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## **Abstract**

For nearly 100 years following federation there was not a settled view as to whether there existed but one common law in Australia, as opposed to a common law for each polity in the Australian federation. This article investigates why that was so. It considers the constitutional and juristic underpinnings of the now established position that there is a single common law in Australia, identifying five conceptual versions of the common law in Australia and three stages in its evolution. The article also considers some of the consequences of the single common law in the Australian legal system.

## **Keywords**

constitution, constitutional, law, body, legal, system, jurisprudence

# An Australian August Corpus: Why There is Only One Common Law in Australia

LIAM BOYLE\*

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## Abstract

*For nearly 100 years following federation there was not a settled view as to whether there existed but one common law in Australia, as opposed to a common law for each polity in the Australian federation. This article investigates why that was so. It considers the constitutional and juristic underpinnings of the now established position that there is a single common law in Australia, identifying five conceptual versions of the common law in Australia and three stages in its evolution. The article also considers some of the consequences of the single common law in the Australian legal system.*

## I Introduction

The simple proposition that there is a single common law in Australia (the ‘proposition’) was not finally endorsed by the High Court until the late 1990s. Thus, for nearly 100 years following federation there was not a settled view as to whether, as in the United States, each polity within the Australian federation has its own individual common law, or whether in Australia there is but a single body of common law, as modified by statute, applicable in every court.

Many distinguished writers have expressed their views on the subject, but until recently none commanded general assent. Even when the existence of the single common law was agreed, there was no doctrinal consistency for its justification. Sir Owen Dixon wrote extensively on the subject and inspired a great deal of debate. But his view, while undoubtedly influential, was forcefully critiqued by notable scholars. In the light of common law developments and divergences, some of Sir Owen Dixon’s reasoning became doubtful.

Significant force for change came in the late 1960s when, in Australia as in England, there emerged a clearer appreciation of Australia’s development as an independent nation. From the 1980s the language used by certain members of the High Court consistently demonstrated support for a single Australian common law. In this era, a number of decisions

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assumed without elaboration the existence of an Australia-wide common law. In *Lange v Australian Broadcasting Corporation* ('*Lange*') the proposition was explicitly endorsed unanimously by the High Court,<sup>1</sup> although this did not settle the matter. It was not until *Lipohar v The Queen* ('*Lipohar*') that a clear constitutional and juristic basis for the proposition was expatiated by the High Court.<sup>2</sup>

Since *Lipohar*, the High Court has not doubted the proposition and it is now firmly part of the Australian legal framework, having been confirmed and explained by a number of subsequent decisions.<sup>3</sup> That it should have taken until 1999 for this issue to be resolved is perhaps surprising,<sup>4</sup> especially as this issue was contemplated at federation and in the light of the fact that the United States had to grapple with a similar issue at a comparatively early stage, albeit in a different constitutional and historical setting.<sup>5</sup>

As an implication of the Australian legal system with significant consequences, the proposition that Australia has but one common law ought surely to be firmly grounded in Australian constitutional law, not least to ensure public confidence in the legal system. It is therefore important to understand conceptually why there is a single common law, how it is grounded, and how and why the debate has changed over the years. This article examines the history, conceptual basis, and certain consequences for the now settled view that in Australia there is only one body of common law, which, together with the *Constitution*, and the federal, state and territory laws, forms 'one system of jurisprudence'.<sup>6</sup>

<sup>1</sup> (1997) 189 CLR 520.

<sup>2</sup> (1999) 200 CLR 485.

<sup>3</sup> *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 61 [23] (Gleeson CJ, Gaudron and Gummow JJ); *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 514–17 [2]–[15] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 71 [38] (Gummow and Hayne JJ); *CSR Ltd v Eddy* (2005) 226 CLR 1, 27 [54] (Gleeson CJ, Gummow and Heydon JJ); *Tofilau v The Queen* (2007) 231 CLR 396, 496 [322] (Callinan, Heydon and Crennan JJ); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 252 [102] (Gummow, Hayne and Heydon JJ); *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *PGA v The Queen* (2012) 245 CLR 355, 396 [111] (Heydon J).

