutually coherent, and they not infrequently used language or concepts the legal import of which might be readily understood in some jurisdictions while being completely opaque on others – good faith being the classic example amongst many. Indeed, it was not always clear that the most basic of ideas, such as that of contract itself, were understood in the same way throughout the Union.

So the CFR emerged initially as a ‘toolbox’ of principles, concepts and terminology which would be commonly understood across the European

³⁸ Hector MacQueen, *The Common Frame of Reference in Europe* (2010) 25 *Tulane European and Civil Law Forum* 177 at pp. 178-179 (excluding the footnotes). For a more sceptical view of the intended role of the CFR see Nils Jansen and Reinhard Zimmermann, *A European Civil Code In All But Name: Discussing the Nature and Purpose of the Draft Common Frame of Reference* (2010) 69 (1) *Camb LJ* 98, 110: “What the DCFR, then, is really supposed to achieve is to establish a kind of conceptual and definitional sovereignty in European private law: an authoritative text in the form of a non-legislative codification”.

Union, and which would be used consistently in future legislation as well as in revising and improving the existing texts (the *acquis communautaire*). Model rules would thus form part of the package. All this would be based on the *acquis* but also make use of the comparative work that had already gone into the making of PECL. The net would however be cast wider than general contract law, since the *acquis* dealt piecemeal with many specific contracts, product liability, aspects of property and securities law, and even in some respects unjustified enrichment. In any event, contract law could not be considered in isolation from others parts of private law. While the Commission was careful not to dub its brainchild the European civil code that the European Parliament had called for many times since 1989, and emphasized that there was no question of supplanting national laws, it did raise the possibility of what it called an ‘optional instrument’ that might be a legal basis to which, for example, parties to cross-border transactions might choose to subject themselves as opposed to making a choice of national laws.”

My own casual observations are that there is little enthusiasm in the legal profession in the larger countries such as the United Kingdom, France and Germany, to surrender what they are used to and relatively sure of, their own national systems for the law of contract. Commercially too, there is little incentive for parties in such jurisdictions to subscribe to an unfamiliar and potentially uncertain optional instrument based on the common frame of reference.

The same may not apply to businesses in smaller European jurisdictions dealing with each other across borders where each is unfamiliar with the other’s legal system, say Scotland and Poland. In the long term rather than the medium, pressure for consistency among legal systems in all the member nations of the European Union may result in the harmonisation of large areas of private law across Europe. This has the potential to affect the content of English common law considerably.

When I say long term, consider the case of the *Vienna Convention on Contracts for the International Sale of Goods* (“CISG”), which combines both civilian and common law legal concepts about the law of contract. It came into force legislatively in the Commonwealth and all States in Australia in 1989³⁹ and now has more than 70

³⁹ At a Commonwealth level, the Convention is a part of federal law by virtue of the *Trade Practices Act 1974* (Cth) s 66A, under which the Convention prevails over the provisions of Pt V of that Act to the extent of any inconsistency. The Convention is a part of State and Territory law by virtue of the following Acts: (ACT) *Sale of Goods (Vienna Convention) Act 1987*, (NT) *Sale of Goods (Vienna Convention) Act 1987*, (NSW) *Sale of Goods (Vienna Convention) Act 1986*, (QLD) *Sale of Goods (Vienna Convention) Act 1986*, (SA) *Sale of Goods (Vienna Convention) Act 1986*, (TAS) *Sale of Goods (Vienna Convention) Act 1987*,

parties worldwide, including most of our major trading partners but notably excluding the United Kingdom. Its Government has been considering the possibility of joining for many years. There are major concerns about the structure of the CISG in England⁴⁰ and, perhaps, there is also a worry that, if the United Kingdom adheres to it, it may affect the work of English courts and arbitrators in resolving international commercial disputes. In fact about half of the matters dealt with by the Commercial Court in London are cases where both parties are not resident in the jurisdiction and have, in effect, chosen to litigate there, which says much for the regard shown internationally for their judges' ability to resolve commercial disputes efficiently and quickly. It is important to the English financial sector that it retain a competitive edge in the field of the provision of legal services.

In Australia, in spite of our adherence to the CISG, the legal culture appears to be to opt out of it, something the legislation permits.⁴¹ Such major alterations to the law, presented as optional instruments, must overcome a great deal of legal and commercial inertia before they become likely to affect the substantive law significantly.

A recent illustration of the forces of harmonisation is the creation of the European Law Institute. It was established in Paris in June 2011 and was welcomed by the European Commission.⁴² It appears to have been inspired at least partly by the American Law Institute, a private body which seeks, on the whole very successfully, to harmonise major aspects of the common law in the American States by the production of the *Restatements of the Law*, the most recent of which is their third on

(VIC) *Sale of Goods (Vienna Convention) Act 1987*, (WA) *Sale of Goods (Vienna Convention) Act 1986*.

⁴⁰ See *Benjamin's Sale of Goods* (8th ed., 2010) at 1-024 and 12-131 but for a Scottish take on the issue see Angelo Forte, *The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom* (1997) 26 *University of Baltimore Law Review* 51-66.

⁴¹ See Lisa Spagnolo, *The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers* (2009) 10 (1) *Melb J Int'l L* 141 and Elise Bant and Matthew Harding, *Exploring Private Law* (Cambridge University Press, 2010) at p. 51 in the article by Paul Finn, *Internationalization or Colonisation: The Australian Cul De Sac? The Case of Contract Law*. See also Luke Nottage, *Who's Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan* [2005] 36 *VUWL Rev* 815, 817 and J S Douglas, *Arbitration of International Sale of Goods Disputes Under the Vienna Convention*: <http://www.sclqld.org.au/qjudiciary/profiles/jsdouglas/publications/>.

⁴² See <http://www.europeanlawinstitute.eu/eli/index.php>.

Restitution and Unjust Enrichment.⁴³ That body has, in recent decades, welcomed scholars and practitioners from outside the United States into its membership, and not just from other common law systems. Its members are also interested in comparative developments elsewhere.

The European Law Institute's mission embraces "the quest for better law-making in Europe and the enhancement of European legal integration." It wants to help form a more vigorous European legal community covering all branches of the law. It wishes to draft, evaluate and improve the principles and rules common to the European legal system.

In the context of whether there is room for harmony between the common law and the various civilian systems, let me also say something about *Foundations of Private Law* by Professor James Gordley, one of the more interesting law books I have read recently.⁴⁴ Professor Gordley is a notable American teacher of comparative law. His thesis is that private law, as we now understand it, was the creation of Roman lawyers, even in common law jurisdictions, where: "Order was brought out of chaos in the 19th century when the English, borrowing a huge amount from the civil law, reorganized their thinking around such categories as contract and tort – rather than assumpsit and trespass – and imported continental learning to understand these categories."⁴⁵ His argument is that the Romans developed the legal categories in which we still think but that it was not until the 16th century in Spain that there began an attempt to combine Roman law with Greek philosophy with a view to the reorganisation of Roman law into a systematic doctrinal structure on the basis of Aristotelian philosophical principles. In doing that, he argues that they identified the basic principles which best explained not only the Roman law of their times but also modern private law.

