STATUTES AND THE COMMON LAW

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In the last two decades Australian law has witnessed both a large encroachment by statute on the traditional domains of the common law and a marked revitalisation and "Australianisation" of the common law. These twin developments are requiring us to address more openly than we have in the past, not only the principles of interpretation which should guide the common law in its treatment of the statutory phenomenon, but also the manner in which the common law itself in its development should respond to the manifest policies and purposes of contemporary statutes.

Australia has had an unusual legal tradition. To illustrate this and to suggest its present importance, it is necessary to advert briefly to that most neglected of subjects - our own legal history. For reasons one need not explore here, from the time of white settlement our country and our laws were built largely under the umbrella of local statutes. The opening up and development of the land, the provision of a governmental infrastructure, the facilitation and regulation of important aspects of economic and business life and much more were pursued, by nineteenth century standards, through an "orgy of statute making".[1] There was much in our legislation that was derivative, but beyond the private and commercial law arenas its provenance was by no means British. Indeed often there was nothing British to copy. Then, as now, we borrowed widely. Equally, it should be noted, there was a matter that was distinctively Australian. I need only note, for example, our Claims Against the Government statutes, the Torrens system, our mining

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1. Compare G Gilmore *The Ages of American Law* (New Haven: Yale University Press, 1977). For an account of the development of government in the colonial period and of the heavy reliance on statute, see P D Finn *Law and Government in Colonial Australia* (Melbourne: OUP, 1987). On the statute phenomenon, see A C Castles *An Australian Legal History* (Sydney: Law Book Co, 1982) 445-492.

legislation and that curious creation, the No Liability company. There are two points to be made here. The first is that we were born to statutes. Even if it were the case that in our commercial legislation we were "content to follow the enactments of the mother country",[2] beyond this there was much that was, or was transformed into, our own - that was addressed to our own circumstances and conditions. The second point, and this is rarely perceived by lawyers, is that in its aggregate and orientation, our legislation created a "semi-socialist order" in environments sympathetic to individualism.[3] This paradox, while attracting international comment (particularly at the turn of the century),[4] appears to have exerted little influence upon the character we gave our common law until very recent times. It drew its inspirations from other sources.

Statute, though, was only one side of the legal story. The common law system - and I include equity in this - provided the other. Though in some important areas it fell to the legislator's scythe - Griffith's Criminal Code and its derivatives provide an obvious example - for the most part it was "disfigured but little by statute"[5] until recent times. As is well-known the United Kingdom Australian Courts Act 1828 in reaffirming the reception of (inter alia) the common law into our country, only required its application "as far as" it could be applied. But with our judiciary showing very little propensity through the "as far as can be" proviso to accommodate the common law to local conditions, it can be said with considerable justice that our common law retained its distinctively English character. This character emphasised liberal, individualistic values, but sheltered the State (the Crown) from liability at the suit of the individual citizen, and this, in our case, despite domestic Claims Against the Government legislation and despite the very prominent role that local statutes had given the State in community life.

2. See Castles ibid, 453.
3. See A W Martin "Australia and the Hartz 'Fragment' Thesis" (1973) 13 Australian Economic History Review 131. This effect has been well chronicled by our economic historians; eg N G Butlin *Investment in Australian Economic Development: 1861-1900* (Cambridge: CUP, 1964).
4. Eg A Métin *Socialism Without Doctrine* (Chippendale: Alternative Publishing Co-operative Ltd, 1977); C H Pearson *National Life and Character* 2nd edn (London: MacMillan & Co, 1894).
5. See Sir Owen Dixon *Jesting Pilate* (Melbourne: Law Book Co, 1965) 13.

The Anglo-centric orientation was itself bolstered by the Privy Council. Even in relation to statutes borrowed from England, that body insisted that it was:

> of the utmost importance that in all parts of the Empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same.[6]

Then later there was the often repeated injunction of the High Court that:

> [A] Supreme Court at first instance, where there is no relevant decision of [the High] Court, should as a general rule follow the decisions of the English Court of Appeal.[7]

If it be, as Oliver Wendel Holmes observed, that "[t]he law embodies the story of a nation's development",[8] then, until the first stirrings of judicial independence in *Parker v The Queen*[9] in 1963, our common law told England's story. This disjunction between what might be called the Australian orientation of our statutes and, until recently, the British orientation of our common law is important to what will be said below.

Of direct relevance to the concerns of this essay is the traditional stance taken in the common law to our statutes. Here one can only talk in generalities and that has its obvious hazards. If a literal interpretation of statutes has reflected the dominant cast in the judicial mind, interpretation itself was not only protective of common law rights (a subsisting attitude),[10] it often was also informed or directed by the common law itself with sometimes curious or unfortunate results. Let me give two examples to illustrate my meaning. First, in the interpretation of Crown Lands legislation - and this for many years was legislation of major social importance - the extensive use of vendor-purchaser analogies could reduce major public statutes virtually to instruments of private right with sometimes cruel consequences to lessees.[11] Secondly, Crown proceedings legislation of the type now evidenced in section 64 of the Commonwealth Judiciary Act 1903, was so interpreted in accordance with English common law principles governing Crown rights and immunities as, in effect, to emasculate much of the very purpose of this

6. *Trimble v Hill* (1879) 5 App Cas 342, 345.
7. *Public Transport Commission of New South Wales v Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336 Barwick CJ, 341.
8. O W Holmes *The Common Law* (Boston: Little Brown and Company, 1964) 5.
9. (1963) 111 CLR 610.
10. Compare *Balog v Independent Commission Against Corruption* (1990) 169 CLR 626; *George v Rockett* (1990) 170 CLR 104; *Plenty v Dillon* (1991) 171 CLR 635.
11. Eg *Collier v Hoskins* (1882) 3 NSWLR 15; but compare *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687.

beneficial legislation.[12] It has only been in the last decade or so that long strides have been taken under the legislation to strip the Crown at last of its preferred and protected position in dealing with the citizen.[13]

