

Equity: Ageless in the Age of Statutes

Mark Leeming*

Current legal writing is replete with references to the “Age of Statutes” - for the most part invoking a very different meaning from that intended by Professor Guido Calabresi’s book “A Common Law for the Age of Statutes”. Identifying what Calabresi was responding to, and what most current writing is responding to, reveals a doubly simplified approach to important aspects of the legal system. One aspect is easily seen: statutes do not speak with one voice, and should not be treated as a single class; complaints about the “Age of Statutes” refer to particular sorts of statutes. The other unduly simplified aspect is less easily seen: Equity’s response to statute is different from the response of common law, for reasons deriving from its different conception of its role and different approach to precedent. When those differences are analysed, patterns of historical continuity may be observed.

1. Introduction

There is a lot of casual reference to this “Age of Statutes”. The term readily trips off the tongue. In that respect it resembles the so-called “Principle of Legality”, whose limited capacity to provide useful guidance has been powerfully criticised,¹ despite which it continues regularly to be invoked, mostly in submissions,² and mostly as a euphonious rebranding of an ancient approach to the construction of statutes which impair certain “common law” rights.

* Judge of Appeal, Supreme Court of New South Wales; Challis Lecturer in Equity, University of Sydney. This is a revised draft of the keynote paper presented to the conference ‘Equity in the Age of Statutes’ held on 27 February 2015 at Melbourne Law School. Parts of section 4 are derived from a paper, ‘Common law, equity and statute: limitations and analogies’, presented on 14 November 2014 to the Private Law Seminar at the University of Technology, Sydney. I am grateful for the suggestions prompted by participants at both conferences, and from Jeffrey Pojanowski, Peter Turner and the anonymous reviewer. I received considerable assistance from Kate Lindeman and Hannah Vieira in the preparation of this paper, but am solely responsible for its errors.

¹ J Basten, ‘The Principle of Legality – an unhelpful label?’, *Deakin Law Review* (forthcoming) (paper delivered 20 February 2015, Deakin University); B Lim, ‘The Normativity of the Principle of Legality’ (2013) 37(2) *MULR* 372; D Meagher, ‘The Common Law Principle of Legality in the Age of Rights’ (2011) 35(2) *MULR* 449; D Meagher, ‘The Principle of Legality as Clear Statement Rule: Significance and Problems’ (2014) 36(3) *Syd LR* 413 and *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [88] (“Unfocussed invocation of the common law principle of construction sometimes now labelled the ‘principle of legality’ can only weaken its normative force, decrease the predictability of its application, and ultimately call into question its democratic legitimacy”) (Gageler J, dissenting; cf at [54] in the joint judgment).

² See for example *Nikolaidis v Satouris* [2014] NSWCA 448 at [15]-[17]; *State of Victoria v Tatts Group Ltd* [2014] VSCA 311 at [50(3)]; *Hamdan v Callanan*; *Younan v Callanan* [2014] QCA 304 at [12]; *Attorney-General (NT) v Emmerson* [2014] HCA 13; 307 ALR 174 at [86].

Professor Guido Calabresi's evocative title, *A Common Law for the Age of Statutes*,³ and the "Principle of Legality" both encourage a simplified legal analysis: that there is a homogeneous class of statutes, which, when they are in conflict with "common law", calls for a particular response. Each response is different. Professor Calabresi famously (and highly controversially) contended that there ought to be "judicial power to sunset some statutes."⁴ According to Calabresi, where statutes failed to achieve their purposes or ceased to fit into the legal landscape, courts might disregard them, no differently from common law rules.⁵ Much more modestly, the presently relevant aspect of the "Principle of Legality" describes an approach whereby very clear language⁶ is required to confirm an abrogation or curtailment of a "fundamental right, freedom or immunity". But the premise of both is that there is a conflict between "common law" and statute.

Analysis of the relationship between judge-made law and statute is to be welcomed. This is a relatively neglected area, including in Australia⁷ and especially in England where Professor Burrows described it as "woefully underexplored"⁸ and Professor (now Lord Justice) Beatson described the most common attitude as the "oil and water" approach.⁹ There are indications that this is changing.¹⁰ Nevertheless, the gravamen of this article is

³ G Calabresi, *A Common Law for the Age of Statutes*, Harvard University Press, Cambridge, 1982.

⁴ Calabresi, above n 3, at p 105.

⁵ Calabresi, above n 3, at eg p 82 and p 164. In a sense, the thesis reflects the converse of the controversial proposition that there are some "constitutional" laws which Parliament cannot repeal or amend: see *Thoburn v Sunderland Shire Council* [2003] QB 151 and, more recently, *H v Lord Advocate* [2013] AC 413, and F Ahmed and A Perry, 'The Quasi-Entrenchment of Constitutional Statutes' (2014) 73(3) *CLJ* 514.

⁶ This is variously expressed, for example "irresistible clearness" in *Potter v Minahan* [1908] HCA 63; 7 CLR 277 at 304 and "unmistakable and unambiguous language" in *Coco v The Queen* [1994] HCA 15; 179 CLR 427 at 437.

⁷ But see E Bant, 'Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence' (2015) 38(1) *UNSWLJ* 367; J Burrows, 'The Interrelation Between Common Law and Statute' (1976) 3 *Otago LR* 583; J Dietrich, 'What is "Lawyering"? The Challenge of Taxonomy' (2006) 65(3) *CLJ* 549; J Dietrich and T Middleton, 'Statutory Remedies and Equitable Remedies' (2006) 28 *Aust Bar Rev* 136; S Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37(2) *Mon LR* 1; W Gummow, *Change and Continuity: Statute, Equity and Federalism*, Oxford University Press, Oxford, 1999, pp 1-37; W Gummow, 'The Law of Contracts, Trusts and Corporations as Criteria of Tax Liability' (2014) 37(3) *MULR* 834 at 839-849; M Leeming, 'Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room' (2013) 36(3) *UNSWLJ* 1002.

⁸ A S Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 *LQR* 232.

⁹ J Beatson, 'Has the Common Law a Future?' (1997) 56(2) *CLJ* 291 at 308; see also at 300 ("the dominant view in common law systems of the relationship between common law and legislation is what I have termed the 'oil and water' approach; a form of legal apartheid"). Examples of other English commentators who have written about the relationship include N Duxbury, *Elements of Legislation*, Cambridge University Press, Cambridge, 2013, J Goudkamp and J Murphy, 'Tort Statutes and Stort Theories' (2015) 131 *LQR* 133 and R Walker, 'Developing the Common Law: How Far is Too Far?' (2013) 37(1) *MULR* 232. The different attitudes may be illustrated by comparing A Briggs, *Private International Law in English Courts*, Oxford University Press, Oxford, 2014 at p 25 ("It is no longer helpful to present the introductory chapters on private international law methodology as though the common law rules of private international law provided the infrastructure of the subject") with Lord Wilberforce's views in 1995 during the debate on the *Private International Law (Miscellaneous Provisions) Act 1995* ("the subject of conflict of laws is essentially one which ought to be left to the judges"), quoted by Beatson, above, at 300.

¹⁰ For two very recent examples, see *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50 at [301]-[302] where Allsop CJ refers to the place of public statutes in influencing the values and norms in a legal system, and Lord Toulson JSC's statement in *Kennedy v The Charity Commission* [2014] UKSC 20 [2014] 2 WLR 808 that the courts have responded to new

that considering common law and statute as contrasting homogeneous bodies is unduly simple. One reason is that the distinction is itself complex, for reasons once explained by Windeyer J: “it is misleading to speak glibly of the common law in order to compare and contrast it with a statute”.¹¹ I do not repeat here what I have elsewhere addressed on that topic.¹² But there are other reasons why, in my view, much more can and should be done in order to capture all aspects of the relationship. First, there are statutes and there are statutes, and their relationship with judge-made law is not monolithic. Secondly, within the body of judge-made law it makes sense to distinguish common law from equity, and the relationship of each with statutes is quite distinct. Thirdly, the relationship is bi-directional and dynamic: each of statute and equity influences the other. What follows expands those propositions. All may be seen as aspects of the coherence of the law.¹³

I have elsewhere written of the role of statutes in the Australian legal system:¹⁴

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

In short, statutes are an under-appreciated component in the academic literature on the Australian legal system: their role lies not merely in stating norms of law, but in influencing judge-made law and as a critical driver of change and restraint in the Australian legal system.