Scholars tell me that there is a continuing debate today about the strength of the argument concerning the role of the late scholastics in achieving this result and I am certainly not qualified to enter into it. There is considerable evidence, however, that

⁴³ *Restatement of the Law Third, Restitution and Unjust Enrichment* (American Law Institute Publishers, 2011).

⁴⁴ James Gordley, *Foundations of Private Law*, (Oxford University Press, 2006).

⁴⁵ See Gordley, *op cit*, at p. 4.

“the common law of obligations grew out of the intermingling of native (English) ideas and sophisticated Roman learning”.⁴⁶ Professor Ibbetson, the author of that sentence, went on to say in his *Historical Introduction to the Law of Obligations*⁴⁷:

“Against this backdrop the modern history of both tort and contract can be divided into three stages. Beginning in the eighteenth century there were stirrings of theorization, squeezing English rules into models developed elsewhere. Especially important were the works of the Natural lawyers, and through their influence a range of ideas based in different aspects of Roman law were introduced into England. These stirrings matured into full-blooded theorized structures in the nineteenth century. So far as contract was concerned, there was a further injection of continental ideas based on the works of Pothier, whereas the law of tort was a largely indigenous development from the eighteen-century Natural law base. The result of this theorization was that both tort and contract became far more sharply delineated. In tort this was accomplished fairly cleanly, for there was little antecedent theory to displace. Contract was more problematic. There were frictions between the emergent model, the Will Theory, and the medieval exchange model that had lain behind the articulation of the sixteenth century, frictions that were resolved largely by ignoring them and – rather unsuccessfully – reorienting pre-existing ideas in line with the newer theory. Finally, largely in the twentieth century, there was a collapse of confidence in the theoretical structures of the nineteenth century; while the language of the nineteenth century (and before) continued to be used, it did so against the background of new theories, against the background of a kaleidoscope of competing theories, or against the background of no theory at all.”

So there is much to be said for the view that the English common law and civilian systems are not completely foreign to each other.⁴⁸ Moreover, many English law students and practitioners are regularly exposed to the civilian systems either through study partly in England and then in other European countries, or the study of Roman and comparative law or through the exigencies of practice where the frequency of cross-border transactions and disputes with residents of other European countries is high. The forces for harmonisation in the long term are significant.

⁴⁶ David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999) at p. 1.

⁴⁷ Ibbetson, *op cit*, at pp. 153-154.

⁴⁸ See also the interesting articles by Justice Arthur Emmett, *Roman Traces in Australian Law*, (2001) *Aust Bar Rev* 205 and Robin Evans-Jones, *Roman Law in Scotland and England and the Development of One Law for Britain* (1999) 115 *L.Q.R.* 605 and the stimulating speech by Lord Neuberger, *Towards a European Law*, delivered to the 2011 Australian Bar Association conference in Berlin: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-berlin-lecture-july-2011.pdf>.

There is also, as I have said, strong institutional interest in harmonisation of the law throughout Europe. I expect that it will encounter political problems in any attempt to standardise European legal systems rapidly. Some of the most distinguished comparative lawyers, such as Professor Reinhard Zimmermann, are against a legislative approach to harmonisation. He argues that scholarship is the first step, showing by historical and comparative study the common aspects of European legal systems.⁴⁹ That may reflect the view that Europe had previously developed a *ius commune* in the 12th century, from the fusion of Roman, canon and feudal law. That body of principle held sway for several centuries, allowing local laws to emerge from its unifying norms.⁵⁰ The re-creation of such commonly accepted norms may be a safer way to achieve the goal of greater harmony.

If, in the long run, English law's rules tend to converge with those of other major European countries, that may be the result of the re-emergence of such a *ius commune* but I believe we are far from that stage at present.⁵¹

The taxonomy of the common law – “bottom-up” Down Under or “top-down” at Home?

⁴⁹ See Reinhard Zimmermann, *The Present State of European Private Law*, (2009) 57 Am J Comp L 479-512 and cf Sir Basil Markesinis, *Comparative Law in the Courtroom and Classroom: The Story of the Last 35 Years* (Hart Publishing, Oxford & Portland Oregon, 2003) and Sir Basil Markesinis and Jörg Fedtke, *Engaging with Foreign Law* (Hart Publishing, Oxford & Portland Oregon, 2009) referred to in MacQueen, op. cit. at p. 193.

⁵⁰ See Manlio Bellomo, *The Common Legal Past of Europe: 1000-1800* (Catholic University of America Press 1995). See also R C van Caenegem, *An Historical Introduction to Private Law*, (Cambridge University Press, 1992) at pp. 70-71 where the author distinguishes the position of the English common law as an essentially different system but one where “Since Vacarius, the *Corpus iuris civilis* had never been completely absent from English legal theory and practice.”

⁵¹ One interesting example of a theoretical attempt to promote such harmonisation can be found in Eric Descheemaeker, *The Division of Wrongs — A Historical Comparative Study* (Oxford University Press, 2009). The author is French and a former student of Professor Birks, now a lecturer at Edinburgh University. The third part of his work concerns itself with the significance of the civilian division of wrongs according to degrees of blameworthiness (*dolus, culpa, casus*) for the common law. He develops a “rather provocative thesis ... that there is a strong case for the adoption of a similar trichotomy as the first-level division of the English law of civil wrongs. From its formulary age, English law has inherited an unstable taxonomy where wrongs intersect. The existence of these mismatched categories continues to cause significant difficulties, which a realignment of causes of action along the above lines would allow to sort out.” One cannot imagine such a radical change without legislation but the ideas are interesting.

What do these views have to do with the continuing influence of English law on Australian law? Is English law likely to be affected more and more by reasoning derived from Roman law? How well might that be received in Australia?