A great windchange has, of course, come in our law. It began in the 1970's in legislation; and in the 1980's in the common law. But before I turn to this let me make one general comment on the common law system as I have so far described it. Our acceptance of an Anglo-centrism had two consequences of some moment. The first is that it relieved us of the need to consider critically the common law's meetness to the circumstances and values of our own society - a matter to which Sir Anthony Mason in particular is now directing our attention.[14] Secondly, it muted such consideration as we might otherwise have given to the role and province of the common law in ordering our society, to the principles informing judicial reformation of the common law itself, and within this to the effect domestic statutory activity can or should have on the formulation and reformulation of common law doctrine. As to this last I would simply note in contrast that, beginning with a provocative article of Roscoe Pound in 1908,[15] United States judges and scholars across this century have addressed the question of "a common law for the age of statutes"[16] with some regularity.[17] I will later return to this literature and also to the very limited Commonwealth writings we have addressing this theme.[18] It must, of course, be said that we have an important trilogy of recent High Court decisions - *State Government Insurance Commission (SA) v Trigwell*,[19] *Public Service Board of New South Wales v Osmond*[20] and *Lamb v Cotogno*[21] - which in some measure will guide our consideration of the matters I have mentioned. I would, though, respectfully

12. For a treatment of this legislation in the colonial period, see Finn supra n 1, 141-159.
13. Eg *Commonwealth of Australia v Evans Deakin Industries Ltd* (1986) 161 CLR 254.
14. This is a recurrent theme in the Chief Justice's extra-curial writings.
15. R Pound "Common Law and Legislation" (1908) 21 Harv L Rev 383.
16. To use the title of G Calabresi *A Common Law for the Age of Statutes* (Cambridge: Harvard University Press, 1982).
17. Eg Landis "Statutes and the Sources of Law" in *Harvard Legal Essays* (Cambridge: Harvard University Press, 1936); H F Stone "The Common Law in the United States" (1936) 50 Harv L Rev 4; R J Traynor "Statutes Revolving in Common Law Orbits" (1968) 17 Cath U of Am LR 401.
18. Eg P S Atiyah "Common Law and Statute Law" (1985) 48 MLR 1; J F Burrows "The Interrelation Between Common Law and Statute" (1976) 3 Otago LR 583; D St L Kelly "The Osmond Case: Common Law and Statute Law" (1986) 60 ALJ 513.
19. (1979) 142 CLR 617.
20. (1986) 159 CLR 656.
21. (1987) 164 CLR 1.

venture that even as far as these cases go, they could not be said to provide other than provisional and partial answers[22] to the difficult issues they raise.[23]

Now let me turn to the windchange itself. First, legislation. From the 1970's we have witnessed the proliferation of statutes which have entrenched directly upon areas of governmental, commercial and social life which for the most part were regulated, if at all, by common law doctrines either alone or, as in the case of companies or family relationships, in association with statutes which themselves left considerable rein to common law principles. The statute which epitomises this change is the Commonwealth Trade Practices Act 1974 ("TPA") and section 52 of that Act is, perhaps, the motif of what I am describing. The examples can be multiplied: environmental and discrimination legislation, investor and creditor protection in corporations legislation and otherwise, in the Commonwealth (and progressively in the States) the creation of the "new administrative law", contract review legislation, de facto relationship statutes, consumer protection laws, regulatory regimes for a wide range of professions and of commercial agencies, privacy statutes and many others. In the areas with which they are concerned directly, these statutory regimes have marginalised the significance of much common law doctrine and for a variety of reasons. Variously, their sweep in the conduct they impugn or regulate, their enlargement of interests accorded legal protection, their flexibility in remedy, their elevation of discretion over rule, their use of conduct standards rather than rules and their relaxation of standing requirements have contributed significantly to this marginalisation.

If one were to generalise the burden of much of this legislation it would seem to embody two broad, often interrelated, themes. The first is to protect the citizen from the abuse of such power (de facto or de jure) as another possesses to affect his or her interests, be that other a person with whom some relationship or dealing is had, or else the State. The second, evidenced most obviously in discrimination and human rights legislation, is the progressive enlargement of the individual interests to be accorded recognition and legal protection. Buttressing both, as the TPA and the national companies and securities legislation illustrate,[24] is the regular adoption of enhanced remedial regimes which facilitate both access to relief and the grant of appropriate

22. Eg *R v L* (1991) 103 ALR 577 Mason CJ, Deane and Toohey JJ.
23. The writer has suggested elsewhere that the decision in n 20 supra requires reconsideration in the light of broad changes (legislative and otherwise) occurring in the citizen-State relationship in this country, see P D Finn and K J Smith "The Citizen, the Government and 'Reasonable Expectations'" (1992) 66 ALJ 139.
24. See J Duns "A Silent Revolution: The Changing Nature of Sanctions in Companies and Securities Legislation" (1991) Comp and Sec LJ 365.

relief. The two generalisations are not particularly illuminating ones as I have stated them. But as I will suggest in a moment both (but especially the former) have considerable resonance in themes now evident in the common law - a resonance important both to the scope to be given such legislation and to its relationship with the common law.

Now let me turn to the common law. Here we have another paradox. On the one hand, as I have noted, there has been significant legislative incursion into the traditional domains of the common law. On the other, since the early 1980's, a reformation of common law doctrines which, in its dimensions and intensity, is unparalleled in our legal history. One need only scan the appellate court case law of the last decade in tort, equity, contract, administrative law, criminal procedure and "classic" constitutional law to conclude that few major bodies of doctrine have escaped this process untouched.[25] If section 52 of the TPA provides the motif of the legislative change, our new law of estoppel forged in *Walton Stores (Interstate) Pty Ltd v Maher*[26] and *Commonwealth v Verwayen*[27] furnishes an appropriate common law counterpart. And yet, as I noticed, we do have a paradox: at once we are witnessing a statutorily induced relegation, and a judicially inspired elevation, of the importance of the common law in the ordering of our affairs. Much in what I now wish to say concerns this.

Our common law has turned and one can now venture some suggestions as to the ends to which it has been turned. In doing this, I would not wish to be taken as suggesting that our judges, and particularly our High Court justices, are of one purpose and of one mind in this matter. It remains the case that many important decisions of the High Court are won of slender majorities. If example be needed in a statutory setting, that important trilogy of legal professional privilege cases - *O'Reilly v Commissioner of State Bank of Victoria*,[28] *Baker v Campbell*[29] and *Corporate Affairs Commission of New South Wales v Yuill*[30] - provides example enough. Nonetheless, for reasons I will suggest later, it is in my view of the first importance that we have some informed understanding of where in its continuing development our common law is going and what are its inspirations, if we are to make anything

25. The writer has considered aspects of this reformation in P D Finn "Commerce, the Common Law and Morality" (1989) 17 MULR 87; Finn and Smith supra n 23.
26. (1988) 164 CLR 387.
27. (1990) 170 CLR 394.
28. (1982) 153 CLR 1.
29. (1983) 153 CLR 52.
30. (1991) 172 CLR 319.

approaching a principled response to what we properly can expect of the common law in "the age of statutes".