This article may be seen as the working out of those ideas with particular emphasis on equity, as distinct from the common law. In what follows, sections 2 and 3 describe

challenges “by a process of gradual adaption and development of the common law to meet current needs. This has always been the way of the common law and it has not ceased on the enactment of the Human Rights Act 1998, although since then there has sometimes been a baleful and unnecessary tendency to overlook the common law. It needs to be emphasised that it was not the purpose of the Human Rights Act that the common law should become an ossuary.” Note also that many of the articles mentioned in the previous three footnotes were published in the last two years.

¹¹ *Gammage v The Queen* [1969] HCA 68; (1969) 122 CLR 444 at 462; see also *Australian Consolidated Press Ltd v Uren* [1966] HCA 37; (1966) 117 CLR 185 at 204-8.

¹² See M Leeming, ‘*Farah* and its progeny: comity among intermediate appellate courts’ (2015) 12(2) *TJR* 165; see also Gummow, above n 7 (1999), at pp 1-3.

¹³ *Miller v Miller* [2011] HCA 9; (2011) 242 CLR 446 at [15]; see further M Gillooly, ‘Legal coherence in the High Court: String theory for lawyers’ (2013) 87 *ALJ* 33; Bant, above n 7.

¹⁴ Leeming, above n 7, at 1002.

Calabresi's argument in its context and why it is inapplicable to the Australian legal system. Section 4 summarises why it is desirable and indeed necessary to consider common law separately from equity. Section 5 illustrates how and seeks to explain why equity's response to statute is different from that of the common law.

2. Nineteenth century approaches to statute, common law and equity

Calabresi's thesis was heavily influenced by a peculiarly American phenomenon: the different approach taken to codification.¹⁵

It is convenient to recall the more limited codification and consolidation in Anglo-Australian law by the end of the nineteenth century.¹⁶ There were of course the signal achievements of Mackenzie Chalmers¹⁷ and (in equity) Frederick Pollock,¹⁸ drafters of English statutes which were enacted in the Australian colonies. This was also a time of consolidation, effected in New South Wales by Commissioner Charles Gilbert Heydon, the Commissioner for the Consolidation of Statute Law. Cockshott and Lamb's volume of 1898 colonial statutes was dedicated to him, and it included new statutes which operated in equity's heartland: the *Trustee Act 1898*, the *Wills, Probate and Administration Act 1898*, the *Conveyancing and Law of Property Act 1898*, the *Bankruptcy Act 1898* and the *Lunacy Act 1898*. Although new in form, their content was very substantially identical to the (respectively) 8, 6, 17, 6 and 5 colonial and imperial statutes of which they were a consolidation. Later came the *Companies Act 1899*, the *Real Property Act 1900* and the *Equity Act 1901*. Plainly there is nothing particularly

¹⁵ I am simplifying. Calabresi was also influenced by a consideration derived from legal realism: the idea that this was already as a matter of substance occurring within the American legal system, but by "tricks and subterfuges" rather than transparently. He gave an extended example of post-World War II decisions on the *Federal Employers Liability Act 1908* at 205-10, including Jackson J's dissent in *Wilkerson v McCarthy* 336 US 53 at 76 (1949) ("if this Court considers a reform of this law appropriate and within the judicial power to promulgate, I do not see why it should constantly deny that it is doing just that"), and his two concluding chapters were titled 'The Uses and Abuses of Subterfuge' and 'The Choice for Candour'. I have passed over this aspect of Calabresi's argument because, so far as can see, it has scant Australian counterpart.

¹⁶ For earlier efforts, see W Swain, *The Law of Contract 1670-1870*, Cambridge University Press, Cambridge, 2015, pp 251-258 (legislation regulating between 1757 at 1854).

¹⁷ *Bills of Exchange Act 1882*, *Sale of Goods Act 1893*, *Marine Insurance Act 1906*. See M Chalmers, 'Codification of Mercantile Law' (1903) 19 *LQR* 10, who fully appreciated that codification did not mean escape from the common law. For the Scottish influence on British mercantile codification, see A F Rodger, 'The Codification of Commercial Law in Victorian Britain' (1990) 108 *LQR* 570.

¹⁸ *Partnership Act 1890*.

modern about legislation having an extensive operation in areas traditionally regarded as equitable. As was said in 1901:¹⁹

[I]t is a matter of every-day occurrence for the Courts to consider whether the wording of enactments shows an intent to get rid of some rule of case-law.

This has little or nothing to do with the “Age of Statutes”. Commissioner Heydon’s work and the statutes consolidated by him illustrate the longstanding relationship between statute and core areas traditionally regarded as equitable.

The nineteenth and twentieth century codification efforts in the United States went much further. It is convenient²⁰ to start with the work of David Dudley Field,²¹ which famously went far beyond Selborne’s Judicature legislation and the later nineteenth century English and Australian legislation referred to above. In part, there was a reaction against the common law because it was English.²² There seem also to have been two additional mutually opposed tendencies which favoured codification. One was the absence of basic legal materials: copies of statutes, court reports and texts, a point emphasised by Professor Ritz.²³ When in the 1820s there was substantial growth in the availability of materials, especially law reports, the absence of a unitary system created much scope for confusion. One attorney remarked in 1823 “the same point is not seldom differently considered in England and America, in Massachusetts and New York”.²⁴ It is revealing

¹⁹ H Hardcastle, *A Treatise on the Construction and Effect of Statute Law*, Stevens and Haynes, 3rd ed, London, 1901, p 307.

²⁰ Field is best seen as the culmination of earlier codifying efforts, including by William Paterson (whose appointment to the United States Supreme Court in 1793 did not prevent his continuing to work on, and being paid for, his efforts in New Jersey): see J O’Connor, ‘Legal Reform in the Early Republic: The New Jersey Experience’ 22 *Am J Leg Hist* 95 (1978). Support for codification reflected (a) the absence of legal materials (statutes and books describing the common law), (b) “anti-British prejudice and a deep dislike of English law”, and (c) a corresponding favouring of French law: see C Cook, *The American Codification Movement: A Study of Antebellum Legal Reform*, Greenwood Press, London, 1981, pp 31-3, 69-84. Cook contends at 187ff that Field’s preminent role needs reassessment. The hostility to common law may be seen from the fact that some States (including Ohio, Kentucky, Delaware and Pennsylvania) passed laws preventing the citation of English decisions altogether. See, generally, M Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Orthodoxy*, Oxford University Press, New York, 1992, pp 117-21 and D S Clark, “The Civil Law Influence on David Dudley Field’s Code of Civil Procedure” in M Reiman (ed), *The Reception of Continental Ideas in the Common Law World 1820-1920*, Duncker & Humblot, Berlin, 1993, 63-87.

²¹ For the influence of Field on English Judicature legislation, see M Lobban, ‘Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part II’ (2004) 22(3) *LHR* 565 at 584 and H M Field, *The Life of David Dudley Field*, Charles Scribner’s Sons, New York, 1898, pp 95-6.

²² This was said to be “enough to win a good many enemies for any institution in post-revolutionary America”: O’Connor, above n 20, at 113. For the “anti-British prejudice and a deep dislike of English law” and a corresponding favouring of French law, see Cook, above n 19, at pp 31-3.

²³ W Ritz, *Rewriting the History of the Judiciary Act of 1789: Exposing Myths, Challenging Premises and Using New Evidence*, W Holt and L H LaRue (eds), Oklahoma University Press, Norman, 1990. This is an under-appreciated aspect of the context relevant to the construction of ss 79 and 80 of the *Judiciary Act 1903* (Cth), which were taken by its drafter (Sir Samuel Griffith) from the 1789 Act.