To attempt to answer this let me say some more about the late Professor Peter Birks and what some judges of the High Court have taken to labelling “top-down” reasoning, perhaps in response to some of his ideas. Professor Birks was a highly influential scholar in Britain and Australia, holding chairs initially in Roman law at Edinburgh University and later as professor of civil law at Oxford. Many of his former students have become significant academics, practitioners and judges. Trained as a Roman lawyer he was intensely interested in the imposition of a logical order on the unruly mass of decisions produced by the common law system, exemplified by an article he wrote in 1996 for the University of Western Australia Law Review on *Equity in the Modern Law: An Exercise in Taxonomy*.⁵²

There he argues, rather earnestly, for a “sound taxonomy, together with a keen sense of its importance, constant suspicion of its possible inaccuracy and vigorous debate on its improvement” as an essential precondition of rationality that he thought was wanting in common law systems.⁵³ “Dependence on the alphabet [for a taxonomy] has encouraged disorderly and conflicting categories. The common law has failed to organise the categories of its thought ... Cutting free from Roman law has made things worse. Whether we knew it or not, we used to lean heavily on Justinian’s Institutes, the scheme of which underlies all the civilian codifications.”⁵⁴ He was not a proponent of codification for fear of its rigidity but believed the uncodified mixed system of Scotland, built on a civilian foundation but much influenced by the method and content of the common law, had the best solution.⁵⁵

He did not believe, however, in the logical place of equity in English law, regarding concepts such as unconscionability as unspecific, concealing a private and intuitive evaluation. Similarly he criticised the indeterminacy of the concepts of the fiduciary,

⁵² P Birks, *Equity in the Modern Law: an Exercise in Taxonomy* (1996) 26 UWALR 1.

⁵³ P Birks, *op. cit.* at p. 4.

⁵⁴ P Birks, *op. cit.* at p. 5.

⁵⁵ P Birks, *op. cit.* at p. 15.

the trust and estoppel,⁵⁶ something that I suspect has not led to the ready acceptance of his ideas among some of Australia's leading scholars of that subject, including Justices Gummow and Heydon of the High Court. As Beatson J of the English High Court and a former leading academic, said of Birks in an obituary:⁵⁷

“Birks' approach did not find favour with those who believe the common law is not susceptible to the elegant tidiness he advocated in the name of rationality. Particular hostility to any re-conceptualisation of familiar categories came from equity lawyers, especially those who saw themselves as the guardians of what they regard as the holy grail of 19th-century equitable doctrine.”

His scholarship was notable in the development of the law of restitution. His *English Private Law* was published in a second edition in 2007, now edited by Professor Andrew Burrows, another leading scholar of the law of restitution. It is a large, single volume exposition of the law aimed at providing a “high-quality overview of the rules and principles that constitute English private law.” Both editions were inspired by *Gloag and Henderson's Laws of Scotland*,⁵⁸ one of the first sources Scottish lawyers go to for an overview of a topic, and are structured in categories inspired particularly by *Gaius' Institutes* and by *Justinian's Institutes*, two of the major sources of Roman law, and *Blackstone's Commentaries on the Laws of England*, partly to assist foreign lawyers to understand English law, which, as it comments, “may otherwise appear to be unstructured and lacking in principle”.⁵⁹

In other words it is organised, not alphabetically in discrete, unrelated categories such as one finds in *Halsbury*, either in England or Australia, but conceptually or taxonomically, beginning with sources of the law and the hierarchy of norms, then proceeding to the law of persons, the law of property, the law of obligations and concluding with litigation. It is said to deserve attention partly because, consciously or subconsciously, it is “preparing the ground for possible harmonization of private law in Europe.”⁶⁰

⁵⁶ P Birks, op. cit. at pp. 16-22.

⁵⁷ *The Guardian*, Friday 16 July 2004, <http://www.guardian.co.uk/news/2004/jul/16/guardianobituaries.obituaries>
The Rt Hon Lord Eassie and Hector MacQueen (eds), *Gloag and Henderson: The Law of Scotland* (12th ed, 2007; W Green and Son Ltd).

⁵⁹ Andrew Burrows (ed), *English Private Law* (Oxford University Press, 2nd ed, 2007) in the preface at p. xxix.
Geoffrey Samuel, *English Private Law: Old and New Thinking in the Taxonomy Debate* (2004) 24 *Oxford Journal of Legal Studies* 335.

Professor Birks' aims were laudable and said by him to be a response to two particular challenges in the modern practice of law, "stovepipe mentality" and "information overload". He described the first of these problems as follows:⁶¹

"There is a constant complaint of 'stovepipe mentality'. It is an allegation that practitioners – especially young practitioners, since the complaint is usually made by senior people – know their law only in the way that many people know London, as pools of unconnected light into which to emerge from a limited number of friendly tube stations...The reason why these 'stovepipe' lawyers cannot move confidently from one area of the law to another is that nobody has shown them the map."

And of the second he said:

"The information explosion makes the need for the structured Blackstonian approach all the more urgent. Information can now be accessed more and more rapidly. The mechanical aspects of the research function are well provided for and constantly being improved. Meanwhile the structure, which is the software which allows the brain to keep the mass of information under intellectual control, is being neglected. While it is becoming ever more essential that lawyers should have a sound grip on the concepts and principles which hold the law together, that need is not being met. . . A high price will be paid if this goes on. Clients will be badly served. The common law will become incoherent, and it will lose respect. That unnecessary disaster is what we hope that *English Private Law*, and its sequel *English Public Law*, will help to prevent, by setting out a coherent, economical account, not only of individual topics, but also of the larger categories of the law and the way that they fit together and, hence, of the law itself."

The risk said to be associated with such a "top-down" organisation of the law to a common lawyer, however, is that it smacks of codification and is antithetical to the traditional common law model based on inductive reasoning from individual decisions leading to the formulation of principle, rather than deductive reasoning from overall principle to the right result in the individual case. Codified law attempts to lay down precepts deemed to be universally valid irrespective of the time or place in which they apply. In other words the rules precede the solutions. Under the common law approach the general rules are extrapolated from the solutions to individual disputes by an empirical method and may be regarded as working hypotheses rather than rules set in stone.⁶²

If one wanted to be philosophical one could contrast the French approach expressed in

⁶¹ See Burrows, *op cit*, at pp. xxix-xxx.

⁶² Lord Goff of Chieveley, *The Future of the Common Law* (1997) 46 ICLQ 745, 753.

their codes with the British by distinguishing the rationalist approach of Descartes of working from *idées claires* or basic principles from the inductive approach of philosophers such as Locke and Hume who were empiricists rather than rationalists. Empiricists are not attracted to *a priori* positions regardless of underlying experience – or as the famous American jurist, Oliver Wendell Holmes Jr said of the common law: “The life of the law is not logic: it is experience.”⁶³ The risk perceived from a “top-down” approach is that the system will lose the flexibility of being able to adapt to changing social, economic and political norms or as Justice Paul Finn has said memorably, “the strict legal taxonomist is the almost invariable herald to the legal taxidermist.”⁶⁴

Professor Birks’ views do not place him on one side only of the codification/common law debate. I have already pointed out his preference for the Scottish system. He also said that his approach was nothing more than “the best currently available hypothesis as to the structure of our law.”⁶⁵ His publication, *English Private Law*, is, however, an example of “top-down” reasoning applied to the common law. Even if the law can be regarded as a social science, many believe it is a misconception to associate legal taxonomy with natural science taxonomy in a way that curtails its practical operation in an ever-changing society.⁶⁶

