

**A. Introduction**

1. I am delighted to have been invited to participate in this seminar series. My task is an easy one, given the many interesting issues thrown up by the excellent paper that Adam Pomerence QC has just presented.
2. In the short time available to me, I propose to offer some additional observations about just three of the matters discussed by Mr Pomerence, each of which to at least some extent raises constitutional considerations. These matters are:
  - a. first, the possible role in the expansion of the statute book of common law interpretive principles;
  - b. second, the constitutional issues with statutes “picking up” or incorporating the common law; and
  - c. third, the problems that can arise in some areas in working out whether the applicable law is properly characterised as common law or statute law (which will give me an opportunity to say something about s 44 of the *Constitution*, although not the paragraph that is presently so popular).

**B. Legislative hyperactivity**

3. In recent years there have been many cases in which the High Court has instructed that, when confronted with the task of ascertaining the meaning of a statute, one must begin and end with the text of the statute.<sup>1</sup> That makes it sound like all one

---

\* Solicitor-General of the Commonwealth of Australia. Speech delivered at the Queen Elizabeth II Courts of Law, Brisbane on 17 August 2017 in response to a speech delivered by Adam Pomerence QC as part of the Current Legal Issues Seminar Series presented by the TC Beirne School of Law, The University of Queensland.

<sup>1</sup> *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Federal Commissioner of Taxation v Consolidated Media Holdings Limited* (2012) 250 CLR 503 at 519 [39] (French CJ, Hayne,

need do is read the words. But, of course, it is not that easy. Indeed, even reading the words can be quite a task given the sheer volume of legislation that must now be navigated. Adam's figures suggest about 200,000 pages of legislation, not including Commonwealth subordinate legislation, are in force in Queensland, which has the consequence that the journey between the beginning and end is quite long, even focusing just on the text. But, in addition, while one must begin and end with the text, there is often a considerable detour through legislative history and purpose, and through the common law background against which particular legislation was enacted, that must be negotiated before one can ultimately return to the text confident that its context is fully appreciated.

4. It is now common for Acts, that a few decades ago were slim volumes, to run into the hundreds of pages. Interlinking definitions, and primary legislation that depends for its content on matters prescribed in subordinate legislation, are now so common that the task of locating the relevant provisions can itself require considerable technical skill, before one even reaches the task of mastering the interaction of provisions in ever more complex and prescriptive statutory regimes. And, having found the relevant provisions, in many areas, including for example tax and migration, there are vast numbers of authorities interpreting the provisions, which not uncommonly establish that the legal meaning of a text does not correspond to the ordinary meaning of that text.
5. How have we reached this point? Of the many possible explanations, I wish briefly to explore two.
6. The first is the quest for certainty. At some point a view appears to have taken hold in our Parliaments that, if only the relevant rules can be specified sufficiently

---

Crennan, Bell and Gageler JJ); *Thiess v Collector of Customs* (2014) 250 CLR 664 at 671 [22] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

comprehensively, legal outcomes will become certain and predictable. I very much doubt that this is true. In fact, it often seems to be the case that, the more detailed the regime, the greater the potential for argument as to the interaction of various provisions. To illustrate, I have spent the last few days in the High Court in cases concerning the interpretation of the *Proceeds of Crime Act 2002* (Cth).<sup>2</sup> It is undoubtedly a very complex Act and one that quite deliberately cuts across deeply entrenched common law values concerning private property. In 2003, just a year after that Act was enacted, restraining orders were made in the matter that, nearly 15 years later, is still being litigated after many trips to the Court of Appeal,<sup>3</sup> two unsuccessful special leave applications<sup>4</sup> and now three jointly heard appeals in the High Court.<sup>5</sup> Submissions on the construction of just two provisions have occupied about one and a half days in the High Court. The highly prescriptive regime did not achieve certainty.

7. Second, the volume of legislation may at least in part be a consequence of the difficulty the Parliament can experience in attempting to change the balance that the common law has struck between rights and other public interests. That difficulty is at least partly a result of common law interpretive principles. In saying that, I don't pretend that it is an original observation. The following quote seemed to me particularly apt in light of some of Mr Pomerence's themes:<sup>6</sup>

---

<sup>2</sup> *Commissioner of the Australian Federal Police v Hart* (B21/2017); *Commonwealth v Yak 3 Investments Pty Ltd* (B22/2017); *Commonwealth v Flying Fighters Pty Ltd* (B23/2017), heard together on 14–15 August 2017.