²⁴ C Cushing, ‘Law Reports’ (1824) 18 *North American Review* 378, cited by Cook, above n 20, at p 55.

that in 1821 there was published an extraordinary book summarising 1200 decisions under the title *A Collection of Cases Overruled, Doubted or Limited in Application*.²⁵

The most ambitious attempt at codification was Field's Californian civil code, but (perhaps inevitably) it was criticised for failing to address much of the received (English) law and thereby increasing uncertainty. After its adoption in California in 1872,²⁶ Pomeroy published an influential series of articles pointing out defects in it and suggested that the code should generally be construed "in complete conformity with the common-law definitions, doctrines and rules",²⁷ so as (in Calabresi's words) "to grow under the tutelage of the courts as if no codification had occurred".²⁸ Calabresi recognised the radical nature of the suggestion: "a judicial authority to alter, rather than simply interpret, statutory law was being claimed". To the same effect, Calabresi sought to rely upon the Uniform Commercial Code²⁹ and the American Law Institute's Restatements. Calabresi pointed to the concerns expressed by the reporters if the restatements were enacted:³⁰

If the principles of law set forth in the restatement are not to be adopted as a formal code it is nevertheless not impossible that they may be adopted by state legislatures with the proviso that they shall have the force of principles enunciated as the basis of the decisions of the highest court of the state, the courts having power to declare modifications and exceptions.

Although that did not occur, Calabresi pointed to the recognition by the report's eminent authors that the increasingly statutorified nature of the law required a solution, one of

²⁵ S Greenleaf, Arthur Shirley, Portland, 1821, cited by Cook, above n 20, at p 67.

²⁶ There is a temporal coincidence between English and United States developments. Lord Hatherley's failed 1870 Judicature bill likewise did not descend to the detail of identifying particular rules, which was one of the criticisms leading to its failure: see M Leeming, 'Equity, the Judicature Acts and Restitution' (2011) 5 *J Eq* 199 at 213-14.

²⁷ J N Pomeroy, 'The True Method of Interpreting the Civil Code', 3 *West Coast Rptr* 585, 691, 717; 4 *West Coast Rptr* 49, 109 and 145; the quote is from 109-110 (1884); see also M E Harrison, 'The First Half-Century of the California Civil Code' (1922) 10(3) *Cal L Rev* 185 at 189-93.

²⁸ Calabresi, above n 3, at p 83.

²⁹ The originating sponsor of the Uniform Commercial Code was the National Conference of Commissioners on Uniform State Laws, which between 1940 and 1950 formulated a complete draft of a Code to replace the outdated earlier Acts which resembled the efforts of Chalmers (such as the Uniform Negotiable Instruments Law 1896, the Uniform Sales Act 1906). See K N Llewellyn, 'Why We Need the Uniform Commercial Code' (1957) 10 *U Fla L Rev* 367. After extensive consultation, Pennsylvania enacted the Code in 1954, Massachusetts in 1957, and 49 States and the District of Columbia by 1968: see W Schnader, 'A Short History of the Preparation and Enactment of the Uniform Commercial Code' (1967) 22 *U Miami L Rev* 1. Schnader was the President of the National Conference of Commissioners on Uniform State Laws. The exception was Louisiana; see now the partial adoption in Louisiana RS 10:9-101.

³⁰ "Report of the Committee on the Establishment of a Permanent Organisation for the Improvement of the Law Proposing the Establishment of an American Law Institute" 1 *ALI Proceedings* 1 at 24, cited by Calabresi, above n 3, at p 247.

which was that if enacted as law, they be treated “with no more or less deference than would be given to a common law rule or set of doctrines”.³¹

Calabresi’s thesis was that because by the second half of the twentieth century the law had become “far more statutorified”, the necessary problem of statutory obsolescence needed to be faced, and even more squarely than had been previously been the case.³² Calabresi added to this the idea promoted by James Landis³³ and said to be supported by many distinguished judges including Stone CJ, Traynor CJ, Cardozo J and Friendly J,³⁴ that statutes did not live apart from the common law. He said:³⁵

If there is a fabric of the law that defines, justifies and delimits judicial law-making, if statutes are part of this total fabric of the law, and if courts are to perform their role of treating like cases alike, why should they fail to exercise common law powers over statutes?

3. Inapplicability of Calabresi’s arguments

Elegantly as the argument was advanced, Professor Calabresi’s thesis was and is, of course, radically heterodox. There is, perhaps, an orthodox way to achieve this end, should any Legislature desire it: see the attempts in Minnesota to enact “The Nonprimacy of Statutes Act”, whose essential concept was that every statute relating to “private law” should cease to be strictly binding after twenty years.³⁶ This was described as “the most imaginative, original proposal for statutory law reform of our time”.³⁷ But it is easy to see the expense and uncertainty which would be introduced, and there are legions of difficulties.³⁸

³¹ Calabresi, above n 3, at p 85.

³² Calabresi, above n 3, at p 85.

³³ J Landis, ‘Statutes and the Sources of Law’ in R Pound (Ed), *Harvard Legal Essays*, Harvard University Press, Cambridge, 1934, p 213.

³⁴ Landis, above n 33, at 247 (“In a real sense all of these writers are precursors of the approach discussed in this book”), referring to H Stone, ‘The Common Law in the United States’ (1936) 50 *Harv L Rev* 4, R Traynor, ‘Statutes Revolving in Common-Law Orbits’ (1968) 17(4) *Cath U L Rev* 401, B Cardozo, ‘A Ministry of Justice’ (1921) 35 *Harv L Rev* 113 and H Friendly, ‘The Gap in Law Making – Judges Who Can’t and Legislators Who Won’t’ (1963) 63 *Colum L Rev* 787.

³⁵ Calabresi, above n 3, at p 86.

³⁶ J Davies, ‘A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act’ (1979) 4 *Vermont LR* 203.

³⁷ J French, ‘Putting a limited life on statutes’ (1979) 65(12) *ABAJ* 1768.

³⁸ What is a “private law” statute? What if one section is amended after ten years? What criteria are to be used by the courts? When will a statute impliedly repeal the Nonprimacy of Statutes Act? More fundamentally, would not the same reasoning which was fatal to s 12 of the *Native Title Act 1993* (Cth), which attempted to give the force of a law of the Commonwealth to “the common law of Australia in respect of native title” stand in the way of the validity of such a provision? In *Western Australia v Commonwealth* [1995]

One large conceptual obstacle confronting Calabresi's thesis is that it extrapolates far too much from the proposition that statute law and judge-made law together comprise the "fabric" of the law *and for that reason should be treated identically*. Where he sees homogeneity, I see a rich variety. Moreover, it is always dangerous in law to extrapolate too far from any premise; legal systems embody principles which are not wholly consistent. As much is clear by consideration the relations between common law and equity, but even within equity itself, the themes and values underlying equitable principle may compete or clash and require resolution.³⁹

Of course judge-made law is (now)⁴⁰ different from statute law, even though "significant elements of what is now regarded as 'common law' had their origin in statute or as responses to statute".⁴¹ Statute has a different source of authority. Its texts are different. Judge-made law resolves a particular problem between particular litigants in a particular way, and only incidentally states the law for the future;⁴² statutes offer abstract solutions to potential conflicts. On the other hand, statutes tend to speak in one voice – their command is of the same quality irrespective of their age, and there is not the same differentiation which lawyers intuitively appreciate between a magisterial decision of Lord Wilberforce or Sir Owen Dixon as opposed to a less distinguished judge.

It is one thing to construe a statutory text, and another to read a court's reasons for judgment and extract principle from them. In part it is because judicial opinions are almost always authorial (indeed, they are said to be "written") and "challenge the reader to follow and assess reasoned argument", whereas statutes (which are invariably "drafted") often comprise a series of definitions and commands, not necessarily in a

HCA 47;183 CLR 373 at 484-8 the High Court pointed to the constitutional impossibility of equating common law and federal statutes.

³⁹ See W Gummow, "Equity – Too Successful?" in M Cope (Ed), *Interpreting Principles of Equity*, Federation Press, Sydney, 2014, 57 at 71.

⁴⁰ The early position was quite different; Neil Duxbury states that "Not until late in the thirteenth century does the word [statute] come to be commonly understood as denoting a form of law distinct from the common law": Duxbury, above n 9, at p 21.

⁴¹ *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at [19]; 74 ALJR 339, 43 ATR 506, 168 ALR 123; [1999] HCA 67. See Burrows, above n 8, at 240-4 and Leeming, above n 7, esp at 1005-1006.