⁶³ O W Holmes Jr, *The Common Law* (Little Brown & Co, 1881) at p 1. Sir Victor Windeyer’s take on this topic is also of interest: “As a legal historian, Windeyer was particularly conscious of the dynamism of the common law ‘to grow and develop as the needs of men change’. He was concerned to link law with the development of society. After his retirement, he said, ‘the law of a people is not an aggregate of abstract concepts, it governs their lives and reflects their history’—a view expressed some 40 years earlier in the early pages of his *Legal History*: ‘Law is not, in essence, a body of technical rules, uncouth formulae and inexorable commands ... It is really a simpler and a grander thing. It is that which makes it possible for men to live together in communities, to lead a peaceful, organised, social life’. As Henry Burmester has noted, this sounds like Oliver Wendell Holmes, reflecting the pragmatic approach of American jurisprudence in the early twentieth century. Not infrequently, he quoted Holmes. He did so in his preface to *Legal History*—‘a page of history is worth a volume of logic’—Windeyer adding that a detailed knowledge of the history of a rule is necessary for an understanding of the living law.” Bruce DeBelle “Windeyer, Victor” *The Oxford Companion to the High Court of Australia*. Michael Coper, Tony Blackshield, George Williams, Oxford University Press, 2007. *Oxford Reference Online*. Oxford University Press. Supreme Court of Queensland Library. 27 September 2011, <<http://0-www.oxfordreference.com.catalogue.sclqld.org.au/views/ENTRY.html?subview=Main&entry=t241.e425>>

⁶⁴ Aladin Rahemtula (ed), *Justice According to Law: A Festschrift for the Hon Mr Justice B H McPherson CBE* (Supreme Court of Queensland Library, 2006) at p. 561.

⁶⁵ Birks (ed), *English Private Law* (OUP, 1st ed) at p. xxxv.

⁶⁶ G Samuel, *English Private Law: Old and New Thinking in the Taxonomy Debate* (2004) 24 *Oxford Journal of Legal Studies* 335, 340.

“Top-down” reasoning has been criticised in the High Court as having “inherent dangers.”⁶⁷ The link between that concern and their Honours’ reaction to Professor Birks’ views on taxonomy is made most clearly in *Bofinger v Kingsway Group Ltd*⁶⁸ in the context of a discussion of unjust enrichment and subrogation. Their Honours said, amongst other things:

“[90] Subrogation, like other equitable doctrines, is applicable to a variety of circumstances, as explained earlier in these reasons. One circumstance concerns sureties, another the paying off of an existing mortgage. But that is not to say that subrogation is a ‘tangled web’ (92) in need of the imposition of the “top-down” reasoning which is a characteristic of some all-embracing theories of unjust enrichment (93).

[91] Such all-embracing theories may conflict in a fundamental way with well-settled equitable doctrines and remedies. Reference was made in the opening paragraph of these reasons to the importance attached by equity to the fashioning of the particular remedy to meet the nature of the case. The administration of the remedies of injunction and specific performance provides perhaps the most obvious examples. So also the remedial constructive trust, as these reasons have sought to demonstrate.

[92] Equity has been said to lack the necessary ‘exacting taxonomic mentality’ when providing an appropriate remedy for unconscientious activity (94). The better view is said to be that liability in “unjust enrichment” is strict, subject to particular defences (95), while ‘[t]he unreliability of conscience’ offends the precept that like cases must be decided alike and not by ‘a private and intuitive evaluation’ (96).

[93] But the experience of the law does not suggest debilitation by absence of a sufficiently rigid taxonomy in the application of equitable doctrines and remedies. And legislatures have taken the same view in Australia, notably by calling upon equitable analogues in framing the remedial provisions laid out in Pt VI of the *Trade Practices Act 1974* (Cth).

[94] As these reasons have sought to show, the relevant principles of equity do not operate at large and in an idiosyncratic fashion...

(92) See Goff and Jones, *The Law of Restitution*, 4th ed (1993), p 592. This statement was removed from subsequent editions.

(93) See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 156 [151].

⁶⁷ See *Lumbers v W Cook Builders Pty Ltd* (2008) 232 CLR 635, 662 [77]; *Director of Public Prosecutions (NT) v WJI* (2004) 219 CLR 43, 53-54 [30]; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 544 [73] per Gummow J; *McGinty v Western Australia* (1996) 186 CLR 140, 232 per McHugh J.

⁶⁸ (2009) 239 CLR 269, 299-302 [85]-[98] in a judgment of the Court consisting of Gummow, Heydon, Hayne, Kiefel and Bell JJ. I have included the footnotes as they tell a good part of the story.

- (94) Birks, 'Equity in the Modern Law: An Exercise in Taxonomy', *University of Western Australia Law Review*, vol 26 (1996) 1, at pp 16-17.
- (95) Birks, 'Equity in the Modern Law: An Exercise in Taxonomy', *University of Western Australia Law Review*, vol 26 (1996) 1, at pp 67-68.
- (96) Birks, 'Equity in the Modern Law: An Exercise in Taxonomy', *University of Western Australia Law Review*, vol 26 (1996) 1, at p 17."

Keith Mason, the former President of the New South Wales Court of Appeal, has recently examined the court's use of the phrase "top-down reasoning" to criticise the concept of unjust enrichment as a general reason for the provision of restitutionary remedies.⁶⁹ He discussed the High Court's concern that the unprincipled development of the idea of unjust enrichment would lead to the distortion of equitable principle, a view reflected in a number of recent decisions and not only in Australia.⁷⁰ There is an observable concern in several judges of the High Court that equitable principle not be subverted by the intrusion of restitutionary remedies.

One may be forgiven for thinking that, if Birks' approach to the structure of the common law is coupled with the increase in harmonisation of English law with European law, that "top-down" reasoning may gain a stronger foothold in England with the effect that the influence of English law on our law may be lessened, particularly with some current members of the High Court. The concern may be that continental learning may distort the structure of the common law and make it overly theoretical and unhistorical in respect of its sources and development.

That seems to me to be an unlikely result in the long run. Mason came to the view, with which I agree, that the two concepts of top-down and bottom-up reasoning "inevitably meet in the day-to-day exertions of any conscientious judge."⁷¹ I fail to see any necessary tension between the two approaches. Rather, they are two sides of the one coin. To treat them as opposed to each other risks creating a false dichotomy. Common lawyers try to work within a systematic conception of the law where individual cases need to be decided in accordance with principle. We may have more

⁶⁹ Keith Mason, *Do Top-down and Bottom-up Reasons Ever Meet?* in Bant and Harding, op cit, at pp. 19-40.

