THE COMMON LAW IN AUSTRALIA: ITS NATURE AND CONSTITUTIONAL SIGNIFICANCE

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The common law has been described by judges and legal writers in Australia in different, and sometimes inconsistent, ways. Some, like Inglis Clark, Justice Priestley and Anstey Wynes, have maintained that it is, by and large, State law.[1] Some who accept that view believe there is, in addition, a smaller area that can be described as federal or Commonwealth common law.[2] Often, however, in recent years it is referred to as the common law of Australia or the national common law.[3] On many occasions in the past it was referred to as the law of England, a view which had great consequences for Australian judicial behaviour. At other times judges speak simply of 'the common law'.

These differences in description, and perhaps in connotation, of judge-made law in Australia are reflected in statutes. Section 80 of the *Judiciary Act 1903* (Cth) required courts, in certain circumstances, to apply 'the common law *of England*', until it was amended in 1988 to refer to 'the common law *in Australia*'. Section 12 of the *Native Title Act 1993* (Cth) attempted to give part of 'the common law *of Australia*' the force of a law

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1 Andrew Inglis Clark, *Studies in Australian Constitutional Law* (first published 1901, 1997 ed) ch 10; William Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed, 1976) 58–60; LJ Priestley, 'A Federal Common Law in Australia?' (1995) 6 *Public Law Review* 221.

2 *R v Kidman* (1915) 20 CLR 425 (Griffith CJ); *In re Usines de Melle's Patent* (1954) 91 CLR 42 (Fullagar J); *R v Sharkey* (1949) 79 CLR 121, 163 (Webb J).

3 Sir Owen Dixon, 'Sources of Legal Authority' (1943) 17 *Australian Law Journal* 138; Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240; *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 15; *Commonwealth v Mewett* (1997) 191 CLR 471, 521–2; *Kable v DPP (NSW)* (1997) 189 CLR 51, 112–3, 137–9; *Lipohar v The Queen* (1999) 200 CLR 485.

of the Commonwealth.[4] Section 51AA of the *Trade Practices Act 1974* (Cth), on the other hand, makes unlawful conduct that is unconscionable under 'the unwritten law *of the States and Territories*'.

Justice LJ Priestley has argued against the view that there is a unitary body of common law in Australia and has concluded that there is a common law of each State and Territory notwithstanding the role of the High Court as a final court of appeal.[5] He accepts that there is also an area that might be called Commonwealth common law, but that is limited to those rules that are necessary to enable the rights and powers of the Commonwealth to be enforced, and are implied in the *Constitution*.

Justice McHugh and Justice Gummow have strongly denied that the common law is primarily that of each State, as in the United States.[6] Their Honours have said that s 73(ii) of the *Constitution*, giving the High Court appellate jurisdiction in respect of judgments, etc, of the Supreme Courts of the States, implies a constitutional object of creating and maintaining a national common law.

From a practical point of view, this dispute might be seen as quite unimportant. Justice Priestley, for example, concluded that the differences in the several States are few, do not matter very much and that the High Court is likely to unify any of those differences. In other respects, however, the differences of view could have profound consequences. For example, from the constitutional purpose they find in s 73, McHugh and Gummow JJ deduce that there are restrictions on a State's legislative power in respect of its judicial system. The issue could also be relevant to constitutional interpretation and suits between governments.[7]

It is the conclusion of this paper that there is much to be said for the proposition that there is a national system of common law available to be used for many different purposes. That proposition is, in my view, supported by historical, constitutional and social considerations. The system of common law operating in an Australian colony before federation or in a State after federation was not usually perceived (subject to some exceptions) as a separate system of principles and rules and constituting an independent source of further evolution and growth.

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4 The provision was held invalid in *Western Australia v Commonwealth* (1995) 183 CLR 373.

5 Priestley, above n 1.

6 *Kable v DPP (NSW)* (1997) 189 CLR 51.

7 The difference of view was also important in relation to whether the reasoning of the Full Federal Court in *Adelaide Steamship Co Ltd v Spalvins* (1998) 152 ALR 418 should be adopted. The Court held that a common law rule should be altered because of irrational and impractical consequences that would otherwise ensue as a result of provisions of the *Evidence Act 1995* (Cth). The holding was, therefore, confined to 'Evidence Act jurisdictions'. New South Wales had similar provisions. That case was disapproved by the majority of a five-judge Federal Court in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1998) 159 ALR 664, which held that, because there was one common law in Australia, it was impossible to hold that the statutory provisions had modified the common law in some jurisdictions while leaving it unmodified in others. On appeal the High Court agreed with that view, although the decision was reversed on other grounds: *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

THE RECEPTION OF ENGLISH LAW[8]

The *Australian Courts Act 1828* (Imp), 9 Geo IV chapter 83, provided in s 24 that the laws and statutes in force in England on 25 July 1828 should apply in New South Wales and Van Diemen's Land so far as they could be applied. This was also the 'reception' date for English law in Victoria and Queensland as a result of their separation from New South Wales. The reception date for South Australia is 28 December 1836 and for Western Australia 1 July 1829.

It might be argued that as the conditions of New South Wales were not the same as those of South Australia and Western Australia at reception (for example, neither of the latter two was a 'convict' colony on settlement) the laws received, including the rules of common law, might be different. English laws were to be applied only so far as they could be applied. In any case, there were in Australia three different dates of reception, and that could also point to different systems of common law.

That is not, however, how the matter was treated. In the case of statutes the test was whether they could be applied on the relevant date. If not, they never became the law of the colony (unless locally adopted) no matter that the development of the colony meant that they could be applied later.[9] The common law, however, was treated differently for this purpose. Its doctrines and rules were regarded as lying dormant ready to be used as soon as conditions in the colony were appropriate for their application.[10]

The reception rules were, in fact, also interpreted to encompass developments made to the common law of England after the reception date. The position was put this way by Gibbs J:

> [A]lthough that date [of reception] is most significant so far as the adoption of statute law is concerned, it is of less importance in considering the application of the common law. Legislation passed after that date will of course not be applicable unless it is expressly applied. But the common law which was adopted is not frozen in the form which it assumed in 1836. It is the common law rules as expressed from time to time that are to be applied … To adapt the example given by Windeyer J in *Skelton v Collins*, if it is not right to say that the principle of *Donoghue v Stevenson* became part of the law of South Australia in 1836, it is at least true to say that a body of principles, including those that developed into the rule subsequently expressed in that case, formed part of the law of South Australia from 1836 onwards.[11]

If, however, later developments of the common law were seen as included within 9 Geo IV chapter 83 or under common law reception rules, that meant that it was 'the law of England' that was being applied. That seems to have been affirmed by Lord Dunedin in *Robins v National Trust Co* when he said:

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8 For detailed accounts of the reception of common law, see William Loutit Morison, *The System of Law and Courts Governing New South Wales* (2nd ed, 1984) ch 7; Alex C Castles, *An Australian Legal History* (1982) ch 17; Alex C Castles, 'The Reception and Status of English Law in Australia' (1963) 2 *Adelaide Law Review* 1.