⁴² A point made by S McLeish, 'Challenges to the Survival of the Common Law' (2014) 38(2) *MULR* 818 at 831.

sensible order, often reading as if drafted by a committee.⁴³ In part it reflects the difference between the general and the particular.⁴⁴ All this is obvious: “the judicial task in statutory construction differs from that in distilling the common law from past decisions”.⁴⁵ Yet it is often ignored, as is revealed by the familiar (and also often ignored) command that a court’s reasons for judgment are not to be read as if they were a statute.⁴⁶

Moreover, a moment’s thought demonstrates that there are *relevantly* different classes of legislation – relevantly, in the sense that their relationship with judge-made law is materially different. Obviously, there is primary and secondary legislation, which have different sources of authority and, importantly, come into force through different procedures. Regulations are less carefully drafted, and less keenly scrutinised, than primary legislation, and for that reason are construed differently. In Viscount Maugham’s words, “it would be a mistake to attribute the same force to an alteration of language in an amending Order in Council as in an amending statute”, because although an order could, after being tabled, be annulled, it could not be amended, and because it received less scrutiny than a bill.⁴⁷ Further, as Scott Donald and Elise Bant have emphasised, the role of regulators and the quasi-legislative documents they create is both pervasive and underappreciated.⁴⁸

Even within the class of primary legislation, there are very different subclasses. There are familiar rules which operate differently between these different subclasses. A consolidating or amending act is construed differently from a free-standing act. Tax acts and criminal acts are construed differently from other classes of legislation. A codifying statute, expressly designed to replicate an area of judge-made law, and using its terms, is construed by reference to that context, quite differently from a substantively new

⁴³ Duxbury, above n 9, at p 60.

⁴⁴ Duxbury, above n 9, at p 59 (“Case law usually sets out reasons for the solution of a problem in a particular way, while statutory provisions tend to stipulate how a problem is to be negotiated in general terms.”)

⁴⁵ *McNamara v Consumer Trader and Tenancy Tribunal* [2005] HCA 55; (2005) 221 CLR 646 at [40].

⁴⁶ See *Hasler v Singtel Optus Pty Ltd* [2014] NSWCA 266; 87 NSWLR 609 at [66]-[67] and [100] and *Brennan v Comcare* [1994] FCA 360; 50 FCR 555 at 572; see further Leeming, above n 12, at 184-5.

⁴⁷ *Liversidge v Anderson* [1942] AC 206 at 223. See also *Environment Protection Authority v Schon G Condon as liquidator for Orchard Holdings (NSW) Pty Ltd (in liq)* [2014] NSWCA 149; 86 NSWLR 499 at [44]-[45] and *Day v Harness Racing New South Wales* [2014] NSWCA 423; 88 NSWLR 594 at [79].

⁴⁸ M S Donald, ‘Regulating for Fiduciary Qualities of Conduct’ (2013) 7 *J Eq* 142 at 164-6; Bant, above n 7, at 371-3.

enactment, as Professor Burrows has noted.⁴⁹ Some substantive new enactments are narrowly prescriptive, some are drafted at the level of confirming or modifying existing legal rules, whilst others are *ex facie* broadly worded (notably s 52 of the *Trade Practices Act* 1974 (Cth), now s 18 of the *Australian Consumer Law*⁵⁰ and s 12DA of the *Australian Securities and Investment Commission Act* 2001 (Cth)), reflecting a legislative intention that their detailed application be determined curially.

Felix Frankfurter and Henry Friendly had anticipated this last distinction, which is important and underappreciated. Justice Frankfurter said that “enactments such as the Sherman Law that embody a felt rather than defined purpose and necessarily look to the future for the unfolding of their content, making of their judicial application an evolutionary process nourished by relevant changing circumstances.”⁵¹ Judge Friendly described such statutes as open- rather than close-ended.⁵² Open-ended statutes, which turn on broadly expressed concepts, like “misleading or deceptive” or “manner of manufacture”,⁵³ naturally and indeed necessarily attract a more purposive and less minutely textual mode of construction. What is more, different parts of the same statute may be construed differently;⁵⁴ consider the general prohibition in the copyright legislation in some jurisdictions against authorising infringing conduct and the narrowly articulated “safe harbour” provisions which guarantee a defence. Judge Robert Katzmann has said, in his elegant account of judging in the Second Circuit, that “Statutes vary in design and substance, and so the interpretive task may change and the tools used may vary depending on the particular statutory issue at hand.”⁵⁵

It simply does not do justice to the richness of the legal system to conflate all these categories of legislation as the premise of an argument. There is a real descriptive loss if

⁴⁹ Burrows, above n 8, at 234ff.

⁵⁰ Schedule 2, *Competition and Consumer Act* 2010 (Cth)

⁵¹ *United States v Union Pacific Railroad* 353 US 112 at 122 (1957). More recently, see *State Oil Co v Barkat U Khan* 522 US 3 (1997).

⁵² H Friendly, ‘Mr Justice Frankfurter and the Reading of Statutes’ in *Benchmarks*, The University of Chicago Press, Chicago, 1967, p 196 at 204.

⁵³ See for example what Crennan and Kiefel JJ termed the “celebrated *NRDC* case” of *National Research Development Corp v Commissioner of Patents* [1959] HCA 67; 102 CLR 252 at 262 on the “concept of patent law ultimately traceable to the use in the Statute of Monopolies of the words ‘manner of manufacture’”: *Apotex Pty Ltd v Sanofi–Aventis Australia Pty Ltd* [2013] HCA 50; 304 ALR 1 at [216]. See for a recent example *Research Affiliates LLC v Commissioner of Patents* [2014] FCAFC 150 at [6]-[8] (Kenny, Bennett and Nicholas JJ).

⁵⁴ See H Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation*, Hart Publishing, Oxford, 2014, chapters 7-16.

⁵⁵ R Katzmann, *Judging Statutes*, Oxford University Press, New York, 2014, p 55.

they are treated as an homogeneous category. Although others have expressed the contrary view,⁵⁶ it is also in my view an unwarranted simplification to equate that category to judge-made law, and conclude that courts must have the same power over legislation as they have over judge-made law. Professor Calabresi's metaphor of a "fabric", although long-standing,⁵⁷ is revealing; fabrics are uniform, and indeed *woven*, but the legal system is stitched together like a patchwork from different materials. The fabric of the law cannot be seamless, and it need not be unvariegated. A better metaphor, appropriately evoking its untidiness, contingency and incorrigible plurality,⁵⁸ was given when Roger Traynor referred to the "continuity script of the common law" in describing the courts' response to statutes.⁵⁹

4. A further simplification in contrasting "Common Law" and "Statutes"

It is easy to see that the interaction between judge-made law and legislation is not monolithic, and that it is necessary to consider more carefully the nature of the legislation. What of the obverse question? Are important distinctions being ignored when we think of "common law" and its relationship with statutes? Is it sensible to consider differently how different bodies of judge-made law interact with legislation? In particular, is equity different in material respects in its relationship with legislation?

The first step in the argument may seem unnecessary, in light of the subject matter, not to mention the name, of this journal. But does it continue to make sense to speak of a distinct body of law called "Equity"? "By "Equity" I mean the distinctive concepts,

⁵⁶ Including A Mason, 'The Wilfred Fullagar Memorial Lecture: Future Directions in Australian Law' (1987) 13(3) *Mon L R* 149 at 160 ("It is inevitable, as Pound suggested almost eighty years ago and as Calabresi strongly urged more recently, that these legislative initiatives will erode the formal separation of common and statute law") although Sir Anthony Mason's point was principally a criticism (with which I respectfully agree) of "the undue deference accorded in the interpretation of statutes to the antecedent common law".

⁵⁷ The metaphor is longstanding. Joel Prentiss Bishop said in 1882 that "In every case, [a statute] is a thread of woof woven into a warp which before existed. It is never to be contemplated as a thing alone, but always as a part of a harmonious whole. ... obviously no statute can be understood except by him who understands the prior law": J P Bishop, *Commentaries on the Written Laws and their Interpretation*, Little Brown and Company, Boston, 1882, p 4.

⁵⁸ See I Jackman, 'Why the History of Restitution Matters' in J Gleeson, J Watson, R Higgins and E Peden (Eds), *Historical Foundations of Australian Law*, Vol 1, Federation Press, Sydney, 2013, p 252 at p 253.