⁷⁰ See, e.g., *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 145 at [121] and the concerns expressed by Lord Goff in *Westdeutsche Bank v Islington LBC* [1996] AC 669, 685 about the potential for the development of the law of restitution to distort the principles underlying some equitable institutions, both discussed in *Quince v Varga* [2009] 1 Qd R 359, 381 at [51]-[52] and see also J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia*, (LexisNexis Butterworths, 7th ed, 2006), at p 289, [1337].

⁷¹ Keith Mason, op cit, at p. 40.

flexibility to develop the law at the margin, and even to reconceptualise it, than judges in civilian systems, but we recognise the importance of coherence in the system overall.⁷²

It must also be said that there is some strength to the view expressed by Justice Finn that taxonomy and taxidermy may well be related. In other words, one may argue that the genius of the common law in England is likely to continue to reject attempts to organise its concepts too rigidly for fear that it will lead to their fossilisation. That is certainly my assessment of the likely reaction of the legal profession in England to attempts to make the structure of their law overly “top-down”. Also, as Professor Michael Tilbury has said, scholars in a “post-realist and post-modern world” may not be “content simply to write about what the law is or (within its own terms) should be. They want to know how law contributes to, fits in with, and operates within, philosophical, political, economic and social systems and structures. Indeed, even one major strand of current legal thought within the positivist tradition, namely, that concerned with issues of taxonomy and classification, can be presented at a level that, while it may sometimes be of importance in the highest courts, is hardly of everyday interest to the practitioner.”⁷³

Even with members of the highest English courts, let alone the ordinary practitioner, talk of taxonomy and “top-down” reasoning is likely to make the eyes glaze over. To paraphrase the droll Irish barrister, Serjeant Sullivan – in the courts of London they talk about nothing else.⁷⁴ In other words, I do not anticipate that common law judicial technique is in imminent danger in England or Australia and hope that we continue to share its benefits indefinitely.

⁷² See the discussion by Heydon J in *Momcilovic v The Queen* [2011] HCA 34 at [392]-[397]. As to reconceptualising see *Restatement of the Law Third, Restitution and Unjust Enrichment* (American Law Institute Publishers, 2011).

⁷³ Michael Tilbury, *Book Review of Justice According to Law: A Festschrift for the Hon Mr Justice B H McPherson CBE* (2008) 27(1) UQLJ 145, 146. See also G Samuel, *English Private Law: Old and New Thinking in the Taxonomy Debate* (2004) 24 Oxford Journal of Legal Studies 335, 361-362 where the author persuasively casts doubt on the whole idea of a rigid taxonomy of rights.

⁷⁴ R W Bentham, *The Bench and Bar in Ireland* (1958) 1 U Tas L Rev 209, 229 and cf A M Sullivan, *The Last Serjeant*, (Macdonald, 1952) at p. 48.

An influence for how long?

One way of testing the question, for how long will English law continue to influence ours, is to imagine what may happen in the future to require us to develop our law. What influences are likely to bear on such developments? I shall examine three areas, human rights, contract and damages for pure economic loss in tort in particular.

Human Rights

I have touched briefly on one area, human rights law, where the likelihood is that, if we introduce a comprehensive national system in this area, English law's experience of the European body of law will be discussed. The extent of the discussion will depend on the body of principles adopted here and how they are expressed.

The Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) encourages recourse to international law and the judgments of domestic, foreign and national courts and tribunals relevant to a human right to assist in its interpretation, something which, as French CJ, has pointed out recently, courts can already do.⁷⁵ But his Honour advised a cautious approach in *Momcilovic v The Queen*⁷⁶ generally, but also specifically in respect of the United Kingdom jurisprudence:

“19 The ‘right’ declared by s 25(1) of the Charter is expressed in terms found in Art 14(2) of the *International Covenant on Civil and Political Rights* (1966) (‘the ICCPR’), Art 6(2) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) (‘the ECHR’) and Art 8(2) of the *American Convention on Human Rights* (1969) (‘the ACHR’). It is found in other conventions and foreign domestic laws and constitutions. Judgments of international and foreign domestic courts may be consulted in determining whether the right to be presumed innocent, declared in s 25(1), should be interpreted as congruent with the common law presumption of innocence or as extending beyond it. The content of a human right will affect the potential application of the interpretive requirement in s 32(1) in relation to that right. *Nevertheless, international and foreign domestic judgments should be consulted with discrimination and care. Such judgments are made in a variety of legal systems and constitutional settings which have to be taken into account when reading them.* What McHugh J said in *Theophanous v The Herald & Weekly Times Ltd* is applicable in this context:

⁷⁵ *Momcilovic v The Queen* [2011] HCA 34 at [18].

⁷⁶ *Momcilovic v The Queen* at [19]-[20] (footnotes omitted and emphasis added); see also at [47]-[51] and, per Gummow J at [146]-[160], Heydon J at [447]-[454] and Crennan and Kiefel JJ at [541]-[564].

‘The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture.’

Despite our common legal heritage, that general proposition is relevant today in reading decisions of the courts of the United Kingdom, especially in relation to the Human Rights Act 1998 (UK) ("the HRA"). It is appropriate to take heed not only of Lord Bingham of Cornhill's remark about the need for caution 'in considering different enactments decided under different constitutional arrangements', but also his observation that 'the United Kingdom courts must take their lead from Strasbourg.'

20 The same general caution applies to the use of comparative law materials in construing the interpretive principle in s 32(1). In this appeal what was said to be the strong or remedial approach taken by the House of Lords to the application of the United Kingdom counterpart to s 32(1) of the Charter, namely s 3 of the HRA, was at the forefront of the appellant's submissions. However, s 3 differs textually from s 32(1) and finds its place in a different constitutional setting.

...

22 ... *The decisions of the European Court of Human Rights and the United Kingdom courts may be a source of guidance in determining whether particular limitations on the right to be presumed innocent are reasonable. They are, however, of little assistance in determining the function of s 7(2) in the Charter.*"

An examination of that decision makes it clear that England will be only one source of the law to be consulted in this area. Human rights jurisprudence in Europe, Canada, South Africa and New Zealand was canvassed extensively in the case as were the rights and freedoms inherent in the common law and constitutional law expressed in many jurisdictions. But what is likely to be of most importance in the long run is the construction of the relevant instrument having regard to the Australian constitutional framework within which it operates, recognising that it is to be construed according to its text.⁷⁷

Contract

The law of contract may provide a significant area of future development. The Commonwealth Attorney-General announced recently the possible introduction of a

⁷⁷ *Momcilovic v The Queen* at [159] per Gummow J.

national contractual code capable of adoption by the States or by parties as an optional instrument governing their agreement and influenced by international examples such as the *Uniform Commercial Code* (“UCC”) of the United States and the *Principles of International Commercial Law* developed by the International Institute for the Unification of Private Law, commonly known as UNIDROIT.⁷⁸ If that occurs then the direct influence of the English law of contract on ours will become much more tenuous as those international instruments tend to try to harmonise the better aspects of existing systems.