9 *Quan Yick v Hinds* (1905) 2 CLR 345.

10 *Cooper v Stuart* (1889) 14 App Cas 286, 292–3; *Delohery v Permanent Trustee Co of NSW* (1904) 1 CLR 283, 289, 291.

11 *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617, 625 (footnotes omitted).

> [The House of Lords] is the supreme tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it. Equally, of course, the point of difference may be settled so far as the Colonial Court is concerned by a judgment of this Board.[12]

As he was dealing with a judgment of the Supreme Court of Ontario he was using 'colonial court' to include a court of the self-governing Dominions. In fact, from the beginning it was probably inconceivable that an Australian court would, on an issue of a general principle of the common law, refuse to follow the House of Lords, even though it was recognised from an early date, that 'technically' the only decisions of a court in England that were binding were those of the Privy Council. Lord Dunedin's statement, however, appeared to be a direction of the Privy Council to follow the House of Lords, the reason being that the colony was 'bound by English law'. In any case, most of the persons presiding over Judicial Committee appeals were Lords of Appeal who sat on House of Lords appeals.

There are many statements in High Court judgments well into the mid-20th century where issues related to the common law are referred to on the basis that it is 'the law of England' that is being applied.[13] In *Piro v Foster*[14] Williams J, in agreeing with the rest of the Court that State courts should follow a decision of the House of Lords in preference to an earlier decision of the High Court, said that otherwise they would be in serious difficulty because they would have to decide whether to follow the direction of Lord Dunedin in the Privy Council, quoted above, or an inconsistent ruling of the High Court.[15] As late as 1975, Hutley JA of the New South Wales Court of Appeal held that, except in the High Court, the law was still that laid down by Lord Dunedin.[16]

Even in 1979, when there was no question of the High Court blindly following either the House of Lords or the Privy Council, the Court treated an issue of common law in relation to South Australia as one of 'the common law of England'. That was probably because it was argued that the rule was not received as one of the laws of England in 1836. Justice Mason stated the issue as being 'whether the common law of England, as settled by the House of Lords in *Searle v Wallbank*,[17] was applicable, in the relevant sense, to the colony of South Australia on 28th December 1836'.[18]

It is clear that when the Commonwealth Parliament directed courts exercising federal jurisdiction to apply, in certain circumstances, 'the common law of England' in s 80 of the *Judiciary Act 1903*, it was not using that term in contradistinction to the common law of Australia. The evidence by and large shows that at the time of federation the common law was conceived as a single body of law. Theoretically, some particular rule might not have been received in one colony, although it was in another

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12 [1927] AC 515, 519.

13 Eg, *Piro v Foster* (1943) 68 CLR 313, 320, 326, 335–6.

14 Ibid 342.

15 Lord Dunedin's statement was criticised by Lord Wright in (1943) 8 *Cambridge Law Journal* 118, 135 on the ground that it was only the Privy Council and not the House of Lords that was the final court of appeal for the colonies. Justice Williams in *Piro v Foster* said that that was 'technically correct' but Lord Dunedin's view was 'eminently practical': (1943) 68 CLR 313.

16 *Kelly v Sweeney* [1975] 2 NSWLR 720, 724. Chief Justice Bray seemed to be of the same view in *Bagshaw v Taylor* (1978) 18 SASR 564, 578.

17 [1947] AC 341.

18 *Trigwell* (1979) 142 CLR 617, 635.

because of the issue of 'inapplicability', but if any such instances survived they would have been seen as exceptions to a general principle that English common law applied to all the colonies.[19] There is, perhaps, an analogy to the exception to the common law in England where a local custom, in the legal sense, is shown to exist.[20]

Of course, courts in the colonies might differ among themselves and differ from those in England on what is the applicable or correct rule or principle to apply; but the existence of the Privy Council and the automatic following of decisions of the higher English courts tended to ensure that in the long run the notion of a uniform common law was preserved.

FEDERATION

The federation of the colonies produced new questions as to the place of the common law in the scheme of things. Those questions arose as a result of the borrowing of the American concept of federal jurisdiction and the division of legislative power between the Commonwealth, as the recipient of express and enumerated powers, and the States as possessors of all residuary power. Principles operating in the United States and criticism there of those principles muddied the water.

As the Supreme Court of the United States was not a general court of appeal, each State developed its own system of common law. It was held, however, in *Swift v Tyson*[21] that the federal courts, in exercising jurisdiction in cases between residents of different States, should decide questions of 'general common law' for themselves. The areas of common law regarded as covered by this principle expanded. The result was that the common law as administered by the State courts differed from that formulated and applied by federal courts. This doctrine was attacked in an influential dissenting judgment of Holmes J.[22] It was overruled in *Erie Railroad Co v Tompkins*[23] where it was held that in applying common law rules the federal courts should follow the decisions of the Supreme Court of the State concerned.