⁵⁹ R Traynor, 'The Unguarded Affairs of the Semikempt Mistress' (1965) 113(4) *U Pa L Rev* 485, at 489-90 ("[J]udges are called upon to interpret all manner of statutes and to fit more and more pieces of statutory law into the continuity script of the common law"). The title is to be contrasted with the reverence expressed, most famously by Pollock, to "our lady the Common Law". See for example "Remember that our lady the Common Law is not a task-mistress but a bountiful sovereign whose service is freedom": F Pollock, *The Expansion of the Common Law*, Stevens and Sons, London, 1904, pp 137-8 and see N Duxbury, *Frederick Pollock and the English Juristic Tradition*, Oxford University Press, New York, 2004, at chapter 4 'The Sanctification of the Common Law'.

doctrines, principles and remedies which were developed and applied by the old Court of Chancery, as they have been refined and elaborated since”,⁶⁰ which depends upon, and may be contrasted with, common law. I am *not* referring to “equitable construction” or the “equity of the statute” in any Aristotelian sense, a label used predominantly in the United States for one approach to purposive construction (sometimes labelled “imaginative reconstruction”).⁶¹ As noted below, this article proceeds on the basis that the process of statutory construction is identical at common law and in equity.

Some lawyers may regard maintaining the continuing distinction between common law and equity – let alone undertaking analysis based on such a distinction – as a sterile, antiquated endeavour. The attitude seems to be implicit in the metaphor (echoing my criticism of Professor Calabresi’s) in the opening sentence of Lord Toulson JSC’s judgment in *AIB Group (UK) Plc v Mark Redler & Co Solicitors*.⁶²

140 years after the Judicature Act 1873, the stitching together of equity and the common law continues to cause problems at the seams.

It is easy to think of other examples, including some which are more pointedly expressed.⁶³ This is an area where in some quarters there is a deal of emotional investment in the outcome.⁶⁴ The position is further advanced in the United States; indeed, it was remarked of the California Civil Code that it “studiously avoided” the terms “legal” and “equitable”.⁶⁵ The different approach to procedural reform in the United States informs Professor Laycock’s view:⁶⁶

⁶⁰ The definition of A Mason, ‘The place of equity and equitable remedies in the contemporary common law world’ (1994) 110 *LQR* 238, at 238.

⁶¹ See Duxbury, above n 9, at pp 197-206.

⁶² [2014] UKSC 58 at [1].

⁶³ See for example K Mason, ‘The Distinctiveness of Law and Equity and the Taxonomy of the Constructive Trust’, in C Mitchell and W Swadling (Eds), *The Restatement Third: Restitution and Unjust Enrichment*, Hart Publishing, Oxford, 2013, p 185 at p 203:

No-one discusses the law of negligence by describing the tort as a common law wrong. And no-one expounds the rules on subpoenas or discovery by suggesting that we are dealing with equitable remedies. Historical differences between tracing ‘at law’ and ‘in equity’ are also passing into history and this will eventually see the adjectival labels disappearing as well.

⁶⁴ See K Mason, ‘The distinctiveness and independence of intermediate courts of appeal’ (2012) 86 *ALJ* 308 at 324; K Mason, ‘Strong coherence, strong fusion, continuing categorical confusion: The High Court’s latest contributions to the law of restitution’ (2015) 39 *Aust Bar Rev* 284 at 290-1 and 319.

⁶⁵ Harrison, above n 27, at 199.

⁶⁶ D Laycock, ‘The Triumph of Equity’ (1993) 56 *Law & Contemporary Problems* 53 at 53-4.

Except where references to equity have been codified, as in the constitutional guarantees of jury trial, we should consider it wholly irrelevant whether a remedy, procedure or doctrine originated at law or in equity.

Save in the area of remedies, that is the conventional position in the United States of America following the success of the Field procedural codes.⁶⁷ I would acknowledge the force of the view that “If equity is not distinctive, there is no reason for it to remain distinct”.⁶⁸

There are at least two difficulties with that position. The first is that a “seamless” legal system in which the very real historical differences no longer matter is a very large goal. Those differences were not confined to procedure (extant in New South Wales until 1972) but extended to very real and continuing differences in methodology and approach in equity and at common law. Professor Finn has explained how “the failure to adopt a Judicature Act system for so long had large consequences for the orientation, preoccupations and methodologies of Australian law”.⁶⁹

There are more general differences. The notion of (a judge) evaluating the whole of the facts in the case, so as to craft a nuanced order for relief is quite foreign to an approach of isolating issues for determination (by a jury) so as to determine the availability as of right of orders; that fundamental difference still informs different approaches in equity as opposed to common law.⁷⁰ Another is the profound difference between common law and equity in their relationship with precedent and reasons for judgment, to which Sir George Jessel MR referred in *Re Hallett’s Estate*,⁷¹ as did Kirby J (for a different purpose) in *Garcia v National Australia Bank Ltd*,⁷² which has ongoing significance for the approach taken to change in judge-made law. The differences are not merely inertial (although that

⁶⁷ See S Bray, ‘The Supreme Court and the New Equity’ (2015) 68 *Vand L Rev* 997.

⁶⁸ S Bray, ‘The System of Equitable Remedies’ (2016) *UCLA L Rev* (forthcoming).

⁶⁹ P Finn, ‘Common Law Divergences’ (2013) 37(2) *MULR* 509 at 517.

⁷⁰ See for example the statement in *Kakavas v Crown Melbourne Ltd* [2013] HCA 25; (2013) 250 CLR 392 at [18] that “The invocation of the conscience of equity requires ‘a scrutiny of the exact relations established between the parties’ to determine ‘the real justice of the case’”, referring to *Jenyns v Public Curator (Q)* [1953] HCA 2; (1953) 90 CLR 113 at 118-19. The same point was made by Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at 379 of the “just and equitable” ground which “does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another”. Not all aspects of equity reflect that distinction (for example, equitable principles governing property may involve rules as strict as those at common law) but that does not invalidate its utility, no differently from the existence of twilight not invalidating “the distinction between night and day”: A M Gleeson, ‘Judicial Legitimacy’ (2000) 20 *Aust Bar Rev* 4 at 11.

⁷¹ (1880) 13 Ch D 696 at 710. See further section 5 below.

⁷² [1998] HCA 48; (1998) 194 CLR 395 at [47].

is real enough; I have elsewhere maintained that erasing them would require an extended legislative or judicial program of law reform).⁷³ The fact that many aspects of equity have a more ancient history than common law and are formulated around unifying maxims and themes rather than rigid rules means that the advocacy for, and acceptance of change is approached differently, even today, depending on whether it is change to a common law rule or an equitable principle. As Allsop CJ has recently said, “Equity, as a reflection of underlying norms and values (and often expressed thus rather than by rules that are precisely linguistically expressed) required, necessarily, a form of judicial technique different to the common law”.⁷⁴

In any event, all this is, in Australia at least, a matter of academic debate only. Until and unless the High Court says to the contrary, the Australian legal system is one replete with “normative complexity”, involving “the interaction between the rules of law, principles of equity, requirements of statute, and between legal, equitable and statutory remedies”.⁷⁵ If one were to be as blunt as Professor Ibbetson, one would say that “scholarly reformulations are sterile until and unless they become accepted as part of the legal fabric”.⁷⁶

None of this is to deny that there should not be a process by which transparency and harmonisation are enhanced, but it should be done in a fashion which respects the past and where possible maintains legal continuity. In a nutshell, historical differences continue to matter, but not merely because of history. Joseph Raz has recalled this “Janus-like aspect of interpretation”, echoing Selden,⁷⁷ which “faces both backward, aiming to elucidate the law as it is, and forward, aiming to develop and improve it”.⁷⁸ It

⁷³ See M Leeming, ‘Subrogation, Equity and Unjust Enrichment’ in J Glistler and P Ridge (Eds), *Fault Lines in Equity*, Hart Publishing, Oxford, 2012, p 27 at pp 39-43.

⁷⁴ *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50 at [271]. This issue is largely beyond the scope of this article. I agree with Professor Paul Mitchell that patterns of legal change remain inadequately understood and little studied in their own right: P Mitchell, “Patterns of Legal Change” (2012) 65 *CLP* 177.

⁷⁵ *Bankstown City Council v Alamo Holdings Pty Ltd* [2005] HCA 46; 223 CLR 660 at [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ). To that may be added the separate bodies of admiralty and ecclesiastical law, to which a Full Court of the Federal Court made reference recently: *CMA CGM SA v Ship ‘Chou Shan’* [2014] FCAFC 90 at [100] (Allsop CJ, Besanko and Pagone JJ).

⁷⁶ D Ibbetson, ‘Comparative legal history – a methodology’ in A Musson and C Stebbings (Eds), *Making Legal History*, Cambridge University Press, Cambridge, 2012, p 131 at p 140, although that criticism understates the role that academic writings can play in developing the law.