<sup>3</sup> *DPP (Cth) v Hart* [2004] 2 Qd R 1; *DPP (Cth) v Hart [No 2]* [2005] 2 Qd R 246; *DPP (Cth) v Hart* [2008] 2 Qd R 106; *Hart v DPP (Cth)* [2011] QCA 176; *Hart v DPP (Cth)* [2012] 2 Qd R 203; *Commissioner of Australian Federal Police v Hart* (2016) 336 ALR 492; *Commissioner of Australian Federal Police v Hart* [2016] QCA 284.

<sup>4</sup> *Flying Fighters Pty Ltd v DPP (Cth)* [2005] HCATrans 788; *Hart v DPP (Cth)* [2007] HCATrans 694.

<sup>5</sup> Above n 2.

<sup>6</sup> Theodore Sedgwick, *A Treatise on the Rules which Govern the Interpretation and Construction of Statutory and Constitutional Law* (2<sup>nd</sup> ed, 1874) at 270–1.

It is a demonstrable proposition, that there is hardly a rule or doctrine of positive practical jurisprudence in England or in the United States to-day, which is not the result, in part at least, of legislation; hardly a rule or doctrine of the original common law which had not been abolished, or changed, or modified by statute. Furthermore, it is conceded that the ancient conception as to the perfection of the common law was absurdly untrue. The great mass of its practical rules as to property, as to persons, as to obligations, and as to remedies, were arbitrary, unjust, cumbersome, barbarous. For the last generation the English Parliament and our [American] State Legislatures have been busy in abolishing these common-law rules, and in substituting new ones by means of statutes. That all this remedial work ... should be hampered, and sometimes thwarted by a parrot-like repetition and unreflecting application of the old judicial maxim that statutes in derogation of the common law are to be strictly construed, is, to say the least, absurd.

8. That passage was written by Mr John Pomeroy in 1874. Yet the issue to which his remarks were directed remains very familiar. We now call the principle about which he complained “the principle of legality” and reliance on that principle is common, both in arguments and in judgments of the High Court and other courts. In many judgments, it is emphasised as a principle of foundational importance, having a quasi-constitutional character. For example, in *Momcilovic v The Queen*, French CJ said that the common law, in relation to the interpretation of statutes, “helps to define the boundaries between the judicial and legislative functions”,<sup>7</sup> which reflected its character as the “ultimate constitutional foundation in Australia”.<sup>8</sup> Similarly, in *Electrolux Home Products Pty Ltd v Australian Workers’ Union*, Gleeson CJ referred approvingly to observations of Lord Steyn to the effect that the principle of legality is “not merely a common sense guide to what a Parliament in a liberal

---

<sup>7</sup> (2011) 245 CLR 1 at 46 [42].

<sup>8</sup> Ibid, quoting *Wik Peoples v Queensland* (1996) 187 CLR 1 at 182 (Gummow J).

democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.”<sup>9</sup>

9. The “working assumption” to which Gleeson CJ referred is the assumption that it is highly improbable that Parliament would “overthrow fundamental principles, infringe rights, or depart from the general system of law without expressing its intention with irresistible clearness”.<sup>10</sup> But while the assumption is no doubt true of the “overthrow of fundamental principles”, it is obviously not true (as Gleeson CJ in fact recognised in *Electrolux*) that Parliament will “infringe rights” only rarely. Nor, in my experience, is it true that it is “in the last degree improbable” that Parliament will infringe rights only by using words of “irresistible clearness”.<sup>11</sup>
10. A very large amount of modern legislation can be described as legislation that infringes rights. It commonly does so, for example, in the context of adjusting rights between parties, or of erecting regulatory or investigative regimes in the public interest. If legislation of that kind is interpreted in such a way that it will “limit rights” only if words of “irresistible clearness” are used, that is an invitation to the Parliament to produce the excessive volume of legislation to which Mr Pomerence has drawn attention and that itself poses a threat to the rule of law.
11. Just one among many possible examples of this interplay is provided by the High Court’s decision in *X7 v Australian Crime Commission*<sup>12</sup> and the legislative response to it. In that case, the High Court held, by a 3:2 majority, that legislation that

---

<sup>9</sup> (2004) 221 CLR 309 (*Electrolux*) at 329 [21].

<sup>10</sup> *Potter v Minahan* (1908) 7 CLR 277 at 304 (O’Connor J), quoted in *Bropho v Western Australia* (1990) 171 CLR 1 at 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ) and *Coco v The Queen* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

<sup>11</sup> See similar observations made by McHugh J in *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 299 [28].