I referred earlier to the background to the CFR in Europe as including the Lando Commission and the Principles of European Contract Law as a form of precursor. The bigger picture also includes the UNIDROIT Principles, the CISG, the UCC and the *Restatement (Second) of the Law of Contracts* and together they have been said to “embody the future with which Australian contract law will inevitably have to contend.”⁷⁹ Perhaps this is one of the concerns driving the Attorney’s views.

One example of the possible developments might relate to the issue whether there should be an implied duty to act in good faith in the performance of a contract. The problem is an old one, at least as old as the Romans.⁸⁰ It is the classic example referred to by Hector MacQueen in the passage quoted earlier as one where different systems even in Europe use language or concepts the legal import of which might be readily understood in some jurisdictions while being completely opaque in others.⁸¹ In France, Germany, the United States and in many other countries influenced by their jurisprudence the implication of such a term is normal.⁸² Most of the international instruments referred to include such a provision with the partial exception of the CISG which mentions the good faith principle in article 7(1). It requires that convention to be interpreted having regard to its international character and to the need to promote

⁷⁸ *The Australian Financial Review*, 10 June 2011, p. 20.

⁷⁹ See Paul Finn, *Internationalization or Isolation: The Australian Cul De Sac? The Case of Contract Law* in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) at p. 63. Justice Finn is a member of the Third Working Group on UNIDROIT’s *Principles of International Commercial Contracts*.

⁸⁰ Cicero, *De Officiis*, Book III [50]-[53] translated by Walter Miller, Loeb Edition, Cambridge: Harvard University Press, 1913 reproduced at http://www.stoics.com/cicero_book.html and at <http://www.thelatinlibrary.com/cicero/off3.shtml> in Latin.

⁸¹ Hector MacQueen, *op. cit.*, at pp. 178-179.

⁸² J S Douglas, *Exploring the recent uncertainty surrounding the implied duty of good faith in Australian contract law*: <http://archive.sclqld.org.au/judgepub/2007/douglas240806.pdf>

uniformity in its application and the observance of good faith in international trade. That does not amount to an implied term requiring the parties to exercise good faith in the performance of the contract but it does require interpretation of the convention in conformity with such an idea.

The idea of good faith is familiar to Australian lawyers from its use in statutes, in equity, in insurance contracts, which are contracts of the utmost good faith, and from the concept of a purchaser in good faith. But a requirement that the parties perform a contract by acting in good faith towards one another has not, historically, been regarded as a necessary feature of commercial contracts in Australia. The accepted wisdom has been that parties to such contracts are expected to look after their own interests, *caveat emptor*.⁸³

The remarks of Priestley JA in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*⁸⁴ made significant inroads into that view. His Honour said that “there are many indications that the time may be fast approaching when the idea, long recognised as implicit in many of the orthodox techniques of solving contractual disputes, will gain explicit recognition in the same way as it has in Europe and in the United States.”⁸⁵ Especially in New South Wales his views rapidly seemed to become almost the new orthodoxy.

The High Court, however, has shown no real enthusiasm to take up the debate. In 2002 it sidestepped the issue in *Royal Botanic Gardens and Domain Trust v South Sydney City Council*.⁸⁶ But Kirby J in particular said that a general implied contractual term appeared to conflict with fundamental notions of *caveat emptor* inherent in common law conceptions of economic freedom and to be inconsistent with the law as it has developed in Australia in respect of the introduction of implied terms into written contracts which the parties have omitted to include. The High Court has not revisited the debate since then.

⁸³ Although Lord Mansfield had described it in 1766 as “the governing principle ... applicable to all contracts and dealings” in *Carter v Boehm* (1766) 3 Burr 1905, 1910; 97 ER 1162, 1164.

⁸⁴ (1992) 26 NSWLR 234

⁸⁵ See at 263-264. His Honour had written extrajudicially on the topic in greater detail; *Contract – the Burgeoning Maelstrom* (1988) 1 JCL 15.

⁸⁶ (2002) 240 CLR 45, 63 [40], 75 [87]-[88] and 94 [156].

Gummow J, while still a member of the Federal Court, decided *Service Station Association v Berg Bennett & Associates Pty Ltd*.⁸⁷ His detailed reasons there leave little scope for the implication of a general term of good faith in the performance of commercial contracts in Australian law.⁸⁸ Even though *Renard Constructions* continued to be relied on to argue that a general implied term of good faith in contractual performance exists in Australia in spite of Gummow J's reservations,⁸⁹ such discussion as there was in the High Court in *Royal Botanic Gardens* does not encourage the conclusion that it will soon imply such a general term in Australian contracts. That is the apparent position in Queensland and Victoria also.⁹⁰

If we do enter into a new world of uniform Australian contract law, perhaps based on an international instrument of the type I have mentioned, I would not be surprised at all if it provided for such an implied term to act in good faith in the performance of a contract. That would change the English common law we have inherited but, even if many other such rules were changed, it does not mean that we would cease to be influenced by English law for reasons I shall develop shortly.

Pure Economic Loss

A developing area of the common law relates to the recoverability of damages for pure economic loss in tort. There is no single governing principle under Australian

⁸⁷ (1993) 45 FCR 84.

⁸⁸ See at 91-98, but cf the views of the New South Wales Court of Appeal in *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349, 363-369.

⁸⁹ See *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349 but cf *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15, [189]-[191] and *Australian Hotels Assn (NSW) v TAB Ltd* [2006] NSWSC 293 [69]-[80] which indicate a renewed reluctance in New South Wales to recognise that commercial contracts are a class of contracts that, as a legal incident, have an implied obligation of good faith. There is now more of a focus on implication of such a term in particular classes of contracts.