All this was rather irrelevant to Australian circumstances. The High Court was (and is) the only federal court with diversity jurisdiction, the State courts (under s 39 of the *Judiciary Act*) have federal jurisdiction in respect of such suits, and the High Court has appellate jurisdiction in respect of all matters of federal, State or common law. But the American experience led to discussions on whether, or to what extent, the common law was 'State law'. Inglis Clark devoted a chapter to that matter and strongly argued that it was. He said that, when the High Court decided an appeal on an issue of common law, it was determining the common law of the State in which the matter arose.[24]

Clearly, however, the common law was relevant to some matters concerning the Commonwealth, such as the extent of executive power and the application to the Commonwealth of Crown prerogatives. Clark treated these issues as the determination of the meaning of the *Constitution* by reference to outside things or events. In that

19 The early cases are examined in Castles' and Morison's works, above n 8.
20 See Morison, above n 8, ch 8.
21 41 US 1 (1842).
22 *Black and White Taxicab Co v Brown and Yellow Taxicab Co* 276 US 518 (1928).
23 304 US 64 (1938).
24 Clark, above n 1. See also Wynes, above n 1.

sense, common law rules were implied in the *Constitution*. 'But in every such case the *Constitution* alone prescribes the law, and the whole of the law is contained in the language in which it is prescribed.'[25]

Chief Justice Griffith indicated that there was an area of 'common law of the Commonwealth' when he held that the common law crime of conspiring to defraud the King applied to protect the Commonwealth.[26] Justice Isaacs agreed with this conclusion, but said that while there was no body of federal common law, the common law was in force throughout the Commonwealth and that the common law recognised 'the peace of the King' in relation to the Commonwealth, created by the *Constitution*.

In *R v Sharkey*, Webb J said that 'there is much to be said for the view that there is a common law of Australia including the provisions relating to sedition as they existed in English law when the first settlers came to this country.'[27] This statement is not very clear, but he appears to be suggesting that the Crown in right of the Commonwealth was protected by that law.

In *In re Usines de Melle's Patent*, Fullagar J was required to apply the *lex situs* of a patent. It existed as a grant from the Commonwealth, and while clearly situated in Australia it could not be regarded as situated in any particular State or Territory. His Honour, therefore, applied a rule of English common law on *bona vacantia* as part of 'the common law of the Commonwealth'.[28]

Justice Murphy expounded a concept of federal common law relating to rules of interpretation of federal statutes and common law rules making effective practices and decisions in regard to federal statutes.[29]

In some of these cases the underlying presumption seems to be that common law principles and rules must be either 'State' or 'Commonwealth'. As the Commonwealth does not have any area of common law as a subject-matter of power, it is, on this view, seen as part of the State law. In some circumstances not within the purview of the State it is necessary to resort to common law principles. This is clearly so in determining the extent of federal executive power, privileges and immunities. In those circumstances it is said that the common law is sometimes implied in the *Constitution*. Where federal statutes call for the application of common law principles, as in the examples given by Murphy J, it could perhaps be said that they are implied in the Act. Where that cannot be done, as was the common law situation dealt with by Griffith CJ in *Kidman* and Fullagar J in *Usine*, it might be necessary to resort to a small area that could be called 'the common law of the Commonwealth'.

Side by side with that particular approach the judges, most of the time, still seemed to view the common law as a single unified body of doctrine inherited from England. That was the subject of two papers delivered by Sir Owen Dixon in 1943 and 1957.[30] His theme was that the common law was antecedent to the constitutional instruments of the colonies and later of the Commonwealth. He based this conclusion on the fact

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25 Clark, above n 1, 201.
26 *R v Kidman* (1915) 20 CLR 425.
27 (1949) 79 CLR 121, 163.
28 (1954) 91 CLR 42.
29 See cases set out in Priestley, above n 1, 230.
30 Dixon, 'Sources of Legal Authority', above n 3, 138; 'The Common Law as an Ultimate Constitutional Foundation', above n 3, 31; Sir Owen Dixon, *Jesting Pilate* (1965) 198, 203.

that the *Australian Constitutions* obtained their validity from being enactments of the United Kingdom Parliament which in turn owed its supreme legal power to the common law. Sir Owen Dixon said: '[w]e therefore regard Australian law as a unit. Its content comprises, besides legislation, the general common law which it is the duty of the courts to ascertain as best they may.'[31] He went on to say that the common law was one system which should receive a uniform interpretation and application 'not only throughout Australia but in every jurisdiction of the British Commonwealth where the common law runs'.[32]

Uniformity with the decisions of the highest courts in England received great emphasis in the High Court until the 1960s. The Court would follow decisions of the English Court of Appeal in preference to its own for the sake of uniformity and not because the Court regarded the English decisions as preferable.[33] As noted earlier, other Australian courts were directed in cases of conflict between the House of Lords and the High Court to follow the House of Lords upon matters of general legal principle.[34]

In the face of these pronouncements and practices those who prefer to regard Australia as having a separate system of common law for each State and Territory would no doubt argue that 'technically' the Australian courts were not bound by the House of Lords (or any other English court) and only by the Privy Council, and that the directions of the High Court to the lower courts in this matter were simply based on judicial policy, namely, the desirability of uniformity.

So far as the State courts were concerned, however, the directions of the High Court to follow the House of Lords were as binding as any rule of precedent. As indicated above, that was also the way many regarded the statement of Lord Dunedin in *Robins*. The notion of separate common laws did not conform to social or legal reality, and never did. To rely on the inapplicability exception to the reception of English common law as the dominating factor in characterising the common law in Australia is to emphasise an insignificant (and possibly non-existent) area of law at the expense of decades of judicial practice, and exposition of doctrine. Contrary to the popular maxim, it treats the local exceptions (if any) as destroying the rule.

The High Court's acceptance of uniformity with English common law ceased soon after the decision in *Parker v The Queen*[35] where the High Court held for the first time that it would not follow a decision of the House of Lords because of the opinion of the Court that it was fundamentally wrong. As a result of that case it was declared in 1966 that the earlier ruling in *Piro v Foster* should no longer be followed.[36]

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31 Dixon, *Jesting Pilate*, above n 30, 199.

32 Ibid.

33 *Waghorn v Waghorn* (1942) 65 CLR 289. It should be noted, however, that the High Court refused to follow the Court of Appeal in *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 606, where the errors in the English judgments were described as 'fundamental'. Chief Justice Latham emphasised that the decision had been often criticised and never considered by the House of Lords or the Privy Council.

34 *Piro v Foster* (1943) 68 CLR 313.

35 (1963) 111 CLR 610.

36 *Skelton v Collins* (1966) 115 CLR 94.