<sup>12</sup> (2013) 248 CLR 92 (*X7*).

authorised the coercive questioning of persons in the course of a criminal investigation did not authorise questioning after criminal charges had been laid, even in circumstances where orders had been made to ensure that the prosecution would not become aware of any answers given during the examination. The problem was not that the legislation did not sufficiently clearly abrogate the principle against self-incrimination (which it did). Instead, Hayne, Kiefel and Bell JJ held that the legislation did not authorise the questioning because such questioning would depart from the accusatorial nature of the process of criminal justice and thus the general system of law.<sup>13</sup> Their Honours' reasoning turned on the failure of that law to abrogate, by express words or necessary intendment, the common law "companion rule" – that rule being "that an accused person cannot be required to testify to the commission of the offence charged."<sup>14</sup>

12. Two years later, as a direct response to that decision, the *ACC Act* is about 30 pages longer than it was and the result has been reversed.<sup>15</sup> That illustrates the trade-off between "irresistible clearness" and increased legislative volume.
13. In the last few years there have been some judicial suggestions that the role for the principle of legality needs to be confined to its original purpose and that it has little role to play in the interpretation of legislation that is plainly intended to limit rights, the issue there being the extent of the limitation. In particular, in *Lee v NSW Crime Commission*,<sup>16</sup> which was decided less than a year after *X7* and which split the Court 4:3 the other way, Gageler and Keane JJ criticised the application of the

---

<sup>13</sup> Ibid at 127 [70]-[71], 132 [87] (Hayne and Bell JJ), 153 [159]-[160] (Kiefel J).

<sup>14</sup> Ibid at 136 [102] (Hayne and Bell JJ), 153 [159] (Kiefel J), citing *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 503 (Mason CJ and Toohey J).

<sup>15</sup> See the Law Enforcement Legislation Amendment (Powers) Bill 2015 (Cth) and the Explanatory Memorandum thereto, which describes the Bill as a response to *X7* and the decisions in *R v Seller* (2013) 273 FLR 155, *Lee v NSW Crime Commission* (2013) 251 CLR 196 and *Lee v The Queen* (2014) 253 CLR 455: at 7.

<sup>16</sup> *Lee v NSW Crime Commission* (2013) 251 CLR 196.

principle of legality in resolving problems of the kind thrown up in X7. Their Honours said that:<sup>17</sup>

The principle ought not ... to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature.

14. A little later, their Honours continued:<sup>18</sup>

The principle at most can have limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked. The simple reason is that “[i]t is of little assistance, in endeavouring to work out the meaning of parts of [a legislative] scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve”.

15. In my view, those observations have considerable force. If they come to be more widely accepted, that may take some pressure off the need for “irresistible clearness” in any legislation that seeks to adjust or limit rights in the deliberate pursuit of an identified competing public purpose.

## **2. The constitutional dimension of statutes “picking up” the common law**

16. The next topic I wish to touch on is the constitutional limitations on statutory incorporation of the common law.

---

<sup>17</sup> Ibid at 310 [313]. See also *ICAC v Cunneen* (2015) 267 CLR 1 at 35–6 [86]–[88] (Gageler J).

<sup>18</sup> Ibid at 310–11 [314], quoting *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321 at 340 [43].

17. This is an area of significance for the Commonwealth because of the range of Commonwealth statutes that “pick up” or refer to the common law establishing rights, duties or liabilities.<sup>19</sup> In addition, other Commonwealth laws seek to apply laws in force in a State or Territory “as laws of the Commonwealth” in particular places, including the offshore area of a State or Territory<sup>20</sup> or external territories.<sup>21</sup> Relevantly, many of the laws to be applied are defined as including “unwritten laws” or “the common law”.<sup>22</sup>
18. Mr Pomerence has already discussed the *Native Title Act Case*.<sup>23</sup> You will recall that, in that case, the High Court found that s 12 of the *Native Title Act 1993* (Cth), which provided in part that “the common law of Australia in respect of native title has... the force of a law of the Commonwealth”, was invalid. It held that the provision would be invalid whether the common law was understood as having “its source in judicial reasons” or “by reference to its content as developing from time to time”.<sup>24</sup>
19. The reasons the Court gave for that conclusion included that:

---

<sup>19</sup> See, eg, *Australian Consumer Law* (Cth) s 20; *Australian Securities and Investments Commission Act 2001* (Cth) s 12CA; *Fair Work (Registered Organisations) Act 2009* (Cth) ss 285, 292; references to the exercise of power, and rights that are granted or transferrable, under the “general law” (which includes the “common law”) in the *Personal Property Securities Act 2009* (Cth); *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth) s 6(7); *Future Fund Act 2006* (Cth) s 56(2); *Corporations Act 2001* (Cth) s 180.