The first, and perhaps the most obvious characteristic of our contemporary common law, is what can be called inelegantly its "Australianisation".[31] The common law in Australia is being transformed into a common law for Australia. No longer dependent upon a distant tribunal - the Privy Council - as the ultimate arbiter of our law, we have embarked upon a process, as the Chief Justice of the High Court has observed, of shaping it "to accord with Australian circumstances, needs and values".[32] This process itself raises a complex of issues which for the most part I must pass by without comment. This much though needs be said. First, it does not necessitate the wholesale abandonment of our legal past. Much that we have acquired from Britain we would quite self-consciously wish to retain. Equally, even where it is felt in a particular instance that a doctrine is inappropriate to contemporary circumstances, it may nonetheless have become so embedded in the legal landscape as to make its excavation a matter of legislative rather than judicial responsibility. But as *Trident General Insurance Co Pty Ltd v McNiece Bros Pty Ltd*[33] (the privity case) illustrates, judicial opinion can differ as to when that point is reached.

Secondly, even as we make the law our own, we will continue to be borrowers from abroad. Of necessity our judges must "subject [foreign rules] to inspection at the border to determine their adaptability to native soil".[34] But what needs to be acknowledged is: (i) that the sources of influence upon our legal thought now extend well beyond Britain[35] - indeed there are many reasons for the British influence to be a fading one; and (ii) that whether we wish it or not, we are being caught up in international trends in the law - and no more is this so than in the areas of commercial law (and particularly of contract)[36] and, for the future I would predict, of human rights.[37]

31. See J L Toohey "Towards an Australian Common Law" (1990) 6 Aust Bar Rev 185.
32. A Mason "Australian Contract Law" (1988) 1 Jo Contract L 1, 1.
33. (1988) 165 CLR 107.
34. Traynor supra n 17, 409.
35. A Mason "Judicial Independence and the Separation of Powers - Some Problems Old and New" (1990) 13 UNSWLJ 173.
36. It can be anticipated that we will not escape the influence of the Commission on European Contract Law's "Principles of European Contract Law" and of Unidroit's as yet to be finalised "Principles for International Contract".
37. Compare M D Kirby "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 ALJ 514.

Thirdly, if our common law is to be addressed to our own society, to what extent should it openly look for inspiration and guidance in its development to the social goals, interests and values apparently expressed in our domestic legislation? It is indisputable, as Chief Justice Traynor has observed, that:

> [w]ith perspective we see that for many centuries judges have been accommodating statutes to the common law openly or indirectly, expansively or warily.[38]

But is welcome, indifference or hostility - or a mix of all three - the appropriate contemporary common law stance in this country? This controversial question is addressed later in this essay.

Fourthly, while the reformation process evidences a clear departure from legal formalism and a preparedness to address substantive issues of public policy and of individual and community interest, it does require attention to be given to the restraints that both the judicial process itself and constitutional principle impose upon judicial law making. As Justice Mason observed in *State Government Insurance Commission (SA) v Trigwell*:

> I do not doubt that there are some cases in which an ultimate court of appeal can and should vary or modify what has been thought to be a settled rule or principle of the common law on the ground that it is ill-adapted to modern circumstances. If it should emerge that a specific common law rule was based on the existence of particular conditions or circumstances, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the court may be justified in moulding the rule to meet the new conditions and circumstances. But there are very powerful reasons why the court should be reluctant to engage in such an exercise. The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The court does not, and cannot, carry out investigations or inquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the court call for, and examine, submissions from groups and individuals who may be vitally interested in the making of changes in the law. In short, the court cannot, and does not, engage in the wide-ranging inquiries and assessments which are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature.
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> These considerations must deter a court from departing too readily from a settled rule of the common law and from replacing it with a new rule.[39]

I would respectfully add in qualification of this that the deterrence felt in departing from a rule must in some real measure be affected by the demonstrated willingness of Parliaments to concern themselves with reform of the

38. Traynor supra n 17, 403.
39. Supra n 19, 633-634.

common law. Parliamentary indifference in turn must in some measure deter courts from "continuing to insist on the application of an unjust rule".[40]

I have referred to this matter at some length because while no fixed formula determines the point at which judicial deference to the legislature should occur, that there is such a point highlights one important boundary in the relationship of common law and of statutes. I would add by way of illustration that the arena in which that boundary is, perhaps, being most sharply tested in our law is in criminal procedure. I would here note, for example, that the majority judgment of the High Court in *McKinney v R*[41] on the warning to be given a jury in relation to certain confessional statements, "which [warnings] will operate for the future", attracted the dissenting views of Justice Brennan (i) that a justification for the warning (ie, the non-use of audio visual recording) intruded into a matter "for which the executive government is responsible"[42] and (ii) that the prospective character of the warning was "more appropriate to the exercise of legislative power than it is to the exercise of judicial power".[43]

As important as the "patriation" of our common law are the themes now emerging in the law itself. None that I will mention can be said to be novel and all in some degree resonate in the jurisprudence of other common law countries. However what, in terms of our own legal history, is significant is the emphasis - the insistence - given to these themes in judicial decisions of the last decade. While the views I am to put are distilled from many sources - from our heightened insistence upon procedural fairness both in administrative law,[44] and in criminal procedure;[45] from case law evidencing a persistent refusal "to erode the common law's protection of personal liberty (or for that matter proprietary or privacy interests) to enhance the armoury of law enforcement";[46] from our revitalised unconscionability based doctrines

40. Compare *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* Mason CJ and Wilson J supra n 33, 123.
41. (1991) 171 CLR 468.
42. Ibid, 486.
43. Ibid.
44. Compare *Annetts v McCann* (1990) 170 CLR 596; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.
45. Compare *McKinney v R* supra n 41.
46. *Williams v R* (1986) 161 CLR 278 Mason and Brennan JJ, 296; *Plenty v Dillon* supra n 10; *George v Rockett* supra n 10.

in equity;[47] from our progressive acceptance of liabilities in tort, equity and contract which are rooted in the concepts of reasonable reliance and reasonable expectations;[48] from those strands in the case law which seem to be leading us inexorably to the recognition of a duty of good faith and fair dealing in contract performance;[49] and from our guarded acceptance of a notion of "unjust enrichment" (or restitution)[50] - this is not the place to demonstrate in detail how my conclusions have been reached. For present purposes I have to content myself with the observation that I believe them to be well-justified by the case law.[51]

Our law, I would suggest, now evidences in strong measure two interrelated and fundamental themes: the one is to curtail the abuse of power (de jure or de facto) possessed over another, be it possessed by the State or by a private individual or corporation; the other is an insistence upon reasonable standards of fairness or fair dealing in our relationships and dealings with others. While not suggesting for a moment that these two stand alone as the common law's sole preoccupations, they nonetheless can aptly be described as providing the hallmarks of the last decade's developments.