From then on the orthodox approach of the High Court, accepted by the Privy Council,[37] was that the common law was capable of developing differently in Australia, in England and in other parts of the Commonwealth of Nations. This was seen as a new development which belatedly followed the development of Australia's political and international sovereignty. Nothing that occurred, however, suggested any further disintegration of the system of common law applicable in this country.[38]

After the abolition of all appeals to the Privy Council from the High Court in 1975 (apart from the highly unlikely grant of a certificate under s 74 of the *Constitution*) the High Court held it was no longer bound by Privy Council decisions.[39] All appeals from State courts were ended by the *Australia Acts 1986* of the Commonwealth and the United Kingdom.

AUSTRALIAN COMMON LAW AND THE *CONSTITUTION*

Since the developments described above there has been considerable judicial reliance on the concept of a 'common law of Australia'. In *Mabo v Queensland (No 2)*, for example, Mason CJ and McHugh J summed up the result of that case as being 'that the common law of this country recognises a form of native title'.[40] Justice Deane and Justice Gaudron have also, in a number of contexts, emphasised the national nature of the common law.[41] A unanimous court in *Lange v Australian Broadcasting Corporation*[42] referred with approval to Sir Owen Dixon's views on 'the one common law' contained in the two articles referred to above. The Court said: '[t]here is but one common law in Australia which is declared by this Court as the final court of appeal.' That view has been consistently followed in later cases.[43]

It probably matters little in any particular case whether the High Court is regarded as laying down the common law of a particular State, which happens to be the same as that of other States, or whether it is determining the common law of Australia. Sir Owen Dixon, however, in the two papers I referred to above, after affirming that Australia had a uniform body of common law, said that a judge sitting in the original jurisdiction of the High Court 'ascertains its contents as best he may'. He added that

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37 *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221; *Geelong Harbour Trust Commissioners v Gibbs, Bright and Co* (1974) 129 CLR 576.

38 Despite these developments Barwick CJ in *Public Transport Commission (NSW) v J Murray-Moore (NSW) Pty Ltd* (1975) 132 CLR 336, 341 said that, on matters of general principle, the Supreme Courts at first instance should follow the English Court of Appeal in the absence of High Court authority and that 'the Supreme Court on appeal would be well advised as a general rule to do likewise'. Justice Gibbs (at 349) said much the same thing. Justice Murphy strongly attacked this approach in *Day and Dent Constructions Pty Ltd v North Asian Properties Pty Ltd* (1982) 150 CLR 85, 109.

39 *Viro v The Queen* (1978) 141 CLR 88.

40 (1992) 175 CLR 1, 15.

41 For example, *Commonwealth v Mewett* (1997) 191 CLR 471, 523–6; *Breavington v Godleman* (1988) 169 CLR 41, 123.

42 (1997) 189 CLR 520, 563. See also *Re Wakim* (1999) 163 ALR 270, 303.

43 *Lipohar v The Queen* (1999) 200 CLR 485; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

the decisions of the courts of the State whose law is applicable 'have no higher authority than the decisions of any other State.'[44]

The views expressed by Sir Owen Dixon on the nature of the common law were embraced and developed by McHugh and Gummow JJ in *Kable v Director of Public Prosecutions (NSW)*.[45] They regarded the concept of a national common law as one of the objects of Chapter III of the *Constitution*, particularly s 73(ii) conferring on the High Court jurisdiction to determine appeals from the judgments, etc, of the Supreme Courts of the States. Justice McHugh said[46] that the *Constitution* intended that there should be a single body of common law under the supervision of the Judicial Committee of the Privy Council at the apex of the system. Later the apex became the High Court.

Justice Gummow[47] similarly held that s 73, together with the abolition of appeals to the Privy Council by s 11 of the *Australia Acts*, ensured 'the unity of the common law of Australia' under the supervision of the High Court.[48]

In respect of matters that do not arise in the course of the exercise of federal jurisdiction the capacity of the High Court to ensure a unified body of common law depends on the existence of each State Supreme Court. There is no provision for appeals to the High Court from the judgments of State courts exercising State jurisdiction other than from those of the Supreme Courts. Justice McHugh and Justice Gummow, therefore, held that a State was constitutionally required to preserve its Supreme Court.

It was necessary, however, to go further because the High Court's intended role in relation to the common law could also be threatened by a State prohibiting appeals from other courts to the State Supreme Court, or preventing review of the orders of tribunals by the Supreme Court. Justice Gummow said:

> The existence of such an integrated system of law and the terms of s 73 itself necessarily imply that there be in each State a body answering the constitutional description of the Supreme Court of that State … [I]t would not be open to the legislature of that State to abolish the Supreme Court and to vest the judicial power of the State in bodies from which there could be no ultimate appeal to this Court.[49]

Similarly McHugh J said:

> [A] State law that prevented a right of appeal to the Supreme Court from, or a review of, a decision of an inferior State court, however described, would seem inconsistent with the principle expressed in s 73 …[50]

Justice McHugh went a stage further. He referred to Sir Owen Dixon's statement, quoted above, that a High Court judge exercising original jurisdiction was not bound to follow common law decisions of courts of the State whose law was applicable to the case. The same reasoning would, of course, apply to the federal courts. Justice McHugh

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44 Dixon, above n 30, 204.
45 (1996) 189 CLR 51.
46 Ibid 112.
47 Ibid 138.
48 Gaudron J interpreted the phrase 'common law in Australia' in s 80 of the *Judiciary Act 1903* (Cth) as meaning a unified body of Australian common law rather than the common law of a particular State: *Commonwealth v Mewett* (1997) 191 CLR 471, 523–4.
49 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 139.
50 Ibid 114.

extended this principle to a State court exercising federal jurisdiction. Such a court, he said:

> must deduce any relevant common law principle from the decisions of all the courts of the nation and not merely from the decisions of the higher courts of its State. A judge exercising the federal jurisdiction invested in a State court must see the common law in exactly the same way that a judge of a federal court created under s 71 of the Constitution sees it.[51]

It seems to me undesirable, if it can be avoided, to have a State court conduct cases and deliver judgments in varying ways dependent on whether federal or non-federal jurisdiction is exercised. There may even be cases where a court may not be aware that it is exercising federal jurisdiction, for example, in determining a suit between residents of different States, where the permanent residence of the parties is not otherwise relevant to the case. It is, in my view, absurd that the question whether a judge is required to follow a common law decision of the Court of Appeal or Full Court of the State should depend on whether the parties reside in the same State or not. But, even in other cases where common law issues arise, different pronouncements on the same common law issue by the same judge does not contribute to an efficient system of law.