⁷⁷ McLeish, above n 42, at p 5.

⁷⁸ J Raz, *Between Authority and Interpretation*, Oxford University Press, Oxford, 2009, p 354.

is an essential aspect of the curial function, seeking to maintain legal continuity while admitting a capacity for incremental development and innovation.⁷⁹

5. Responses by common law and equity to statute

Most references to the “Age of Statutes” merely invoke an uncontroversial feature of the Australian legal system: the importance of legislation as a source, or qualification upon, the most important rights in ordinary social life and commerce. As Professor Finn put it:⁸⁰

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.

About this there is nothing novel. Last year, Chief Justice French observed:⁸¹

There are few who would disagree with the proposition that statutory interpretation today pervades every area of the law. There are few, if any, problems upon which practitioners have to advise or courts have to decide that can be resolved purely as a matter of applying the common law of contract or torts or the doctrines of equity.

It is helpful for present purposes to contrast two broad classes of statutes (I am not saying that the distinction is clear-cut). There are statutes which modify or qualify already existing rules and principles of judge-made law. Such statutes operate at the level of detail (including overturning or clarifying a particular decision). The provisions of the *Trustee Acts* dealing with the powers and duties of trustees, or of the *Civil Liability Acts* on the law of torts, are ready examples. *Especially* in the area of equity, such legislation has been the norm for more than a century, as is clear from the late colonial New South Wales consolidating legislation referred to above. This is *not* at the core of what is meant

⁷⁹ *White v Johnston* [2015] NSWCA 18 at [98] and *Australian Financial Services and Leasing Pty Limited v Hills Industries Ltd* [2014] HCA 14; 88 ALJR 552 at [107].

⁸⁰ P Finn, ‘Statutes and the Common Law’ (1992) 22(1) *UWAL Rev* 7 at 11.

⁸¹ Launch of 8th edition of *Statutory Interpretation in Australia*, Chief Justice Robert French, University House, Australian National University, Canberra, 24 October 2014.

by the “Age of Statutes”. Equity has cohabited harmoniously with statutes, including deeply intrusive statutes, for many decades.

Then there are statutes which create substantially new rights and obligations. Industrial laws and anti-discrimination and equal opportunity laws are obvious examples. It was to such statutes that Finn J referred in *Buck v Comcare*:⁸²

To confine our interpretative safeguards to the protection of ‘fundamental common law rights’ is to ignore that we live in an age of statutes and that it is statute which, more often than not, provides the rights necessary to secure the basic amenities of life in modern society.

Patrick Atiyah said thirty years ago that:⁸³

The relationship between common law and statute law must be seen as the relationship between two developing and moving bodies of law and the way in which they interact on each other becomes a matter of no little importance.

I entirely agree. The point is far from novel,⁸⁴ although the interactive relationship between judge-made law and statute law is a neglected area. There has been and continues to be much curial criticism of statutes. Chief Justice French commenced his launch of the most recent edition of *Pearce & Geddes* late last year with these words:⁸⁵

It is often said that we have too many statutes and that our statutes have too many words in them. It is rare to find a kind word said of statutes by lawyers or judges. Nor are they read in a kindly spirit.

Many legal texts either fail to address legislation, or regard legislation as a mere supplement to judge-made law.⁸⁶ That reflects a well-known attitude to which Kirby J once referred:⁸⁷

[W]hat we see all the time in this Court of the lawyers adhering to the language of judges rather than adhering to the language of the statute. Lawyers love the common law; they hate statutes.

⁸² [1996] FCA 388; 66 FCR 359 at 364-5.

⁸³ P Atiyah, ‘Common Law and Statute Law’ (1985) 48 *MLR* 1.

⁸⁴ See R Pound, ‘Common Law and Legislation’ (1908) 21 *Harv L Rev* 383; Landis, above n 32 and the writings cited at notes 7 and 9 above.

⁸⁵ R French, above n 81.

⁸⁶ See D Wright, ‘Understanding the Law of Obligations: Essays on Contract, Tort and Restitution by Andrew Burrows’ (1998) 20 *Adel L Rev* 369 at 370.

⁸⁷ Transcript of Proceedings, *Vigolo v Bostin* [2004] HCATrans 107 (2 April 2004) at 145-50 (Kirby J).

Much of that criticism is simply a product of the fact that the very small minority of statutory provisions that reach the attention of courts, especially appellate courts, prove to have a contestable application to the facts of the particular case. It is important to recall that the overwhelming majority of legislation never gives rise to litigation; most of the time, what is or is not a “vehicle in the park” is uncontroversial.⁸⁸

When closer attention is given to the interrelationship between judge-made law and statute, it is usual for common law and equity to be assimilated. For example, neither Calabresi nor Atiyah distinguished between common law and equity. More recently, although Professor Burrows has powerfully and persuasively exposed the relative neglect of the interrelationship, seeking to “shatter once and for all the myth that common law and statute are very separate bodies of law that should not be treated as if merged in an integrated whole”,⁸⁹ he too conflates equity and common law.

If it be right that it remains useful to consider equity as a distinct body of law from common law, then it may be asked whether there are material differences in the relationship between common law and statute on the one hand and equity and statute on the other hand. Although the inquiry seems natural, it seems only rarely to be undertaken. One of the more thoughtful analyses was given by Beatson:⁹⁰

[W]e have three strands in our law; the unenacted law made up of common law and equity, and legislation. Each comes from a separate source with its own bundle of traditions. Each functions somewhat differently. Common law and equity have been subjected to generalisation in the realisation that common principles need to be identified as such. [After speaking of restitution as the clearest example of this he continued] But there has been no similar development with statute law and it is to the impact of statute and regulation on the common law that I now turn.

⁸⁸ See F Schauer, ‘A Critical Guide to Vehicles in the Park’ (2008) 83 *NYU L Rev* 1109 for the literature flowing from Hart’s example.

⁸⁹ Burrows, above n 8, at 233.

⁹⁰ Beatson, above n 9, at 298.

Even so, it may be seen that Beatson's approach explicitly proceeded on the basis that because equity and common law are both judge-made, they should be treated together in order to understand their relationship with statute. Undoubtedly that is one way of analysing the legal system, but is it the only way? Does it simplify and therefore conceal meaningful elements of the legal system? I wish to suggest that it does.

(a) Different conceptions of common law and equity

Some common themes may be seen if one considers the reaction of common law judges, as opposed to equity judges, to statute. Stone J described statute as an "alien intruder in the house of the common law",⁹¹ while Frankfurter J referred to the traditional regard for statutes "as wilful and arbitrary interference with the harmony of the common law and with its rational unfolding by judges".⁹² Lord Scarman wrote in 1980 that:⁹³

Statutes are predators in the sense that they can, and some of them do, destroy common law rules and principles. ... Today's crisis for the common law is to come to terms with statute law so that both may flourish and to enter the public sector, where the help of the judges is being seen as necessary to prevent abuse of power by public authority.

Sir Frederick Pollock's attitude is illustrative. It is relatively easy to do so, having regard to the intellectual history written (with careful reference to the primary materials) by Neil Duxbury.⁹⁴ It is worth doing because of Pollock's signal contribution to the modern formulations of tort and contract. Although some have said that "he was no opponent of legislation",⁹⁵ and it must be said that his great work on Contract Law deals more carefully with legislation than any of its competitors and than most of its successors,⁹⁶ Pollock was basically hostile to legislation. Duxbury writes "The more one reads Pollock's books and essays, the more one finds his antipathy towards legislative initiatives smothering his apparent sense of proportion."⁹⁷

⁹¹ Stone, above n 34.

⁹² *Pope v Atlantic Coast Line Railway* 345 US 379 at 390 (1953) (dissenting in the result).

⁹³ Lord Scarman, 'The Common Law Judge and the Twentieth Century – Happy Marriage or Irretrievable Breakdown?' (1980) 7 *Mon L R* 1 at 3.

⁹⁴ Duxbury, above n 59, esp at pp 169-183.

⁹⁵ S Hedley, 'Sir Frederick Pollock and the Teaching of English Law' in J Bush and A Wijffels (Eds), *Learning the Law: Teaching and the Transmission of Law in England 1150-1900*, Hambledon Press, London, 1999, p 407 at p 408, cited by Duxbury, above n 59, at p 170.