<sup>20</sup> See, eg, *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) s 80; *Offshore Minerals Act 1994* (Cth) s 428.

<sup>21</sup> See, eg, *Norfolk Island Act 1979* (Cth) s 18A; *Christmas Island Act 1958* (Cth) s 8A; *Cocos (Keeling) Islands Act 1955* (Cth) s 8A.

<sup>22</sup> See, eg, *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) s 79(b); *Norfolk Island Act 1979* (Cth) s 18A; *Christmas Island Act 1958* (Cth) s 8A; *Cocos (Keeling) Islands Act 1955* (Cth) s 8A.

<sup>23</sup> *Western Australia v Commonwealth* (1995) 183 CLR 373.

<sup>24</sup> *Native Title Act Case* at 485 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).



- a. section 12 attempted “to confer legislative power upon the judicial branch of government”,<sup>25</sup>
  - b. this was done simply in order to use s 109 of the *Constitution* to make the common law immune from the operation of a valid State law;<sup>26</sup> and
  - c. the legislative power of a State, confirmed by s 107 of the *Constitution*, is necessarily a power to override the common law and, if s 12 were valid, it would necessarily diminish that power.<sup>27</sup>
20. I suggest that none of those reasons is particularly persuasive and that the issue may warrant re-examination.
21. The first reason is particularly problematic, for the proposition that s 12 was an attempt to confer legislative power on the judicial branch appears to constitute the suggestion that, because the effect of s 12 would be that, as the content of the common law changes, the content of s 12 changes, it must follow that there was a delegation of legislative power to the organ that had the capacity to bring about that change. The Court was concerned with statute requiring a court to apply the common law as developed “from time to time” because “the Parliament cannot delegate to the Courts the power to make law involving, as that power does, a discretion or, at least, a choice as to what that law should be.”<sup>28</sup>
22. I agree with the observation of the Hon Sir Anthony Mason that this reasoning is problematic.<sup>29</sup> If it were to be applied consistently, it would have dramatic adverse consequences for many well established Commonwealth legislative schemes that

---

<sup>25</sup> Ibid.

<sup>26</sup> Ibid at 487.

<sup>27</sup> Ibid at 487–8.

<sup>28</sup> Ibid at 486.

<sup>29</sup> Sir Anthony Mason, “The Interaction of Statute Law and Common Law” (2016) 90 *Australian Law Journal* 324 at 327–8.

“pick up” law from other sources and that the High Court has already held to be valid. That follows because the “delegation” logic from the *Native Title Act Case* would suggest that the Commonwealth Parliament had delegated its legislative power to State Parliaments. Examples of the laws that would be threatened by such an approach include:

- a. section 79 of the *Judiciary Act 1903* (Cth), which “picks up” State laws – whatever their content may be – that cannot apply in federal jurisdiction, that being the provision at issue in the High Court’s recent important decision in *Rizeq v Western Australia*;<sup>30</sup>
- b. mirror taxing legislation; and
- c. the *Commonwealth Places (Application of Laws) Act 1970* (Cth), in which the Commonwealth Parliament responded to the fact that the Commonwealth has exclusive legislative power under s 52 of the *Constitution* with respect to Commonwealth places by providing, in s 4(1), that:

The provisions of the laws of a State as in force at a time (whether before or after the commencement of this Act) apply, or shall be deemed to have applied, in accordance with their tenor, at that time in and in relation to each place in that State that is or was a Commonwealth place at that time.

23. Apparently conscious of the possibly overbroad effect of its reasoning, the High Court in the *Native Title Act Case* drew a distinction between s 12, which it characterised as a law that gave the common law “the force of a law” of the

---

<sup>30</sup> (2017) 91 ALJR 707.