Disapproval of this aspect, however, does not affect the main argument. In *Kable* all the judges accepted that the doctrine of the separation of judicial power prescribed for federal courts under Chapter III did not apply to the States and their courts. The decision was that the States cannot confer on a State court that is invested with federal jurisdiction (according to Gaudron, McHugh and Gummow JJ) or is exercising such jurisdiction (Toohey J) powers or functions that are 'incompatible' with its exercise. Otherwise, however, there is nothing in *Kable* that would stop the State Parliaments from conferring judicial power on administrative bodies or non-judicial power on courts or, it would seem, itself exercising judicial power.

It seems to me, however, to follow from the reasoning of McHugh and Gummow JJ that there may be limits on State power to confer judicial power on executive or administrative bodies. In some of those circumstances, at any rate, the power of the High Court to ensure a uniform law could be defeated, except in the unlikely event of there being an appeal to the Supreme Court, which would probably defeat the purpose of the legislation.

It is sometimes said that, having regard to different developments of the common law in the several States from time to time, there can in reality be different common law rules and principles operating in two or more States. Justice Priestley considered that this possibility 'in itself is sufficient to show in theory that there is not one common law throughout Australia, nor an Australian common law.'[52]

Clearly, however, differing decisions of the final courts of Victoria and Queensland are consistent with a theory of uniform common law on the basis that at least one of those courts has not correctly expounded the law. That occurs where different trial courts within a State or different federal courts in original jurisdiction give inconsistent decisions. Clearly, also, the Federal Court in applying a common law principle is not

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51 Ibid.

52 Priestley, above n 1, 232. See also LJ Priestley, 'A federal common law in Australia?' (1995) 46 *South Carolina Law Review* 1043, 1065–7.

bound by a decision of the Supreme Court of the relevant State. It is hard to reconcile the Priestley view with that situation.

In my opinion the notion of separate State common laws with different rules (until the High Court comes out with a uniform rule) would require, for federal courts, a principle similar to *Erie Railroad Co v Tompkins*,[53] without one of the main reasons for that decision, namely, the absence of any federal authority to supervise the judicial action of the States. In the United States this meant that the differing views of State and federal courts prevented uniformity in the administration of the law within a State. That is not the position in Australia.

The notion that the *Constitution* guarantees by implication the uniformity of the common law goes beyond the mere recognition that that is what we have. Clearly, the framers intended that the High Court should be a national court of appeal. At the same time s 73 evidences a policy of not interfering with the State judicial systems in their hierarchical aspects. It might be argued that the existence of the State Supreme Courts and court systems is simply an assumption of the founders, which is not the same as prescribing their continued existence in the future.

In *Australian National Airways Pty Ltd v Commonwealth*,[54] for example, Dixon J referred to an argument that the commerce power was intended to confer the power to regulate private commerce and not to authorise government participation. He replied: '[i]t confuses the unexpressed assumptions upon which the framers of the instrument supposedly proceeded with the expressed meaning of the power.'[55]

In this instance, however, we are concerned with a clear departure from the American model in a chapter which contains much copying from the *United States Constitution*, some of it quite inappropriate, and which has been described as 'pedantic imitation'.[56] This points to a clear intention of creating the Court as a national judicial institution. It can be regarded as a reasonable implication from that constitutional purpose that a State cannot undermine it.

It does not, of course, follow from the existence of a common court of appeal that it is intended to administer the same system of law in each jurisdiction. The House of Lords, in respect of England and Scotland, and the Privy Council, with regard to the various types of legal systems in the Empire, are evidence of that. But, as explained above, at federation the common law was, on the whole, regarded as a unified body of English law. It could not have been intended that the High Court would act in any other way.

THE OPERATION OF THE NATIONAL COMMON LAW

The error, in my opinion, of those who sought to label the common law as primarily 'State' is, as I have indicated, based on the notion that all law must either be 'State' or 'Commonwealth'. Although the Commonwealth Parliament and government have some powers in respect of the High Court (for example, s 72 and s 51(xxxix)), it is essentially the only national institution, apart from the Queen, in the *Constitution*. That

53 304 US 64 (1938).
54 (1946) 71 CLR 29.
55 Ibid 81.
56 *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290, 330.

might be seen as a departure from pure federal theory, but it is understandable in the light of the fact that the colonial courts were never the ultimate or final interpreters of law in their respective colonies. While the Privy Council was a long way off, with wider Imperial responsibilities, the High Court could be expected to interfere more often.

In the light of what we have seen, the body of common law in Australia can be regarded as existing side by side with the *Constitution*, much of which is explicable only when read against the background of that law. It is the common law that confers on the Crown in the right of the Commonwealth and State powers, privileges and immunities. While they are, in the case of the Commonwealth, deemed to be incorporated in s 61 of the *Constitution*, it is the common law that determines their scope and governs their exercise.

It is a more open approach to recognise that one is resorting to that body of law directly rather than smuggling it into the *Constitution* by way of 'implication'. Had s 61 not 'vested' 'the executive power of the Commonwealth' but simply provided for the Queen and Governor-General to administer the government (as in Canada) it is certain that the Commonwealth would have had the same prerogative powers and immunities that directly flow from the application of the common law to the Queen as head of each of her realms and territories.

Indeed it is not very satisfactory to include in the concept of 'executive power' various privileges and immunities which do not relate to any particular powers but to the fact that the Commonwealth and States are governments of the Queen. That is why, for example, in *Federal Commissioner of Taxation v Farley Ltd*,[57] the Commonwealth and State shared, on a basis of equality, the prerogative right of priority in the payment of debts in the winding up of a company. When it is said that common law principles are implied in the *Constitution* one might ask with Harrison Moore, 'is it "implied" for any other reason than that it is law?'[58]

A good example of the relationship of the *Constitution* to a body of common law is provided by the High Court's decision in *Commonwealth v Mewett*.[59] In 1923 it had been held that the Commonwealth was rendered liable in tort as a result of s 75(iii) of the *Constitution* conferring original jurisdiction on the High Court in matters 'in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party'.[60] That decision clearly required implying the imposition of substantive common law liability from a constitutional provision conferring jurisdiction. Later cases expressed doubt as to the reasoning of that decision, and it was rejected in *Mewett*.