⁹⁶ See F Pollock, *Principles of Contract*, 5th ed, Stevens and Sons, London, 1885, pp 253-60 and pp 682-6 on the principles governing illegality.

⁹⁷ Duxbury, above n 59, at p 171.

Pollock saw the common law as a self-contained, scientific system, indeed, one of considerably beauty and rationality. Pollock looked to emulate Savigny, in whose works “the vast mass of detail was dominated by ordered ideas and luminous exposition. . . . Title by title, and chapter by chapter, the treasures of the Common Law must be consolidated into rational order before they can be newly grasped and recast as a whole”.⁹⁸ He was acutely conscious of the role of legislation: “Legislation has grown upon us, but with it and even because of it the reign of judicial law has grown too”.⁹⁹ Parliamentary legislation was “apt to produce an unsatisfactory kind of law” while judicial legislation “has created at least two-third of what is best in the law of England”.¹⁰⁰ Statutes tend “to choke the life out of principles under a weight of dead matter which posterity may think no better than a rubbish-heap”.¹⁰¹

Equity was different. Equity never regarded itself as a self-sufficient system of principle. Instead, equity’s premise was that there were other rules which called for softening, or adjustment, or supplementation. Maxims such as “equity follows the law” and doctrines developed to prevent the Statute of Frauds from being used as a cloak for fraud and the application of limitation statutes by analogy provide ready examples. Moreover, there is the important point made by Gummow:¹⁰²

The precept that ‘equity follows the law’ encourages the notion that what now are regarded as the ‘core subjects’ of the common law of obligations, contract and tort, have a greater antiquity than is the case. Yet to a significant degree, both are products of nineteenth-century decisions and treatises, whereas the guiding principles of equity are older, perhaps considerably so.

It is therefore to be expected that one can identify occasions where equity dealt with statutory intrusion quite differently from common law. In short, much of equity was a product of, or a response to, statute, in a way that is quite distinct from the historical development of common law.¹⁰³

⁹⁸ Pollock, above n 97, at p iv.

⁹⁹ F Pollock, ‘The Continuity of the Common Law’, 11 *Harv L Rev* 423 at 433 (1897-1898), cited by Duxbury, above n 59, at p 181. (1893) 9 *LQR* 106 and 18 *LQR* 106, cited by Duxbury, above n 59, at p 172.

¹⁰¹ Oration given in 1895, reprinted in F Pollock, above n 59.

¹⁰² Gummow, above n 7 (1999), at p 39.

¹⁰³ See Leeming, above n 7, at 1008-11.

(b) Different responses to statutes at common law and in equity

The attitude associated with common law gave rise to substantial difficulties when it became necessary for common law to interact with statute. One result is the aspect of the “Principle of Legality” which requires clear language before certain common law doctrines are abrogated or qualified. Another was the struggle to identify when breach of a statute whose prohibition is an offence gives rise to a cause of action sounding in damages. There is some overstatement, but not too much, in Glanville Williams’ terse summary “When [penal legislation] concerns industrial welfare, such legislation results in absolute liability in tort. In all other cases it is ignored”.¹⁰⁴

I am *not* suggesting that the chancery court *construed* statutes differently from common law courts (although, obviously, different remedies were available and indeed doctrines such as equity not permitting the statute of fraud to be used as a cloak for fraud had a dramatic impact upon the operation of the statute).¹⁰⁵ I am not aware of evidence to substantiate a claim that the process of statutory construction was different. The claim strikes me as counterintuitive: why should the subject matter of the proceedings (especially, in a court which exercised both common law and equitable jurisdiction, like the Exchequer until 1841, and most courts today), affect the judicial function of supplying the legal meaning of a statutory text? In any event, this would be contrary to notions of equity following the law in respect of property at common law, to what was long ago said in *Bosanquett v Dashwood* that “a court of equity will not differ from the course of law in the exposition of statutes”,¹⁰⁶ and to the statement to the same effect by Deane and Gummow JJ in *Nelson v Nelson*.¹⁰⁷

That is not to say that the response is the same. A rare example of a court separately considering the relationship between equity and statute may be seen in *Minister for Lands*

¹⁰⁴ G Williams, ‘The Effect of Penal Legislation in the Law of Tort’ (1960) 23 *MLR* 233. See also *O’Connor v S P Bray Ltd* (1937) 56 *CLR* 464 at 478; 11 *ALJR* 29; 37 *SR* (NSW) 190; 54 *WN* (NSW) 73; [1937] *ALR* 461; HCA 18; BC3700027 and Gummow, above n 7, at p 33.

¹⁰⁵ See Hang Wu Tang, ‘Equity in the Age of Statutes’ (2015) 9 *J Eq* 214 at 215.

¹⁰⁶ (1734) *Cases T Talbot* 38 at 39–40; 25 *ER* 648 at 649.

¹⁰⁷ [1995] *HCA* 25; 184 *CLR* 538 at 553.

and Forests v McPherson,¹⁰⁸ where the question was whether statute dealing with leases cut down from traditional equitable jurisdiction for relief against forfeiture. Kirby P referred to the principle of construction that common law rights were not derogated from without unambiguously clear language, and asked:¹⁰⁹

Does a similar principle apply in relation to basic principles of equity, where those principles have been developed over the centuries to safeguard the achievement of justice in particular cases where the assertion of legal rights, according to their letter, would be unconscionable.

In principle, there would seem to be no reason why a similar approach should not be taken to basic rules of equity.

Few would quarrel with that reasoning, which was sufficient to decide the case.

However, the concurring reasons of Mahoney JA contained a more general analysis which speaks directly to the question posed in this article.

Mahoney JA said that there were two alternative views of what was done when a “lease” was granted under the statute: either the statute was granting a common law lease with covenants and conditions as specified in the statute, or else it was conferring statutory rights, conveniently described as a “lease”. If the former, the common law lease would, absent something to the contrary express or implied in the statute, be subject to ordinary equitable doctrines. But Mahoney JA added:¹¹⁰

But if the second view be correct, the result is, I think, the same. If they be statutory rights ... [they] are rights subject to the implications and, I think, the equitable doctrines applicable to common law transactions of an analogous character. Thus, I think, equitable doctrines relating to release or waiver would be applicable in respect of these rights. Whether or not laches be available against the Crown, acquiescence as an equitable defence would, I think, be available in the present case. On either view, therefore, the right to relief against forfeiture would be available.

It will be noted that the point made by Mahoney JA is *much* more general for two reasons. The first is that almost inevitably statutes pick up the language of common law

¹⁰⁸ [1991] NSWSC 496; 22 NSWLR 687.

¹⁰⁹ [1991] NSWSC 496; 22 NSWLR 687 at 700. Meagher JA agreed.

¹¹⁰ [1991] NSWSC 496; 22 NSWLR 687 at 713, citations omitted.

and equity,¹¹¹ and in such cases it will commonly be necessary to determine whether the language translates to the general law concept, or whether a new statutory creature with incidents resembling those at general law is denoted.¹¹² The second is that on the second approach to which Mahoney JA referred, the question is not merely the contestable issue whether an equitable doctrine is “basic” or “fundamental” so as to engage a particular principle of statutory construction. Instead, the nature of equity is that *much* of its doctrines and remedies are susceptible to statute. Did the legislation pursuant to which a rural perpetual lease selection was granted permit the operation of a vendor’s lien?¹¹³ It has been held that equitable liens are not excluded by the *Corporations Act*,¹¹⁴ and the generality of the principles have recently been confirmed.¹¹⁵ All this is consistent with the view that much of equity is supplemental to an existing body of law.

The 5th edition of *Meagher, Gummow & Lehane’s Equity: Doctrines and Remedies* includes this passage:¹¹⁶

[E]quitable doctrines and remedies readily lend themselves to dealing with property or rights or liabilities arising under statute (consider equitable assignments and priorities, contribution and marshalling), and, for reasons which may be worthy of closer analysis than has occurred to date, statute often invokes equitable notions.

The point was made recently by Peter Turner, by reference to part performance:¹¹⁷

[T]he traditional formulation of the threshold to be crossed by a claimant who seeks equitable relief in aid of legal rights is not that the claimant must show that *damages* would be inadequate relief, but to show that *relief at law* – including under statute – would be inadequate on the facts of the case.