In cases involving the citizen-State relationship the themes noted have led to an accentuated focus on the protection of individual rights and interests, to the holding of the State to a strict legal justification for interfering with such rights and interests, and increasingly to the demand for procedural fairness where the State has:

> the power or authority adversely and directly to affect the rights, interests, status or legitimate expectations of a ... person or entity in an individual capacity.[52]

47. Compare *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Taylor v Johnson* (1983) 151 CLR 422; *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Stern v McArthur* (1988) 165 CLR 489.
48. Compare *Waltons Stores (Interstate) Pty Ltd v Maher* supra n 26; *The Commonwealth v Verwayen* supra n 27; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, esp Mason J; *Hawkins v Clayton* (1988) 169 CLR 537 Gaudron J; *Trident General Insurance Co Pty Ltd v McNiece Bros Pty Ltd* (1988) supra n 33 Mason CJ and Wilson J.
49. This topic is exceptionally essayed in H K Lücke "Good Faith and Contractual Performance" in P D Finn (ed) *Essays on Contract* (Sydney: Law Book Co, 1987); *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (unreported) Court of Appeal of New South Wales 12 March 1992 no 40109 of 1990.
50. Compare *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221.
51. They would seem to be consonant with the views expressed by A Mason in his Address to the 27th Australian Legal Convention "Changing the Law in a Changing Society", 17-18; incidentally by Sir Robin Cooke both extra-curially in "Fairness" (1989) 19 VUWLR 421; *Nicholson v Permakraft (NZ) Ltd* (1985) 3 ACLC 453, 459.
52. *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) supra n 44 Deane J, 652.

They equally have led to greater judicial review penetration into the process of government,[53] to a more critical examination of State prerogatives and immunities[54] and to the promotion of open government.[55] Put briefly, in controlling the exercise of State power, the predominant emphases are upon openness and accountability and upon securing the "rights of the individual". A notable example of the latter is provided in the decision of the High Court in *J v Lieschke*[56] which, in reversing the New South Wales Court of Appeal,[57] founded a mother's right to be heard in proceedings under the New South Wales Child Welfare Act 1939 involving an allegation that her child was neglected, on the "natural parental right to discharge parental duties and to exercise parental authority".[58]

When one turns to cases involving private sector relationships and dealings, the same two fundamental themes I noted are there, though they find a quite different expression. Now, and diluting the common law's traditional championing of individualism, the focus is very much upon what should be taken to be our duties to our "neighbour", as also upon the tempering of the exercise of one's rights and powers because of the effect their exercise may have on another's interests and expectations. Our burgeoning unconscionability based doctrines of estoppel, unconscionable dealing, relief against forfeiture and the like, are testament to this. I would simply note in passing that it was in the private sector context that Sir Robin Cooke spoke of fashioning legal obligation so as to accord "with the now pervasive concepts of duty to a neighbour and the linking of power with obligation".[59] It is also in this same context that the courts most commonly relate the heightened standards they are imposing to "reasonable community standards" and/or to commercial morality. A controversial recent example of this is to be found in the decision of Justice Rogers in *Banque Brussels Lambert SA v Australian National Industries Ltd.*[60]

I am conscious that I have spoken in broad generalisations and have given no indication of how these themes and foci are utilised in the actual shaping of individual doctrines. But as I will indicate in a moment, the generalisations themselves are sufficient for what I wish to say of the relationship of *our*

53. Eg *FAI Insurances Ltd v Winnecke* (1982) 151 CLR 342.
54. Eg *Commonwealth of Australia v Northern Land Council* (1991) 103 ALR 267.
55. Eg *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39.
56. (1987) 162 CLR 447.
57. *Shales v Lieschke* (1985) 3 NSWLR 65.
58. Supra n 56 Brennan J, 458.
59. *Nicholson v Permakraft (NZ) Ltd* supra n 51, 459.
60. (1989) 21 NSWLR 502.

common law to *our* statutes. I emphasise the "our" in this, for though we doubtless will be attentive to the stand taken in other countries, this particular issue is one which seems peculiarly affected by considerations of a local character. As Professor Atiyah has noted, differences in political and constitutional systems, differences in the reforming zeal of legislatures, may well induce divergent responses in different countries.[61]

THE RELATIONSHIP?

What has been said so far provides an extended, although necessary, prologue to our real concern - the relationship of the common law to statute. I have already suggested that in making a principled response to this matter we require first and foremost an informed understanding of the nature and character of our common law system itself and of the contemporary purposes and inspirations of doctrine. Before indicating why I consider this to be so, and so as to provide a convenient point of reference for what I have to say, let me begin with a somewhat lengthy quotation from Roscoe Pound who posited four ways in which the courts, through the common law, might deal with legislative innovation:

> (1) They might receive it fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior authority to judge-made rules on the same general subject; and so reason from it by analogy in preference to them.
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> (2) They might receive it fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it, however, as of equal or co-ordinate authority in this respect with judge-made rules upon the same general subject.
>
> (3) They might refuse to receive it fully into the body of the law and give effect to it directly only; refusing to reason from it by analogy but giving it, nevertheless, a liberal interpretation to cover the whole field it was intended to cover.
>
> (4) They might not only refuse to reason from it by analogy and apply it directly only, but also give to it a strict and narrow interpretation, holding it down rigidly to those cases which it covers expressly.[62]

61. See Atiyah supra n 18, 27.
62. Supra n 15, 385-386.

Of this quartet Pound asserts:

> The fourth hypothesis represents the orthodox common law attitude toward legislative innovations. Probably the third hypothesis, however, represents more nearly the attitude toward which we are tending. The second and first hypotheses doubtless appeal to the common law lawyer as absurd. He can hardly conceive that a rule of statutory origin may be treated as a permanent part of the general body of the law. But it is submitted that the course of legal development upon which we have entered already must lead us to adopt the method of the second and eventually the method of the first hypothesis.[63]

Two immediate comments should be made of this. First, while a significant contemporary issue in our law relates to Pound's second category (the analogical use of statutes in the development of the common law) - and this is the issue upon which the appeal in *Public Service Board of New South Wales v Osmond*[64] foundered, yet was nonetheless influential in securing a favourable outcome in the recent "rape in marriage" decision in *R v L*[65] - it seems very much the case that judicial treatment of statutes in this country falls into Pound's third and fourth categories (liberal interpretation but without analogical use, and strict and narrow interpretation). The majority decision of the High Court in *Concrete Constructions (NSW) Pty Ltd v Nelson*[66] on the scope of section 52 of the TPA, exemplifies, I would suggest, the liberal interpretation category; the surprising construction given to "error of law" in the Commonwealth Administrative Decisions (Judicial Review) Act 1977 by the same Court in *Australian Broadcasting Tribunal v Bond*,[67] exemplifies the "strict and narrow".

Secondly, more importantly, Pound's stated preference for his first two categories is obviously founded upon a particular democratic conception of legislation as law:

> We see in legislation the more direct and accurate expression of the general will.[68]

For this reason, he finds the justification for the subordination of the common law to the social policies of legislation. It is exactly at this point, I would suggest, that our need to have an informed understanding of the nature and character of our common law begins to arise.

63. Ibid, 385-386.
64. Supra n 20 and see Kelly supra n 18.
65. *R v L* supra n 22.
66. (1990) 169 CLR 594.
67. (1990) 94 ALR 11.
68. Supra n 15, 406.

Given the diet of Dicey to which most of us were subjected in our legal education, it may come as a surprise to be reminded that, the limitations of our Commonwealth Constitution apart, we have not as yet committed our common law to the acceptance of an unqualified doctrine of parliamentary sovereignty. It remains an open question:

> [w]hether the exercise of ... legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law.[69]

While it is to be hoped that those drastic circumstances do not arise in this country which will oblige our courts to answer this bleak question, that it is a question (and in a country that does not have a constitutionally entrenched Bill of Rights) suggests that we cannot - and in my view should not[70] - conceive of our own common law as absolutely subservient to legislation.

My purpose here though is not to dwell on high constitutional and democratic principle. Even if we accept, as we do routinely, that legislation and the common law are not coordinated species of law in the sense that we clearly allow the former to supplant or modify the latter, we are nonetheless still very far from the proposition that the common law should exist under the shadow of legislation, and that in consequence (i) it should be regarded as having been abrogated or modified whenever legislation could be construed as having this effect; and (ii) it should attune its reformation and development to the policies and purposes evidenced in at least contemporary legislation.

What I will in fact be suggesting is that in certain circumstances we have accepted and should accept these consequences, but that in others, we have resisted and should resist them sternly. In the result, I will be suggesting that all four of Pound's categories have an appropriate place in our law, but that no one has any claim to exclusive sway. The present issue for us, and we have little addressed it, is to identify the principles (or at least the factors) which should guide our choice in individual cases. Such principles, I should add, will impact both on some at least of our principles of statutory interpretation and on the manner of development of legal doctrine itself.

69. *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10. For a convenient collection of scholarly and judicial comment upon this matter, see Sir Robin Cooke "Fundamentals" [1988] NZLJ 158.

70. The manner in which parliamentary government has on occasion been practised in this country, the effects of the party system on parliamentary proceedings, the manipulation of parliament by the executive, and the important if unrecognised influence that both parliamentary draughtsmen and public servants can have on the detail of legislation renders it particularly difficult, in the writer's view, to accept as an unqualified proposition that each and every individual piece of legislation is both "truly democratic" and an "accurate expression of the general will" - to use Pound's terms, supra n 15, 406.

We are, or course, already making choices. Though our concern must be with how and why those choices are made if we are to ensure a rational relationship between statute and the common law, let me first give four examples of choice to illustrate the importance to us of the choice issue itself.

First, in the recent decision of *Commonwealth Bank of Australia v Mehta*,[71] Judge Samuels, in analysing the liability imposed by section 52 of the TPA, observed that because it prescribed a norm of conduct which was "morally neutral", it is:

> incorrect to use liability under the general law as a means of enlivening [it] ... [S]ilence is not misleading only where there is a duty to disclose at common law or in equity. It may simply be the element in all the circumstances of a case which renders the conduct in question misleading or deceptive.[72]

Secondly, in the "rape in marriage" decision of the High Court in *R v L*, the joint judgment of Chief Justice Mason and Justices Deane and Toohey concluded that even if there was compelling early authority for the view:

> that by reason of marriage there is an irrevocable consent to sexual intercourse, this Court would be justified in refusing to accept a notion that is so out of keeping with the view society now takes of the relationship between the parties to a marriage. The notion is out of keeping also with recent changes in the criminal law of this country made by statute, which draw no distinction between a wife and other women in defining the offence of rape.[73]

Thirdly, in the coronial inquiry - natural justice decision of *Annetts v McCann*[74] - the High Court held by majority that the "critical question" was:

> whether the terms of the Coroners Act 1920 (WA) ... display a legislative intention to exclude the rules of natural justice and in particular the common law right of the appellants to be heard in opposition to any potential finding which would prejudice their interests.[75]

Fourthly, in construing the statutory injunctive power given by the then section 574(2) of the Commonwealth Corporations Code the caution of Dr Spry[76] was endorsed in *Re Brunswick NL*:[77]

> Care should be taken to ensure both that preconceptions by reference to the general practices of courts of equity do not cause legislation conferring special powers to be misapplied and also that in the exercise of widely expressed powers a desire to assist

71. (1991) 23 NSWLR 84.
72. Ibid, 88.
73. Supra n 22, 582-583.
74. (1990) 170 CLR 596.
75. Ibid, 598-599.
76. I C F Spry *The Principles of Equitable Remedies Specific Performance, Injunctions, Rectification and Equitable Damages* 4th edn (Sydney: Law Book Co, 1990) 435-436.
77. (1990) 3 ACSR 625.