A majority of the Court in that case held that the liability of the Commonwealth arose under the common law, and the grant of jurisdiction had abolished the common law immunity of the Crown from suit. Quite clearly, the Court treated the common law as one which exists independently of, but affected by, the *Constitution*. Under that approach it is unnecessary to refer to the common law as being 'of the Commonwealth' as distinct from 'of the State', nor does the *Constitution* imply anything relevant. Rather

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57 (1940) 63 CLR 278.

58 Sir Harrison Moore, 'The Federations and Suits Between Governments' (1935) 17 *Journal of Comparative Legislation* 163, 199.

59 (1997) 191 CLR 471.

60 *Commonwealth v New South Wales* (1923) 32 CLR 200, 204.

the common law is applied to the new situations and institutions created by the *Constitution*.

As Gummow and Kirby JJ put it:

> [Chapter III of the *Constitution*] also required that in Australia the common law be informed by the structure of and institutions established by the Constitution.[61]

They went on to say:

> This new state of affairs, established by the Constitution, required adjustment to habits of thought formed in a common law system with a unitary structure of government.

Thus, Chapter III gave rise to a number of types of controversies 'not encompassed by the common law as it developed in England'. Among this number is the fact that 'the mutual relations between the Commonwealth and the States may give rise to actions between them in tort and contract.'[62]

In the case of many of these disputes the law applicable will be the same as that which is applied to a dispute between private subjects, and will be regarded as governed by ss 79 and 80 of the *Judiciary Act*, which provide as follows:

> 79. The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.
>
> 80. So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.[63]

Often, however, no reference, or no relevant reference, is made to these provisions. In *Mewett,* for example, ss 79 and 80 were only used to deal with the issue of which statute of limitations applied. In any case there will be circumstances where, as Professor Enid Campbell has pointed out, State legislation does not come within ss 79 and 80 because it cannot be said to be 'applicable' within the meaning of those provisions.[64]

In 1936 Harrison Moore examined the constitutional jurisdiction of the High Court in suits between governments (s 75(iii) and (iv)), and where the purpose of conferring

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61 *Commonwealth v Mewett* (1997) 191 CLR 471, 546.

62 Ibid 547, citing *South Australia v Victoria* (1911) 12 CLR 667; *Commonwealth v New South Wales* (1923) 32 CLR 200; *South Australia v Commonwealth* (1962) 108 CLR 130, 139, 148.

63 There is some dispute as to whether s 80 should be first applied before considering s 79. This is on the basis that s 80 is a law of the Commonwealth and, therefore, comes within the phrase 'except as otherwise provided by … the laws of the Commonwealth' in s 79: *Commonwealth v Mewett* (1997) 191 CLR 471, 523–6 (Gaudron J), 554 (Gummow and Kirby JJ), 492 (Brennan CJ), 506 (Dawson J). The thesis of this paper is in agreement with Gaudron J in so far as she states that 'the common law in Australia' must refer to the one and only common law operating throughout Australia.

64 Enid Campbell, 'Suits Between Governments of a Federation' (1971) 6 *Sydney Law Review* 309. See also Geoffrey Lindell, *Justiciability of Political Questions Under the Australian and United States Constitutions* (LLM Thesis, University of Adelaide, 1972) 697–9, 701.

the jurisdiction makes the law of one or other of the States inapplicable.[65] Clearly, the Court was given the jurisdiction in suits between States because it is not the domestic forum of either of the parties, but rather a common forum whose task it is to determine 'an alleged violation of some positive law to which the parties are alike subject'.[66]

As mentioned earlier, the law applicable will often be that which would apply to private persons, such as the proper law of the contract, the situs of immoveable property or the place where the tort was committed or whatever the appropriate common law conflicts rule is. Harrison Moore, however, raised the question of the Parliament of the State whose law would otherwise be applicable enacting a statute nullifying the contract or authorising the tort. Would the High Court in its original jurisdiction be required to hold that the enactment of the legislature of the defendant State was determinative of the issue either on general principles or under ss 79 or 80? In the case of agreements (that is, justiciable, not 'political', agreements) that would seem an inequitable result, particularly where the agreement was legislatively authorised and approved by both Parliaments. Harrison Moore said:

> There might be glaring injustice without either legal or political remedy. The negative result of a jurisdiction which must find that the plaintiff has no right whenever the defendant's legislature has said so, would impute to the constitutional powers of governments within the same system an absoluteness which international law denies to sovereignty itself. The conflict of powers arising from the omnicompetence of each legislature would be the more singular where, as in Canada and Australia, the powers of all are derived from a common authority.[67]

Similar issues arise in respect of torts crossing State borders such as persons in State A suffering pollution or other damage emanating from State B, where the legislature of State B authorises the nuisance. There are a number of cases in the United States of this nature where the Supreme Court has applied what is referred to as 'interstate common law'. In this case of course State B (or its Attorney-General) is suing not in respect of injury to the government but as *parens patria*.[68] The Supreme Court applies its own law having regard to the concept of the equality of States and has produced a body of judge-made law.

There is much to be said for the view of Harrison Moore that in the above circumstances the common law of Australia provides 'the law to which the parties are alike subject'.[69] He pressed the proposition that is emphasised in this paper that the common law was an Australia-wide body of law always on hand to be applied in familiar or new or difficult situations, unless a competent legislature has enacted otherwise.

Nevertheless, it is the case, here, as Gummow and Kirby JJ have pointed out, of the common law adapting itself to the *Constitution*, namely the subjection of the Crown in all its Australian 'rights' to a common jurisdiction and one from which immunity from suit has been excluded. There is also an assumption that 'States', for example, in s 75(iv), is not confined to the executive governments but extends to the whole organisation of the polity, that is, the State community. This notion is brought out by

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65 See Moore, above n 58, 163.
66 *South Australia v Victoria* (1911) 12 CLR 667, 715 (Isaacs J).
67 See Moore, above n 58, 186.
68 Ibid 188–90.
69 Ibid 164. See also at 202.