Commonwealth”, and a law that merely “enact[s] the common law as a law of the Commonwealth.”<sup>31</sup>

24. The suggestion appears to be that laws such as s 4(1) of the *Commonwealth Places (Application of Laws) Act 1970* (Cth) would fall into the latter category and therefore be valid. The Court indicated that a provision in that form only referred to the provisions of the laws of a State (both written and unwritten) as a “dictionary for reference in ascertaining the rights and duties under Commonwealth law.”<sup>32</sup> That was so notwithstanding the fact that it is clear from the terms of s 4 that the State laws that are given effect by the provision may change after the commencement of the Act, meaning that the content of s 4 could change over time, without any further action by the Commonwealth Parliament.
25. In comparison, s 12, as a law which gave the common law “the force of a law of the Commonwealth”, failed in its attempt to engage s 109 of the *Constitution* to make the common law immune from affection by a valid State law.<sup>33</sup>
26. The distinction between the common law being given “the force of law” and being “enacted as a law” is elusive. As Mr Pomerence has pointed out, in *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd*,<sup>34</sup> French J (prior to his elevation to the High Court) grappled with the *Native Title Act Case* and drew a different distinction. His Honour noted that s 51AA of the *Trade Practices Act 1974* (Cth) “does not purport to adopt the unwritten law relating to unconscionable conduct and give to it the force of statute”, but rather it “uses the unwritten law to the extent that it provides for the characterisation of conduct as

---

<sup>31</sup> *Native Title Act Case* at 487 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) (emphasis added).

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid* at 487-8.

<sup>34</sup> (2000) 96 FCR 491.

unconscionable and then prohibits such conduct.”<sup>35</sup> However, his Honour considered that it was “too simplistic” to say that s 51AA “merely provides a dictionary to give content to the term ‘unconscionable conduct’”.<sup>36</sup>

27. Subsequently, in *Aid/Watch Inc v Federal Commissioner of Taxation*,<sup>37</sup> the High Court clarified that a Commonwealth Act can do more than apply the common law as a dictionary. It said that:<sup>38</sup>

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

28. Assuming that that passage means what it says, and therefore that the Commonwealth can both confirm the common law and enact a law that derives its content from the common law from time to time, the authority of the *Native Title Act Case* must now be very questionable. Such a law would plainly be a law of the Commonwealth for the purposes of s 109 of the *Constitution*. As a result, it would prevail in the face of any State legislation that sought to modify the common law. The end result would appear to be that, while a State Parliament could still enact a law that purported to change the common law, that enactment would be invalid to the extent of the inconsistency, so that in practical terms the Commonwealth would have prevented the State Parliament from modifying the common law. It is, I suggest, difficult to see how that conclusion can stand consistently with the result reached in the *Native Title Act Case*.

---

<sup>35</sup> Ibid at 504 [28].

<sup>36</sup> Ibid at 509 [41].

<sup>37</sup> (2010) 141 CLR 539 (*Aid/Watch*).

<sup>38</sup> Ibid at 548–9 [20] (French CJ, Gummow, Hayne, Crennan and Bell JJ) (emphasis added).

29. Contrary to the suggestion in the *Native Title Act Case*, it is difficult to see how that gives rise to any incompatibility with s 107 of the *Constitution*. Indeed, well before *Aid/Watch* was decided, Professor Lindell had argued that this aspect of the decision should be reconsidered.<sup>39</sup> The reason is that s 107 at most preserves the capacity of a State Parliament to enact legislation and does not protect its capacity to enact a law that alters other State legislation, if by doing so the State law would be inconsistent with Commonwealth legislation. It is hard to see why a State law that purports to modify the common law should be any different. For that reason, s 107 cannot protect the ability of a State to enact operative legislation that alters the common law. It preserves the capacity to enact the law, but once it is enacted it is like any other State law, meaning that it can operate only to the extent that it is consistent with Commonwealth legislation.
30. Academic commentators have suggested that s 12 may have been found to be invalid because it was a “bad faith” attempt by the Commonwealth Parliament to use s 109 to prevent State legislation on native title of any description.<sup>40</sup> For my part, I have considerable difficulty with the concept of “bad faith” legislation. Rather than attempt to justify the decision on that basis, I suggest that the better view is that the case was simply wrongly decided.

### **3. Characterisation of a law as statute law or common law**

31. Amongst the many difficult questions, it might be thought that it is at least easy enough to tell whether a particular law is statutory or common law. But even that task can cause problems.

---

<sup>39</sup> Geoffrey Lindell, ‘Grappling with Inconsistency between Commonwealth and State Legislation and the Link with Statutory Interpretation’ (2005) 8 *Constitutional Law and Policy Review* 25 at 39.

<sup>40</sup> Nicolas Dour and Greg Taylor, ‘Manufactured Inconsistency’ (2013) 39 *Monash University Law Review* 131 at 140–2.