<sup>4</sup> See WA Wynes, *Legislative, Executive and Judicial Powers in Australia* (Law Book, 5th ed, 1976) 58, which suggested that it is a question not without practical importance. However, some commentators suggested that the proposition is mostly of academic interest and has little practical significance. See, eg, Alex C Castles, 'The Reception and Status of English Law in Australia' (1963) 2 *Adelaide Law Review* 1, 11; Bernard O'Brien, 'The Law Applicable in Federal Jurisdiction (Pt 2)' (1977) 2 *University of New South Wales Law Journal* 46, 60.

<sup>5</sup> Following *Swift v Tyson*, 41 US 1 (1842), significant commentary developed on the issue of separate common laws. Notably, however, *Swift v Tyson*, 41 US 1 (1842) was later overturned: see *Erie RR Co v Tompkins*, 304 US 64, 78–9 (1938), which also overturned *Black & White Taxicab & Transfer Co v Brown & Yellow Taxicab & Transfer Co*, 276 US 518, 533–4 (1928).

<sup>6</sup> *Lange* (1997) 189 CLR 520, 564. The origin of this felicitous expression in Australia appears to lie with Sir Harrison Moore in *The Constitution of the Commonwealth of*

In considering the development of the theoretical underpinnings of an Australian single common law, the article identifies five conceptual versions of the common law in Australia and three stages in the common law's evolution as Australia developed as a nation. These stages explain how and why the debate has changed over time. As part of this evolution, this article also illustrates the significance of the judicial system established by the *Constitution* and the notion of Australian sovereignty. Some of the consequences of the single common law, and their significance, are canvassed later in the article.

## II Some Preliminary Propositions

The phrase 'common law' has a variety of meanings.<sup>7</sup> For the purposes of this article it is taken to refer to that body of judge-made law enforced and developed by the courts, which includes equity and other specialist areas of law such as admiralty. That judge-made element should not, however, obscure the fact that, as Leeming JA recently commented, common law 'is and always has for the most part been sourced in statute and is unintelligible without reference to statute'.<sup>8</sup>

As to a 'single' common law, for the purposes of this article this adjective refers to the notion that the common law in Australia is provided from a single body of law and enforced by the different courts in a unified manner. It refers to more than a mere application of uniform but conceptually discrete streams of law,<sup>9</sup> and may be contrasted with the position, noted above, whereby each polity within the Australian federation has its own individual common law, discretely enforced by the courts of the various polities.

By way of contrast, the United States has distinct bodies of common law. This arises chiefly because the United States Supreme Court is a federal court, without appellate jurisdiction in respect of state cases not involving federal law. Therefore the various state supreme courts are ultimate appellate courts, free to enforce and develop their own distinct common law for each state. Further, and separate from the various common laws of the states, there exists in the United States a federal common law, being a distinct body of common law developed by and binding on federal courts.<sup>10</sup> While it is settled that there is no 'general'

*Australia* (Charles Maxwell, 1910), 5. In using the expression Moore cited *Claffin v Houseman*, 93 US 130 (1876).

<sup>7</sup> See, eg, the definition of 'common law' in *Jowitt's Dictionary of English Law* (2010, 3rd ed).

<sup>8</sup> Justice M Leeming, 'Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room' (2013) 36 *University of New South Wales Law Journal* 1002, 1004. This was also observed as far back as Hale: see Sir Matthew Hale, *The History of the Common Law of England* (Nutt and Gosling, 3rd ed, 1739) 3.

<sup>9</sup> See also Mark Leeming, 'Common Law within Three Federations' (2007) 18 *Public Law Review* 186, 187.

<sup>10</sup> For a broad overview of the comparative systems in the United States, Canada and Australia, see *ibid*.

federal common law, the precise scope of the federal common law in the United States is unclear.