Dixon J, in a different connection, in *Tasmania v Victoria*[70] when he said: '[t]he Constitution determines the mutual relations of States considered not only as governments but sometimes also as communities.'[71]

In the contractual circumstances mentioned above it would not, therefore, be sufficient for the Crown in the right of State B to plead that it is not responsible for its legislature or that the contract cannot bind its Parliament so as to prevent it changing the law. Clearly, the substantive law has to be adjusted in working out the federal aspects of the system established by the *Constitution*. At times, principles of international law might be relevant or provide appropriate analogies to some degree.

When new situations arise under the *Constitution* the common law is there as part of the law of Australia to be applied according to the circumstances. Australian common law is not, therefore, a set of specific rules but a body of law containing doctrine, principles, rules, concepts, values and methodology. Windeyer J put it this way:

> It is enough I think to say that our inheritance of the law of England does not consist of a number of specific legacies selected from time to time for us by English courts. We have inherited a body of law. We take it as a universal legatee. We take its method and its spirit as well as its particular rules … Here, as it is in England, the common law is a body of principles capable of application to new situations, and in some degree of change by development.[72]

There is nothing to be said for thinking in terms of the common law of the States, the common law of the Commonwealth, common law implications of the *Constitution* and interstate common law. The inheritance of the common law is a common inheritance: the High Court was created as a common national court. It has produced a national common law adjusted to suit Australian circumstances, including the demands of the *Constitution*. Interestingly, however, as our common law has ceased to be under Imperial supervision and become nationalistic, more regard is had to principles and approaches in other countries and systems, as well as to international law.

COMMON LAW RIGHTS AND THE *CONSTITUTION*: CONSTITUTIONAL RIGHTS AND THE COMMON LAW

When the cases deal with 'rights' at common law there is no doubt that the courts regard the common law as a single body of law. In the past decade or so there have been decisions where statutory provisions have been given a restricted scope so as not to impair a 'fundamental common law right'. For example, in *Coco v The Queen*[73] an Act provided for a judge to authorise a police officer to use a listening device to obtain evidence. It was held that the Act did not confer authority to enter premises for the purpose of installing and maintaining the listening devices. The Court said that the right to exclude others from one's property was a 'fundamental common law right',[74] and that statutory authority to infringe it had to be in 'unmistakable and unambiguous

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70 (1935) 52 CLR 157.

71 Ibid 188. Quoted by Moore, above n 58, 185. For judicial references to the 'Commonwealth' as a body politic and community, see Patrick Harding Lane, *Lane's Commentary on the Australian Constitution* (2nd ed, 1997) 862.

72 *Skelton v Collins* (1966) 115 CLR 94, 135.

73 (1994) 179 CLR 427.

74 Ibid 435.

language'.[75] A similar situation occurred in *Plenty v Dillon*,[76] which held that a police officer was not authorised by common law or statute to enter private property, without express or implied consent, to serve a summons.

This rule of interpretation was applied by Mason CJ and McHugh J to an aspect of the determination of the scope of a head of Commonwealth power. In *Nationwide News Pty Ltd v Wills*,[77] the Court unanimously held invalid a provision which made it an offence to use words calculated to bring the Industrial Relations Commission into disrepute. Four judges relied on an implied freedom of communication related to the constitutional prescription of representative government. Chief Justice Mason and Justice McHugh, however, held that the provision was not incidental to the conciliation and arbitration power in s 51(xxxv) of the *Constitution*. The issue for them, therefore, was whether the law was 'appropriate and adapted' to achieving a legitimate object within power. Chief Justice Mason said that it was necessary for this purpose to examine 'any infringement of fundamental values traditionally protected by the common law, such as freedom of expression.'[78] Justice McHugh also relied on the importance of the common law right in determining whether the law was incidental to the power.[79]

It is of the essence of Australian federalism that total power is distributed between the Commonwealth and State governmental organisations, leaving aside constitutional limitations. Generally speaking, if a federal law cannot be characterised as one with respect to a subject-matter of power because it impairs a right, it follows that the States can impair that right.[80] This does not seem, therefore, an appropriate method of preserving common law rights. It produces a freedom that is lopsided because it is not necessary except in rare cases to 'characterise' a State law by reference to a subject-matter of power. This approach has not been followed in any later case.

This process of interpretation would apply only where the statutory provision does not operate directly on the subject-matter, or is otherwise within the core of the power, such as a law prohibiting or regulating broadcasting (s 51(v)), overseas trade (s 51(i)) or the trade of trading or financial corporations (s 51(xx)). In those cases the law is with respect to the subject-matter because it acts directly upon it, and so it is not necessary to examine whether it is appropriate and adapted to a particular purpose within power.[81]

In a paper delivered extra-curially, Toohey J suggested that the rule of statutory interpretation in protection of common law rights could be extended to the interpretation of constitutional powers as a whole. He said:

> Just as Parliament must make unambiguous the expression of its legislative will to permit executive infringement of fundamental liberties before the courts will hold that it has done so, it might be considered that the people must make unambiguous the expression

75 Ibid 436.
76 (1991) 171 CLR 635.
77 (1992) 177 CLR 1.
78 Ibid 31.
79 Ibid 101–4.
80 Subject to the Commonwealth 'covering the field' so that s 109 applies.
81 *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1; *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271.

> of their constitutional will to permit Parliament to enact such laws before the courts will hold that those laws are valid.[82]

This suggestion, if followed, would make all Commonwealth (and possibly State) powers subject to fundamental common law rights in the absence of a clear indication to the contrary. It would amount, as Toohey J said, to an implied bill of rights the content of which would emerge only in the course of time. As Toohey J put it, 'the courts would over time articulate the content of the limits on power arising from fundamental common law liberties'.[83]

An attempt to convert common law principles protecting rights into constitutional restraints was first made by Deane and Toohey JJ in *Leeth v Commonwealth*.[84] They held in a dissenting judgment that a concept of 'equality' was implied in the *Constitution*. Among the several reasons given was the proposition that it was a fundamental principle of the common law, and that the *Constitution* adopted it as a matter of necessary implication,[85] unless there was a clear indication to the contrary.

The concept of an entrenched common law was repeated by those judges in *Nationwide News Pty Ltd v Wills*.[86] This time, however, the issue became more difficult by the insertion of a temporal limitation. They spoke of implications 'which flow from the fundamental rights and principles recognized by the common law at the time the Constitution was adopted as the compact of Federation'.[87] The notion of the common law as it existed in 1901 raises a similar issue to that discussed in respect of the reception of English law at a prescribed date.