¹¹¹ “When a statute enters a field that has been governed by the common law, the pre-existing common law almost invariably gives guidance as to the statute’s meaning and purpose. That is because the meaning of legislation usually depends on a background of concepts, principles, practices and circumstances that the drafters ‘took for granted or understood, without conscious advertence, by reason of their common language or culture’”: *Conway v The Queen* [2002] HCA 2; 209 CLR 203 at [5] (Gaudron, McHugh, Hayne and Callinan JJ).

¹¹² Another possibility is that statute has created something quite new: see the mining “lease” created by statute described by Windeyer J in *Wade v New South Wales Rutile Mining Co Pty Ltd* [1969] HCA 28; 121 CLR 177 or the “trust” created by statute considered in *Bathurst City Council v PWC Properties Pty Ltd* [1998] HCA 59; 195 CLR 566, and see generally *Wik Peoples v Queensland* [1996] HCA 40; 187 CLR 1 at 197-8.

¹¹³ See *Bridgewater v Leahy* [1998] HCA 66; 194 CLR 457 at [111].

¹¹⁴ See *Commonwealth Bank of Australia v Butterell* (1994) 35 NSWLR 64 at 71 (Young J); *Morgan, in the matter of Brighton Hall Securities Pty Ltd (in liq)* [2013] FCA 970 at [153] (McKerracher J).

¹¹⁵ *Stewart v Atco Controls Pty Ltd (in liq)* [2014] HCA 15; 252 CLR 307.

¹¹⁶ J D Heydon, M Leeming, P Turner, *Meagher, Gummow & Lehane’s Equity: Doctrines and Remedies*, 5th ed, LexisNexis, Sydney, 2015, p xxiii.

¹¹⁷ P Turner, ‘Inadequacy in Equity of Common Law Relief: The Relevance of Contractual Terms’ [2014] 73(3) *CLJ* 493 at 495, original emphasis.

(c) Different conceptions of precedent at common law and in equity

The declaratory theory of law encouraged the notion that statutory amendments or intrusions into areas of common law were disfavoured. Once again, equity was different.

As Sir George Jessel MR said in *Re Hallett's Estate*,¹¹⁸

[I]t must not be forgotten that the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time – altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them.

That in turn raises questions as to whether statute has influenced equitable doctrine differently from its influence upon common law, and, conversely, whether equity has influenced statute differently from the influence of common law. One aspect of the latter is readily seen. The whole of the law of remedies is – save for the important exception of damages – essentially equitable, as David Wright has recently observed.¹¹⁹ The statutory remedies which involve orders in the nature of injunctions, specific performance, and varying existing rights are derived from and informed by equity,¹²⁰ both as to their nature and to the occasion for their exercise.

The impact of legislation upon judge-made law is more interesting, and more controversial.¹²¹ However, it is well established that a “consistent pattern of legislative policy” may inform a change to judge-made law. Lord Diplock said long ago:¹²²

Where over a period of years there can be discerned a steady trend in legislation which reflects the view of successive Parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course.

The same or similar sentiments were expressed by Gleeson CJ, Gaudron and Gummow JJ in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*.¹²³ Professor Finn

¹¹⁸ (1880) 13 Ch D 696 at 710. See also A Mason, ‘The Impact of Equitable Doctrine on the Law of Contract’ (1998) 27 *Anglo-Am LR* 1 at 3 (equity “made no secret of its evolutionary development”).

¹¹⁹ D Wright, *Remedies*, 2nd ed, Federation Press, Sydney, 2014, p 2 (“Most remedies are equitable in their nature. Much of the law of remedies is a subset of equity. However, the most important remedy, damages, is a common law remedy.”)

¹²⁰ *Marks v GIO Australia Holdings* [1998] HCA 69; 196 CLR 494 at [116] (“the principles which govern equitable remedies may provide guidance as to the appropriate order in a particular case”).

¹²¹ P Cane, ‘Taking Disagreement Seriously: Courts, Legislature and the Reform of Tort Law’ (2005) 25(3) *OJLS* 393 at 399.

¹²² *Warnink v J Townend & Sons (Hull) Ltd* [1979] AC 731 at 743. See also *The Universe Sentinel* [1983] 1 AC 366 at 385.

has consistently advocated this over many years,¹²⁴ as have many other judges and academics.¹²⁵ This reflects the ordinary processes of seeking coherence in the whole body of law.

Two Australian examples may be seen in the areas of the remedial constructive trust, and partial rescission. Australian law contains a so-called remedial constructive trust – a trust imposed non-retrospectively by a court’s order, something described last year by Lord Neuberger PSC as “equity at its flexible shabby worst”.¹²⁶ There is a large question whether such trusts exist in England, and, as Dyson Heydon QC said in response, it does not seem that the Australian solution, which is only rarely ordered, as an “extreme emergency measure” has caused much harm.¹²⁷ But it seems fairly clear that the “other orders” available following a contravention of a statutory norm of conduct under the *Trade Practices Act* and the *Corporations Act* have done nothing to prevent the recognition of the remedy.

Secondly, in *Vadasz v Pioneer Concrete (SA) Pty Ltd*¹²⁸ the High Court ordered partial rescission of a contract, expressly diverging from the English approach.¹²⁹ That conclusion was *expressly* based on cases decided under the *Trade Practices Act* and the *Contracts Review Act*. The reasoning has given rise to controversy,¹³⁰ but the influence of statute upon equitable principle is clear.

¹²³ [1999] HCA 67; 201 CLR 49 at [23]-[28]; see also *Lamb v Cotogno* [1987] HCA 47; 164 CLR 1 at 11-12. This is related to the idea that there is a “single common law of Australia”, something which is outside the scope of this paper, but see Leeming, above n 12.

¹²⁴ See P Finn, above n 80 and above n 69, at 535.

¹²⁵ Leeming, above n 7, at 1003 (footnote 3) and 1021-6; Burrows, above n 8, at 248-57; A Mason, ‘A Judicial Perspective on the Development of Common Law Doctrine in the light of Statutory Developments’ (paper delivered at Hong Kong Obligations VII Conference, 17 July 2014).

¹²⁶ D Neuberger, ‘The Remedial Constructive Trust – Fact or Fiction’, paper delivered 10 August 2014, at the Banking Services and Finance Law Association Conference, Queenstown, available at <https://www.supremecourt.uk/docs/speech-140810.pdf>.

¹²⁷ J D Heydon, ‘Commentary on Lord Neuberger’s “The Remedial Constructive Trust – Fact or Fiction”’, paper delivered 10 August 2014, at the Banking Services and Finance Law Association Conference, Queenstown, available at https://www.eisewhere.com/file_uploads/118066829b9658bdab9146d9c3cb1f30_P1-HonDysonHeydonAC.pdf.

¹²⁸ [1995] HCA 14; 184 CLR 102.

¹²⁹ The joint reasons (of all members of the Court stated (albeit in a footnote!) that “the view [in *TSB Bank Plv v Camfield* [1995] 1 WLR 430] to the effect that setting aside is an ‘all or nothing process’ should not be accepted in this country”: [1995] HCA 14; (1995) 184 CLR 102 at 116 at n 46.

¹³⁰ Cf D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission*, Oxford University Press, New York, 2008, chapters 13 and 19, where it is discussed under the heading ‘Heretical Approaches’. However, it is considered and supported by J Dietrich and T Middleton, ‘Statutory remedies and equitable remedies’ (2006) 28 *Aust Bar Rev* 136 at 163-6, where reference to other views may be found.

One final point lies outside the scope of this article, but is worth mentioning. Of course the declaratory theory of (common) law has long been discredited, and to that extent common law now more closely resembles equity. Even so, it would be of interest to consider whether the modes of reasoning whereby appellate courts decide whether or not to implement change in common law are different from what occurs when the question is one of equitable principle.

6. Conclusion

The increasing attention being given to the relationship between judge-made law and statute is welcome and timely, but this article goes further and contends that it is useful to consider that relationship in a more nuanced way than commonly occurs. One aspect of this involves looking carefully at the interrelationship between statutes and equity. Slogans such as “the Age of Statutes” or indeed the “Principle of Legality” do not much assist analysis, and may indeed obscure important distinctions. The focus given in this article to equity, as opposed to common law, discloses a pattern of historical continuity, reflecting the continuing operation of long-standing equitable themes. Hence this article’s title.