> legislative policy does not cause discretionary considerations such as hardship to be overlooked.[78]

Here, in four different contexts, we have wholly unobjectionable observations. Yet, one from the other, each expresses a quite different view of the appropriate relationship of the common law and statute. In the *Commonwealth Bank of Australia v Mehta*, the common law is to be disregarded; in *R v L*, it draws on a statutory analogue; in *Annetts v McCann*, it survives, presumptively, in the face of a statute; and in *Re Brunswick NL*, its letter is to be disregarded, but its spirit honoured. For all this, though, one can, I believe, give a principled explanation of the differences, an explanation, as I will indicate, which takes one back to the themes of the first part of this article. But before providing it, let me advert again to one matter simply for the purpose of putting it to one side. It is what I will for convenience call the *Trigwell* principle.[79]

In the reformation of the common law (including principles of statutory interpretation)[80] there is a point at which responsibility for change, no matter how much desired, passes to the legislature. The reasons for this are various and include the limitations of the judicial method, constitutional principle, the degree to which a particular doctrine in need of reform has become embedded in the legal landscape, the nature of the change that is desired and, importantly, the demonstrated preparedness of Parliament to concern itself in common law reform. At that point in the face of inadequacy or limitation in the common law, the judicial function is, at best, to orient the common law insofar as is practicable in the desired direction by direct[81] or indirect means;[82] at worst, to apply it as it stands, though drawing the matter to legislative attention. It is worthy of note that, though not without prior judicial stirrings, it required legislation to enable a systematic use to be made of extrinsic aids in statutory interpretation.[83]

Now to the explanation, but one which I should emphasise immediately, does not purport to be comprehensive of all aspects of the statute-common law relationship.

78. Ibid, 629.
79. *State Government Insurance Commission (SA) v Trigwell* supra n 19.
80. Compare *Bropho v State of Western Australia* (1990) 93 ALR 207.
81. Compare *Williams v R* (1986) 161 CLR 278.
82. Compare *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* supra n 33 Brennan and Deane JJ.
83. See generally D C Pearce and R S Geddes *Statutory Interpretation in Australia* 3rd edn (Sydney: Butterworths, 1988) 15-32.

Our backdrop is the general (though perhaps not absolute)[84] power of the legislature to disavow both statutory interpretation and common law doctrines and stances of which it disapproves or which it wishes, for whatever reason, to disregard. This power doubtless gives a democratic quality to our legal development. But the vitally important matter is the length to which a Parliament must go in expressly articulating its intentions, before it should be accepted by the courts as actually disavowing judicial interpretation or the doctrines and stances of the common law.[85] This, as I will suggest, may be little, or it may be far.

Subject to this, the relationship we are wishing to divine would seem to - and in my view should - arise out of the consonance or otherwise of a statute with the fundamental themes and purposes which give our common law its contemporary character. While acknowledging that not all of our recent case law conforms to them - and I would note specifically the decision of *Public Service Board of New South Wales v Osmond*[86] which, in my respectful view, is discordant with the general tenor of common law's recent development in the public sector[87] - I would describe that relationship in the following propositions:

1. *Where a statute or statutory provision is consonant with or else builds upon a fundamental theme in the common law, then -*
   (a) *it should be interpreted liberally and in disregard of common law doctrines which would narrow its effect*;[88]
   (b) *it may (subject to the Trigwell principle) be used analogically in the common law itself in its own development*;[89] but
   (c) *where it is cast in broad and general terms, it may nonetheless be interpreted in the light of limiting considerations to be found within apposite common law doctrines, where such considera-*

84. See the discussion of parliamentary sovereignty, supra.
85. Contra: *Minister for Lands and Forests v McPherson* supra n 11.
86. Supra n 20.
87. See Finn and Smith supra n 23.
88. Compare *Commonwealth Bank of Australia v Mehta* supra n 71.
89. See L J Priestly "A Guide to a Comparison of Australian and United States Contract Law" (1989) 12 UNSWLJ 4, 10; *Day v Mead* [1987] 2 NZLR 443; but compare W M C Gummow "Compensation for Breach of Fiduciary Duty" in T G Youdan (ed) *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 57, 82-92. It should be noted that the form of analogical use suggested here - one which is based on a *like* orientation in statute and the common law - is quite distinct from that considered in *Lamb v Cotogno* supra n 21, 11-12 where statute, by repeated example, is being used to give a *new* direction to the common law.

tions are conducive to the attainment of justice in individual cases.[90]

2. *Where a statute or statutory provision is antithetical to (or else possibly inconsistent with) a fundamental theme in the common law, then -*
   (a) *it will be interpreted strictly*[91] *(or so as to avoid that inconsistency);*[92]
   (b) *it will not be used analogically in the common law itself in its own development;*[93] and
   (c) *will be subjected, presumptively, to common law doctrines which serve either to protect individual rights, interests, etc from untoward affection,*[94] *or to prevent unfairness in dealings.*[95]

The obvious considerations underlying both of these propositions are that, as we now develop our own appreciation of the ends of the common law in our own society, we should make ready use (both in interpretation and in analogical development) of statutes which promote those ends, but that, until openly compelled or corrected by the legislature, we should (in interpretation and otherwise) inhibit statutory derogation from those ends. In the result, this explanation does not proceed from any presumed antipathy between statute and the common law. But it is predicated upon the judges themselves remaining the masters of the values and the ends the common law. This last, I acknowledge, is not an uncontroversial position.

The two principles suggested by no means exhaust the possible interactions of the common law and statute.[96] But so far as they go they have, I venture, a particular appropriateness to the statutory age we are now experiencing.

90. One has in mind here such matters as discretionary considerations in the grant of relief. Compare *Re Brunswick NL* supra n 78 and the role that risk assumption, "contributory negligence" and the like may have in reducing or eliminating even a statutory liability; but compare *Sutton v AJ Thompson Pty Ltd* (1987) 73 ALR 233.
91. Compare *Balog v Independent Commission Against Corruption* supra n 10.
92. Ibid, 635.
93. Compare *Williams v R* supra n 46, 398.
94. Compare *Minister for Lands and Forests v McPherson* supra n 11 Kirby P.
95. This is readily evidenced in case law which gives some scope in the common law both to circumvent the (Imp) Statute of Frauds 1677 and to ameliorate the effects of statutorily created illegality in contractual dealings.
96. See *Erven Warnink Besloten Vennootschap v Townend & Sons (Hull) Ltd* [1979] AC 731 Lord Diplock, 743 considered by the High Court in *Lamb v Cotogno* supra n 21.