⁹⁰ See *Gold Coast Waterways Authority v Salmead Pty Ltd* [1997] 1 Qd R 346, *Laurelmount Pty Ltd v Stockdale & Leggo (Queensland) Pty Ltd* [2001] QCA 212 and *Re Zurich Australian Insurance Ltd* [1999] 2 Qd R 203, 213-219 [34]-[82]. There is no great desire to leap into the fray either; *Re Kendells (NSW) Pty Ltd (In Liq)* [2005] QSC 064 [58]-[60] where Muir J surveys the cases helpfully and *Highmist Pty Ltd v Tricare Australia Ltd* [2005] QSC 115 at [43]. In Victoria see *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228 [3]-[4], [25]. Finn J in *Hughes Aircraft International v Airservices Australia* (1997) 76 FCR 151, 191-194 expressed his personal preference for the views of Priestley J in *Renard Constructions* while noting the decision of Gummow J in *Service Station Association*. His Honour decided the issue before him on the basis that the implication of such a duty was a legal incident of the particular class of contract with which he was dealing. That case dealt with pre-award contracts dealing with procurement from a Government authority and his Honour found a duty to act fairly appeared to have been accepted in other British Commonwealth jurisdictions.

law that will determine whether a duty of care exists to compensate a plaintiff for pure economic loss. The lack of certainty and diversity of approaches in this area affects not only common law systems but most of those based on the European civil codes.⁹¹

Gibbs J in *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad*,⁹² said that a duty may be owed where “the defendant has knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence.”⁹³ Stephen J, pointed out, as one of a number of salient features, the defendant’s knowledge that the property damaged was of a kind inherently likely when damaged to be productive of consequential economic loss to those who rely directly upon its use.⁹⁴ Both of those approaches need to be supplemented. In Australia the search at present is for appropriate “salient features”, whose relevance will depend greatly on the circumstances in which the claim arises but will often include as an important requirement the vulnerability of the plaintiff.⁹⁵

Until *Perre v Apand*⁹⁶ the Australian approach to the determination of liability in such cases was effectively the same as that in England. As Kirby J said in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*:⁹⁷

“I favoured, as I did in many other cases before and after, the three-fold test expressed by the House of Lords in *Caparo Industries Plc v Dickman* for deciding whether a duty of care existed in a particular factual situation, which the law of negligence would enforce. This approach requires consideration of reasonable foreseeability and proximity (in the sense of “neighbourhood”) without attributing to either of these factors the primacy accorded to them in the past and without turning either into a sufficient criterion for acceptance of a duty of care. *Caparo* also obliges a transparent consideration of the issues of legal policy that tend to favour, or reject, the imposition of a legal duty of care sounding in damages for a negligent breach.”

⁹¹ See Bussani and Palmer (eds), *Pure Economic Loss in Europe* (CUP, 2003) esp. at pp. 123-159 and F H Lawson, *The Duty of Care in Negligence: A Comparative Study (1947-1948)* 22 Tul L Rev 111 esp. at pp. 118-119, 123-124.

⁹² (1976) 136 CLR 529, 555.

⁹³ See also Stephen J at 576-577 and Mason J at 593.

⁹⁴ At 576 and adopted by the majority decision in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, 530 [22].

⁹⁵ *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, 530 [22]-[23]; see also *Perre v Apand Pty Ltd* (1999) 198 CLR 180 and *Fortuna Seafoods Pty Ltd v Ship ‘Eternal Wind’* [2008] 1 Qd R 429.

⁹⁶ (1999) 198 CLR 180.

⁹⁷ *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* at 572 [158].

It is not likely at present that we will revert to the English approach, but nor does it seem to me that the current “rule” is capable of readily answering whether a duty of care will exist in an unusual case.

As with the other areas I have looked at, English jurisprudence may help but will not be determinative. Nor will the law of other jurisdictions be decisive unless an international norm develops that commands acceptance for its good sense and ability to be applied generally. In that context it may be said that English law has, for the moment, ceased to influence our law in this area. But, where both attempts to answer the question are unclear our systems will benefit most from comparative analysis of other systems in the hope that a generally useful answer will emerge. What may be most important for both England and Australia is that we keep an eye out for developments in the wider world.

Conclusion

Our willingness to look to the wider world is one feature of our system that has always struck me. When I was a student English and American jurisprudence appeared to be focussed inwardly. There was little reference to decisions from outside their borders. England’s engagement with Europe has led it to cast off that insularity to a marked degree. In that respect it has a privileged observer position in the cockpit of Europe and greater exposure to legal developments there than lawyers here. It also has to be remembered that some of the modern civilian systems being developed in Eastern Europe have significant common law influences imported, for example, from sources as unexpected as Quebec, which has recently modernised its civil code based partly on influences from Scotland and England mediated through international instruments such as the UNIDROIT Principles.⁹⁸ What we are beginning to see is an internationalisation of legal norms which is affecting England more than Australia at present but which is likely to affect us in the long run. The establishment of the International Criminal Court and the other more specific international criminal tribunals is another example of the phenomenon.

⁹⁸ Presentation by Mónica Józson: *Unification of private law in Europe and the use of ‘mixed jurisdictions’ as a model for the new civil codes in the Central-Eastern European Member States of the EU* at the Third International Congress of the World Society of Mixed Jurisdiction Jurists 20-23 June 2011 at the Hebrew University of Jerusalem, Israel.

Nor is it all one way traffic from the civil systems to the common law systems. That great invention of equity, the trust, was effectively unknown to the civilian systems but has infiltrated them, particularly in the mixed jurisdictions like Scotland, South Africa and Israel. In 2007, after lengthy debate, the French *Civil Code* was amended to include an institution called the “fiducie” which bears a close resemblance to the trust.⁹⁹

English and American common law has had a significant influence on the development of contractual instruments such as the UNIDROIT principles, the PECL and the CFR as much as the civilian systems. English scholars, practitioners and civil servants are at the heart of legal developments in Europe and likely to be better informed in many respects about international developments than we are. The British Institute for International and Comparative Law is an active and influential body operating in the heart of London and there is vigorous engagement with foreign law professionally and academically in many areas of English law. These may all be signs of the initial stages of a global *ius commune*.

While English common law is unlikely to survive unaltered in the long run its influence is not likely to disappear and I believe we will need to keep in touch with developments there as one of the primary means of keeping in touch with the world generally. That we speak a common language and share many legal values means that it is likely that we will continue to benefit from knowing what is happening in England. Even if we do not adopt their solutions to common problems we will be better informed about the range of possible solutions.

If the rules of English law change beyond recognition, which is doubtful, we in Australia are also still likely to keep the method and spirit of the common law. That method and spirit apply as much to our legal institutions and courts as well as to the rules of law. Our institutional arrangements, for example for the appointment of judges, are markedly different from most of the civilian systems, although some

⁹⁹ *Code Civil*, Article 2011 Créé par [Loi n°2007-211 du 19 février 2007 - art. 1 JORF 21 février 2007](#): “La fiducie est l'opération par laquelle un ou plusieurs constituants transfèrent des biens, des droits ou des sûretés, ou un ensemble de biens, de droits ou de sûretés, présents ou futurs, à un ou plusieurs fiduciaires qui, les tenant séparés de leur patrimoine propre, agissent dans un but déterminé au profit d'un ou plusieurs bénéficiaires.”

mixed jurisdictions such as Scotland are similar. Our institutional independence is as much a cultural thing as a constitutional guarantee and enhanced, I believe, by the recruitment of most of our senior judges from the leaders of an independent legal profession. In many of the civilian systems the judiciary is recruited from young graduates who, in France for example, might not have graduated as lawyers and who will train with and follow a parallel public service career structure with prosecutors, who are very much their professional colleagues. It is a culture which works there in a system which has a similar constitutional guarantee of judicial independence but it would be unlikely to fit here.