32. To take one interesting example I nearly had reason to test a few months ago, consider the law of contempt of court. In England, it developed as part of the common law, the power to punish for contempt becoming established as part of the inherent jurisdiction of a superior court of record.<sup>41</sup>
33. In Australia, however, as the High Court pointed out in *New South Wales v Kable*, there are no courts of unlimited jurisdiction.<sup>42</sup> All Australian courts have a statutory underpinning. However, the statutes are often not particularly informative. They may, for example, do little more than create the relevant court as a “superior court of record”<sup>43</sup> and provide that the judges of the court shall have the same “jurisdiction power and authority as the superior courts of common law and the High Court of Chancery in England.”<sup>44</sup> Further, there may be rules of court that refer to the relevant court’s power to punish for contempt.<sup>45</sup>
34. If that kind of statutory background is considered within the framework of s 44(ii) of the *Constitution*, interesting questions arise. Section 44(ii) provides that:

any person who ... has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State

<sup>41</sup> See *R v Metal Trades Employers’ Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 241–3 (Latham CJ).

<sup>42</sup> (2013) 252 CLR 118 at 132–3 [30] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

<sup>43</sup> In Queensland, the jurisdiction of the Supreme Court is found in s 58 of the *Constitution of Queensland 2001* (Qld). Section 58(1) provides that “[t]he Supreme Court has all jurisdiction necessary for the administration of justice in Queensland”. Section 58(2) goes on to provide that, without limiting the Supreme Court’s jurisdiction, it is a “superior court of record in Queensland and the supreme court of general jurisdiction in and for the State” and “has, subject to the Commonwealth Constitution, unlimited jurisdiction at law, in equity and otherwise”.

<sup>44</sup> See, eg, *Supreme Court Act 1995* (Qld) s 200 (now repealed), as considered in *Elder v Queensland* (1998) 2 Qd R 385.

<sup>45</sup> Thus, it was said recently in respect of the Supreme Court of Queensland in *O’Connor v Hough [No 2]* [2017] QSC 68 at [21] (Burns J) that “[t]he jurisdiction of the court to punish for contempt is both inherent and provided for under Chapter 20 [of the *Uniform Civil Procedure Rules 1999* (Qld)]”. See also *Court Procedure Rules 2006* (ACT) Div 2.18.16; *Federal Court Rules 2011* (Cth) Pt 42; *High Court Rules 2004* (Cth) Pt 11; *Supreme Court Rules* (NSW) Pt 55; *Supreme Court Rules* (NT) O 75; *Enforcement of Judgments Act 1991* (SA) s 12; *Supreme Court Rules 2000* (Tas) Pt 36 Div 3; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 75; *Rules of the Supreme Court* (WA) O 55.

by imprisonment of one year or longer ... shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

35. It is clear enough that, where contempt remains a common law offence, a person convicted of contempt cannot be said to have been convicted of an “offence punishable under the law of the Commonwealth”. That follows because the High Court has held that “[a] ‘law of the Commonwealth’, as that term is used in the *Constitution*, cannot be the unwritten law”.<sup>46</sup>
36. If, however, one then focuses on the common law, it might be thought that it cannot be the law of a State, because the High Court held in *Lipohar v The Queen*<sup>47</sup> that there is a single “common law of Australia”, which derives its unity through the role of the High Court under s 73 of the *Constitution*.
37. But, in circumstances where all Australian courts have statutory underpinnings, is a person convicted of contempt by a court that applies common law principles of contempt, but that when created was given by statute all the powers of the High Court of Chancery in England, convicted of a common law offence or of an offence against a statute law of the State? It sounds like an academic question. But while I don’t propose to offer any view about the answer, I note that just a few months ago the balance of power in the House of Representatives might have turned on the answer, had the Court of Appeal of the Supreme Court of Victoria decided not to accept the apology of three Commonwealth Ministers and instead referred them for prosecution for contempt.<sup>48</sup>

---

<sup>46</sup> *Native Title Act Case* at 487 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

<sup>47</sup> (1999) 200 CLR 485 at 505–8 [43]–[51] (Gaudron, Gummow and Hayne JJ). See also *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 29–30 (Brennan J); *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 71 [38] (Gummow and Hayne JJ); *Blunden v Commonwealth* (2003) 218 CLR 330 at 349 [59] (Kirby J).

<sup>48</sup> *DPP (Cth) v Besim* [2017] VSCA 165.

38. That seems an appropriate note on which to close, for it illustrates that, while the issues raised by Mr Pomeranke have undoubted academic interest, they also have implications of a practical kind for the administration of law on a day-to-day basis. For that reason, Mr Pomeranke is to be commended for his skilful treatment of an important subject.