Rather than analyse them in detail here, let me make some suggestions as to the light they might throw on some of what I consider to be major issues in the common law today. These are (1) the relationship of statute and the common law in the development of fair dealing doctrines; (2) the move to a "common law" Bill of Rights; and (3) a re-examination of the common law's scheme of remedies. My observations, necessarily, must be brief.

1. Fair Dealing

Section 52 of the TPA, and to a lesser extent section 52A, provide a convenient focus for discussion here. While we now concede that these sections have the capacity in their spheres to marginalise the significance of much common law doctrine, we have not addressed the question of how great is the burden we should place on them in securing legal development. Increasingly it is being recognised that some number of what are now regarded as landmark decisions in the common law of recent times, could as readily have been brought as section 52 cases. I would refer, for example, to *Commercial Bank of Australia Ltd v Amadio*,[97] *Waltons Stores (Interstate) Pty Ltd v Maher*[98] and *Trident General Insurance Co Pty Ltd v McNiece Bros Pty Ltd*.[99] While in not one of these decisions was reference made to section 52 for analogical purposes or otherwise, one can, with hindsight, now say that a failure to have made the developments evidenced in these cases would have consigned even more of our common law to oblivion - would have expanded section 52's burden - but that the developments themselves, so far as they go, are quite consonant in their thrust with that of section 52.

There are two questions to be asked, given this recognition and given the proposals I have made. First, if analogical use can properly be made of statute in the development of the common law, should the learning we now have built up under section 52 be used (i) to bring into relative harmony with section 52 those common law doctrines whose deficiencies it has exposed directly,[100] and (ii) more distantly, to influence the development of doctrines, for example, the unilateral mistake rules of *Taylor v Johnson*[101] which, though ameliorative in character, contain limitations which sit uneasily beside our

97. (1983) 151 CLR 447.
98. Supra n 26.
99. Supra n 33.
100. Eg those concerned with the legal consequences to be attributed to pre-contractual statements which have no contractual effect.
101. (1983) 151 CLR 422.

section 52 jurisprudence?[102] The question has a particular salience where the conduct in issue in a given case escapes the censure of section 52 for no other reason than that it does not occur "in trade or commerce".[103] It bears, equally, upon the balance we would wish to strike for the future between statute and the common law as vital instruments in regulating relationships and dealings in our community.

Secondly, there is the converse issue. Despite some judicial protestation that construction of section 52 and, where relevant, of section 82 will ordain the appropriate result in individual cases, there is the question whether those considerations which the common law system increasingly is acknowledging to be relevant to the proper disposition of particular cases on grounds of intrinsic fairness - I refer here to such matters as risk assumption, risk allocation and "contributory negligence" - may not also be relevant under sections 52 and 82.[104] We now perceive them to be of importance, for example, in unconscionability based doctrines.[105] Can they or should they really be concealed in section 52 cases (especially in ones founded on non-disclosure) through manipulation of reliance and causation?[106] I am not here arguing for the common law's recapture of section 52. I am merely suggesting, consistently with my two proposals (see proposal 1(c)), that considerations which now enliven the common law may have an appropriate analogical role to play in securing the fair and just application of a statutory provision necessarily cast in broad terms.

2. A Bill of Rights?

We now have sufficient indications in the case law to predict that a major concern for the common law in the 1990's is how best to protect basic rights in the absence of a constitutionally entrenched Bill of Rights. This is too large an issue to canvass in detail here. Consistent with the themes of this essay, I will confine the discussion to the following observations.

102. Here I would mention, for example, the limitation in unilateral mistake where one party deliberately attempts to inhibit discovery of the mistake; see eg *Easyfind (NSW) Pty Ltd v Paterson* (1987) 11 NSWLR 98 - not followed but on another point in *Lewis v Combell Constructions Pty Ltd* (1989) 18 NSWLR 528.
103. Compare *O'Brien v Smolonogov* (1983) 53 ALR 107; *Argy v Blunts* (1990) 26 FCR 112.
104. Compare the general views of R S French "A Lawyer's Guide to Misleading or Deceptive Conduct" (1989) 63 ALJ 250.
105. Eg *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582.
106. Compare *Neilsen v Hempston Holdings Pty Ltd* (1986) 65 ALR 302; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83.

There is now much in judicial decision which indicates the importance presently being attributed to broad liberal-democratic themes in the regulation of State action: the limitations imposed on the common law protection given governmental secrets;[107] the enhanced facility accorded the citizen to obtain redress against the State through expansive interpretation of provisions such as section 64 of the Commonwealth Judiciary Act 1903;[108] the recasting of principles of statutory interpretation hitherto favourable to the Crown;[109] the case law on natural justice[110] and criminal procedure;[111] and the interpretative rules used where statute could be construed so as to affect adversely individual liberty, property or privacy interests.[112] The emergence of what can appropriately be called a "common law Bill of Rights" is, I would suggest, one manifestation of this liberal democratic preoccupation. And it relates directly to the abuse of power theme I have already discussed.

Though the common law alone is incapable of entrenching basic individual rights against State legislative invasion,[113] what is now becoming clearer, particularly in case law involving criminal procedure and investigative agencies, is the protective stance our courts will take in the face of legislation. This stance is strongly evidenced in the second of the two explanatory principles I earlier proposed. First, it involves a heightening of the responsibility of parliament to be explicit in its intention to interfere with basic rights; and secondly, a cautious enlargement both of the rights that will be protected and of the means of their protection.

The interpretative dimension of this is simply illustrated in observations in the joint judgment in *Bropho v State of Western Australia*:

> One can point to ... "rules of construction" which require clear and unambiguous words before a statutory provision will be construed as displaying a legislative intent to achieve a particular result. Examples of such "rules" are those relating to the construction of a statute which would abolish or modify fundamental common law principles or rights ... which would operate retrospectively ... which would deprive a superior court of power to prevent an unauthorised assumption of jurisdiction ... or

107. *Commonwealth of Australia v John Fairfax & Sons Ltd* supra n 55; *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, 91.
108. Eg *Commonwealth of Australia v Evans Deakin Industries Ltd* supra n 13.
109. *Bropho v State of Western Australia* supra n 80.
110. Eg *Annetts v McCann* supra n 44.
111. Eg *Williams v R* supra 81.
112. Eg *George v Rocket* supra n 10.
113. But compare the unanswered "parliamentary sovereignty" question noted earlier in this article.