It is a characteristic of the common law that no verbal formulation has the authoritative status of the text of a statute. It is open to later courts to say that an earlier declaration was not a correct exposition, or that it needs qualifying or expanding in the light of new matters that have since emerged. In a sense the essence of the common law is that it is always evolving. If the principle in *Searle v Wallbank* can be regarded as having been received into South Australia in 1836, any development of the common law may be regarded as having existed in 1901.

The other problem is with the concept of 'fundamental'. This issue exists anyway in respect of statutory interpretation, but, there, the Court's view is subject to being overturned by Parliament. Clearly, what rights are included depends on the values of

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82 Justice John Toohey, 'A Government of Laws and Not of Men' (1993) 4 *Public Law Review* 158, 170.

83 Ibid. In *AMS v AIF* (1999) 199 CLR 160, 180, Gleeson CJ, McHugh and Gummow JJ distinguished between the rule of construction that a statute is to be interpreted, so far as its language permits, as consistent with international law, and the interpretation of the *Constitution* which is not subject to that rule. Kirby J has argued on a number of occasions that, when the *Constitution* is ambiguous, regard should be had to international law, particularly in respect of human rights — see, eg, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 657; *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 417–8. No other judge has adopted that approach.

84 (1992) 174 CLR 455.

85 They acknowledged, however, that to conclude that equality was a common law right it was necessary to put 'to one side the position of the Crown and some past anomalies, notably, discriminatory treatment of women': ibid 486. The implication of equality was rejected by most of the Court in *Kruger v Commonwealth* (1997) 190 CLR 1.

86 (1992) 177 CLR 1.

87 Ibid 69.

the judges or the judges' view of community values. Do they include freedom of contract or the right to use one's property without injury to others or the right derived from the principle in *Donoghue v Stevenson*?[88] John Doyle, before his appointment as Chief Justice of South Australia, pointed out that the processes of the common law leave a great deal of discretion to the judges to create new rights and that one important factor is whether the courts regard a right as reflecting a fundamental value of our society. He rightly said that the adjective 'common law', in this context, tends to obscure the degree of judicial creation by implying an historical or evolutionary basis which might not be justified.[89]

The adoption of these views of Deane and Toohey JJ would, of course, amount to a large transfer of power from the Parliament to the High Court, and without even the degree of guidance and prescription provided by an authoritative bill of rights. This approach does not, in my view, have any justification in the text or structure of the *Constitution* or in any trace of historical evidence of intention. As Professor Goldsworthy has pointed out, if any doctrine of the common law could be regarded as fundamental in 1901 it was the supremacy of Parliament.[90]

It is unlikely that those views of Deane and Toohey JJ will be followed. However, what might be described as the reverse process — the capacity of constitutional rights and principles to affect the common law — has been adopted. In *Theophanous v Herald and Weekly Times Ltd*,[91] a majority of the Court held that the law of defamation was inconsistent with the principle of federal representative government which had earlier been held to be prescribed by the *Constitution*.[92] The Court formulated new principles by way of defence to defamation proceedings where communication about governmental matters was in issue. Chief Justice Mason, Justice Toohey and Justice Gaudron said that '[i]f the Constitution, expressly or by implication, is at variance with a doctrine of the common law, the latter must yield to the former.'[93] The new defence formulated by the majority was regarded as derived from the *Constitution*. Justice Brennan and Justice McHugh were of the opinion that the *Constitution* did not deal with the common law rights and duties of individuals *inter se*. In a later case Gummow J also seemed to doubt the earlier decision because, inter alia, it not only restrained the exercise of legislative, executive or judicial power, but also 'what otherwise would be the operation of the general law upon private rights and obligations.'[94]

Theophanous was challenged in *Lange v Australian Broadcasting Corporation*,[95] another defamation case. Much to the surprise of everyone the Court unanimously affirmed the consequential effect of the guarantee of representative government on the common law. The judgment, at first, said that the implied freedom of communication precluded

88 [1932] AC 562.
89 John Doyle, 'Common Law Rights and Democratic Rights' in Paul Finn (ed), *Essays on Law and Government* (1995) 144, 155–6.
90 Jeffrey Goldsworthy, 'Implications in Language, Law and the Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 150, 174–8.
91 (1994) 182 CLR 104 (Mason CJ, Deane, Toohey and Gaudron JJ; Brennan, Dawson and McHugh JJ dissenting).
92 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.
93 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 126.
94 *McGinty v Western Australia* (1996) 186 CLR 140, 291.
95 (1997) 189 CLR 520.

curtailment by legislative or executive power.[96] In an apparent criticism of *Theophanous* the Court said that the issue was not, as in the United States, the creation of a 'constitutional privilege' or defence against the enforcement of State common law. That is because in Australia there was one common law which was laid down by a national court of appeal.[97]

Despite the earlier reference to the implied freedom as restricting legislative and executive power, the judgment went on to say that:

> Of necessity, the common law must conform with the Constitution. The development of the common law in Australia cannot run counter to constitutional imperatives. The common law and the requirements of the Constitution cannot be at odds.[98]

The Court thus remodelled the common law to make it consistent with the implied constitutional freedom.[99] It is sometimes suggested that the approaches in *Theophanous* and *Lange* are, in this respect, very different. The argument is that *Lange* denied that the constitutional implication operated directly to alter the private rights of individuals *inter se*, and that *Theophanous* was therefore, in effect, overruled. As, however, it was held that the common law must conform to constitutional requirements there is no difference in result and only superficial difference in method. In each case it can sensibly be said that the defendant was guaranteed a defence by virtue of the *Constitution*.[100]

Events once again illustrated the interaction of the *Constitution* and the common law of Australia.

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96 Ibid 560.
97 Ibid 563.
98 Ibid 566.
99 The Court in fact expanded the defence of qualified privilege so as to take it beyond that required by the *Constitution*. To that extent it was vulnerable to statutory alteration.
100 Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melbourne University Law Review* 374, 404–17; Adrienne Stone, 'The Common Law and the Constitution: A Reply' (2002) 26 *Melbourne University Law Review* 646.