The manner in which reasons for decisions are expressed openly, fully and logically is another feature of the common law system, as is the dissenting judgment.¹⁰⁰ There is little likelihood that will change to the sometimes Delphic unanimity of the Cour de Cassation. Judicial decisions will, I expect, continue to be treated, independently of codes or statutes, as a source of law. That has certainly happened with the *Criminal Code* in this State. Nor, it should be noted, is codified law immune from judicial development in the civilian systems even if the legal theory is that the code is paramount.

The pragmatism which marks the development of the common law is part of a culture which we share with the English and which marks out our judicial method. I do not expect that culture to change significantly in the near or long term. Even if the English or our common law is eventually replaced by codes or statutes we are also still likely to apply the rules of statutory interpretation developed by the common law – but that is another story waiting to be developed. In that sense we will need to keep an eye on developments in English law indefinitely.

An increase in Australian lawyers' exposure to the other great legal systems of the world is also desirable. In Canada, at McGill University's law school, all subjects are taught comparatively. That is natural in Quebec where the civil law is to be found in the French derived code but the rest of the country is governed by a common law system. English universities have for some years also recognised the desirability of

¹⁰⁰ See Justice Dyson Heydon, *Varieties of Judicial Method in the late 20th Century*, Inaugural R P Meagher lecture delivered 18 August 2011.

widening their students' education and opportunities by offering law degrees covering both the common law and civilian systems, split between institutions in England and Europe. That is natural in a member of the European Union.

Australia is neither a mixed jurisdiction nor part of an economic community with other states from the civil law tradition. It is, however, a major trading nation with commercial connections with countries representative of all the great legal systems. Our major trading partners such as Japan and China have systems heavily influenced by the civil law tradition. India's developing economy has a legal system firmly based in the English common law. America is another inheritor of that system whose influence is enormously influential. Ignorance of either of those major systems hinders a proper understanding, historically and practically, of the laws of most of the world.

A failure to keep in touch with English law in particular will remove our understanding of the historical roots of our own law. Keeping in touch will enhance our understanding of legal developments not only in England but also in Europe and elsewhere. In one way or another, whether through direct reception or filtered through the experience of other major common law systems or international instruments, English law will influence ours indefinitely. Globalisation is not about to go away,¹⁰¹ nor are the lasting effects on Australian law of one of the world's foremost legal systems.

¹⁰¹ See the recent speech by French CJ, *Home Grown Laws in a Global Neighbourhood - Australia, the United States and the Rest* at: <http://www.hcourt.gov.au/assets/publications/speeches/currentjustices/frenchcj/frenchcj18jan11.pdf>.

Schedule

The tables below provide a useful insight into the self citation practice of the House of Lords, later the Supreme Court of the United Kingdom, and the High Court of Australia and their respective citing of one another for the sample years 1920, 1940, 1960, 1980, 1996 and 2011.

As can be gleaned from the table below, a mere five judgments of the High Court were cited by the House of Lords – one in 1980 and four in 1996 – figures not dissimilar from the Supreme Court’s citing of the High Court in 2011.

House of Lords Citation Practice for the years 1920, 1940, 1960, 1980, 1996

Cited Court	1920	1940	1960	1980	1996
Self citation	15	26	5	70	125
High Court of Australia	0	0	0	1	4

The distribution of citations immediately below is demonstrative of the High Court’s recognition of the House of Lords as part of the immediate judicial hierarchy. In 1920,¹⁰² the percentage of self citations as a percentage of total citations was 24 per cent vis-à-vis 17.2 per cent, being the percentage of House of Lords citations. In 1940,¹⁰³ the percentages were 13.4 per cent and 9.5 per cent respectively. In 1960,¹⁰⁴ 33 per cent and 8.8 per cent. In 1980,¹⁰⁵ 44.6 per cent and 12 per cent. In 1996,¹⁰⁶ 47.4 per cent and 4.9 per cent. The sharp change in citation practice for 1996 is referable, amongst other things, to the *Australia Act* 1986 and the then emerging notion of an “Australian common law”. Although, it should be pointed out that for each of the sample years the High Court cited a greater number of its own decisions, the smallest margin being 57 cases in 1940.

¹⁰² Russell Smyth "Citations by Court" *The Oxford Companion to the High Court of Australia*. Michael Coper, Tony Blackshield, George Williams, Oxford University Press, 2007. Oxford Reference Online. Oxford University Press. Supreme Court of Queensland Library. 9 September 2011 <<http://0-www.oxfordreference.com.catalogue.sclqld.org.au/views/ENTRY.html?subview=Main&entry=t241.e59>>

¹⁰³ Ibid

¹⁰⁴ Ibid

¹⁰⁵ Ibid

¹⁰⁶ Ibid

High Court of Australia Citation Practice for the years 1920, 1940, 1960, 1980, 1996¹⁰⁷

Cited Court	1920	1940	1960	1980	1996
Self citation	452	192	841	1227	4095
House of Lords	324	135	225	330	422

The self citation practice of the Supreme Court below is the lowest figure contained in the four tables and a natural consequence of the Court having replaced the Appellate Committee of the House of Lords as the highest court in the UK in October 2009. Interestingly, however, the House of Lords' citation of the High Court in 1996 was double that of the Supreme Court in 2011.

Supreme Court of the United Kingdom Citation Practice – 2011 (as at 26 September 2011)

Cited Court	2011
Self citation	40
House of Lords	347
High Court of Australia	2

Two points of interest emerge from the below table. For 2011, the High Court's citation of the Supreme Court is double the Supreme Court's citation of the High Court and, interestingly, the distribution of citations below is most akin to the High Court's citation practice in 1960.

¹⁰⁷

Ibid

High Court of Australia Citation Practice – 2011 (as at 26 September 2011)

Cited Court	2011
Self citation	774
House of Lords	87
Supreme Court of the United Kingdom	4

The citation practice of the highest courts in Australia and the United Kingdom over the sample years provides a snapshot of the different stages in the history of each. The figures are reflective of the reliance that each places on the other although the High Court has, historically, and continues to draw more heavily on the House of Lords as a source of authority. This, it could be argued, is explicable by reference to the firmly entrenched historical ties, notwithstanding the abolition of appeals from the High Court to the Privy Council, but also, since 1986, suggestive of the High Court's willingness to incorporate foreign precedents in judicial reasoning.