> which would take away property without compensation... The rationale of all such rules lies in an assumption that the legislature would, if it intended to achieve the particular effect, have made its intention in that regard unambiguously clear. Thus, the rationale of the presumption against the modification or abolition of fundamental rights or principles is to be found in the assumption that it is "in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, *without expressing its intention with irresistible clearness*; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used" (*Potter v Minahan*).[114]

The principle stated here is not new. But what is important, in my view, is the strength of its reaffirmation.[115] Illustrative of the cautious enlargement of basic rights and of the means of their protection are, first, the recognition of the importance to be given to privacy interests in the law of search and seizure[116] and to reputation protection in the reporting of investigative agencies;[117] and secondly, the gradual development of what are in effect "due process" requirements in criminal procedure.[118]

I have adverted, admittedly briefly, to this matter, not only because of its intrinsic importance to our community, but also because of its immediate relevance to the concerns of this article.

3. Remedy

As a brutal, practical consideration it is the case that where both the common law and a statutory jurisdiction provide potential avenues for relief, the choice between the two will turn often enough upon the ease with which access to relief can be obtained as also upon the respective relief each makes available. It is equally clear today that, in major areas of litigation, that choice is being made overwhelmingly in favour of statute.[119] This phenomenon

114. *Bropho v State of Western Australia* supra n 80, 214-215 (emphasis added); *Potter v Minahan* (1908) 7 CLR 277, 304.
115. A strength, the implications of which, becomes the more apparent when one has regard to modern applications of the "common law requirements of procedural fairness": *Haoucher v Minister for Immigration and Ethnic Affairs* supra n 44, 652.
116. See *George v Rocket* supra n 10.
117. Compare *Balog v Independent Commission Against Corruption* supra n 10, 477; and see *Ainsworth v Criminal Justice Commission* (unreported) High Court of Australia 9 April 1992 no 1238.
118. Eg *Williams v R* supra n 81; *McKinney v R* supra n 41; *Jago v District Court (NSW)* (1989) 168 CLR 23.
119. This is particularly so in case law falling under the TPA and our Federal Corporations legislation.

poses an obvious dilemma for the common law whose remedy system, for the moment, remains a captive of historical division (particularly in the law-equity divide), limitation and accident. Our continuing inability to award damages (even on a discretionary basis) for innocent misrepresentation is sharp testimony to this.[120]

It is highly improbable, even if so minded, that our courts could refashion remedies at common law to mirror distantly some of the more expansive statutory regimes now available to us and here one need only note the order making power conferred by section 87 of the TPA. But this acknowledged, a systematic reappraisal of remedy at common law is not only necessary, but inevitable, the more so in the light of developments occurring in New Zealand and Canada.[121] Such a reappraisal has, potentially, a variety of dimensions. I simply note two. First, are we to continue to honour the common law-equity divide or, as seems probable, are we to admit a "cross-over"[122] of remedies and, in particular, the use of a damages remedy in aid of what we now regard as equitable rights? Such a development, if allowed to occur in such doctrines as unilateral mistake, innocent misrepresentation and unconscionable dealing,[123] would effect a much closer approximation of the common law to section 82 of the TPA than is presently the case. The strongest impulse to the "cross-over" development will come, I venture, from our working out of the remedy system which is to sustain our new law of estoppel.[124]

Secondly, and relatedly, are we to continue to assume that there are preordained hierarchies in remedies and preordained links between particular doctrines and remedies, or is it to be accepted that the common law system provides a range of remedies which is potentially available for use in all cases,

120. Canadian courts have felt no such inhibition in this, building upon the important decision of the Court of Appeal in British Columbia in *Dusik v Newton* (1983) 48 BCLR 111.

121. In New Zealand see eg *Acquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299; *McKaskell v Benseman* [1989] 3 NZLR 75; *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180; in Canada *Dusik v Newton* ibid; *Canson Enterprises Ltd v Boughton & Co* (1992) 85 DLR (4th) 129.

122. Compare Priestly supra n 89, 29.

123. Compare *Dusik v Newton* supra n 120.

124. See *Walton Stores (Interstate) Pty Ltd v Maher* supra n 26; *Commonwealth v Verwayen* supra n 27; A Mason "Foreword" (1989) 12 UNSWLJ 1, 2.

so that the issue in principle in a given case is not the availability of a particular remedy, but rather its appropriateness? Of our present remedial hierarchy Professor Tilbury has concluded that:

> [t]he inference is inevitable that the Australian hierarchy of remedies is no more than a conclusion of history, and that there should be a non-hierarchical remedial law in which selection of remedy is dependent on the appropriateness of each remedy in the context of the policies of the substantive law in issue.[125]

In exemplification of this I would also add that New Zealand's Court of Appeal has recently held in relation to a duty of confidence, that:

> [f]or its breach a full range of remedies should be available as appropriate, no matter whether they originated in common law, equity or statute.[126]

Acceptance of a "basket" approach to remedies does, however, raise a related issue: is the final choice of the remedy to depend on a plaintiff's election or upon the exercise of a judicial discretion?[127]

If again I have merely posed questions, it is to reinforce that, in the context of remedy as much as in doctrine, the common law system has challenges to meet if it is to secure for itself significant viability and relevance in the face of statutory innovation.

CONCLUSION

How we conceive of the common law, and the vitality we are prepared to give it, in the age of statutes, is an issue of no little practical importance. The statutory shadow is not one likely to recede. And accommodate ourselves to it, we must. Unless we retreat to the desperate view that the statute-common law relationship is akin to that of "ignorant armies clashing by night", the search for some principled explanation of this phenomenon is necessary. Though it may be discomforting for many of us, that search takes us back to very basic questions that we have long avoided about our legal order and, in particular, about the role and character of the common law in it. It is this necessity which justifies and explains the, perhaps, unusual course of this essay.

125. *Civil Remedies* Volume 1 (Sydney: Butterworths, 1990) 14.
126. *Acquaculture Corp v New Zealand Green Mussel Co Ltd* supra n 121, 301.
127. Compare the division of opinion in the Supreme Court of Canada in *Rawluck v Rawluck* (1990) 65 DLR (4th) 161.