### III The Early Views

#### *A Effectively a Single Common Law*

At federation, the question of what laws were to operate under the *Constitution* was not overlooked. The American constitutional model had ‘exercised a persuasive and powerful influence’ during the drafting and debating of the *Commonwealth Constitution*.<sup>11</sup> The delegates and commentators were well aware of the position of the United States Supreme Court vis-à-vis state supreme courts. In particular, they were aware of the debate in the United States about the existence and scope of federal common law.

The views at federation recognise that the common law in the colonies was English common law, and demonstrate that the common law in Australia at the time of federation was uniformly English common law. The colonial supreme courts administered the common law rules and principles developed in England, with superintendence by the Privy Council, which maintained unity of the common law in Australia. Although the role of the Privy Council was questioned during the federation debates, the singularity of the common law was not. South Australian barrister and politician, Sir Josiah Symon, saw the creation of a High Court of Australia as maintaining the uniformity of the common law in Australia, in substitution for the role played by the Privy Council:

Uniformity, it is said, will not be preserved. Well, the law, of course, is always proverbially uncertain. We are guided by the House of Lords, not by the Privy Council. We are bound by the decisions of the House of Lords as long as we are part of the empire. The High Court of Justice here — the Federal High Court will be bound to give effect to English law as expounded in the highest court available to English-speaking people, and the uniformity will be maintained just as effectually without the intervention of the Privy Council upon a discretionary appeal, such as is proposed, as if the right of appeal were retained in its full force.<sup>12</sup>

These views were similar to those expressed in an earlier Victorian Royal Commission Report, which suggested the creation of an Australian court of appeal for the colonies.<sup>13</sup> This suggested court was intended to

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<sup>11</sup> Sir Zelman Cowen, ‘Diversity Jurisdiction: The Australian Experience’ (1955) 7 *Res Judicatae* 1.

<sup>12</sup> *Official Report of the National Australasian Convention Debates*, Melbourne, 11 March 1898, 2308 (Sir Josiah Symon). Although some years later his zeal for abolishing the Privy Council had changed, he maintained that the Privy Council and the House of Lords provided uniformity of the common law in the Empire: Sir Josiah Symon, ‘Australia and the Privy Council’ (1922) 4 *Journal of Comparative Legislation and International Law* 137, 141–2, 150.

<sup>13</sup> Victoria, Royal Commission on Intercolonial Legislation, *First Report* (1871).

allow a more uniform application of English law in the Australian colonies without having to resort to the far away Privy Council (again this assumed that the same body of common law was being applied in each colony in Australia).<sup>14</sup> Rejecting this suggestion, the Lord President of the Privy Council observed that a function of the Privy Council was to ensure ‘the uniformity of the *law of England* in those colonies’.<sup>15</sup>

Quick and Garran, commentating on the *Constitution* before it had commenced, had a clear view of Australia’s position. They saw the manifest differences between the United States’ position, especially the United States Supreme Court’s status as a federal court, and the Australian position, where under s 73 of the *Constitution* the High Court is a national court that deals with appeals from both federal and state courts.<sup>16</sup> In their view:

Throughout the Commonwealth of Australia, the unlimited appellate jurisdiction of the High Court will make it — subject to review by the Privy Council — the final arbiter of the common law in all the States. The decisions of the High Court will be binding on the courts of the States; and thus the rules of the common law will be — as they always have been — the same in all the States. In this sense, that the common law in all the States is the same, it may certainly be said that there is a common law of the Commonwealth.<sup>17</sup>

It is interesting to note that, although Quick and Garran clearly avowed a single common law view, they appear to reach this conclusion in a practical sense, because the common law in the states is (and always had been) the same. That is, they do not appear to have treated the body of common law in Australia under the *Constitution* as a single corpus; there was, rather, effectively a single common law of the Commonwealth because the rules of the common law were the *same* in each state, as overseen by the High Court.<sup>18</sup> This interpretation is also supported by a later text by Quick in which he discussed the states being able to modify ‘the common law of their States’.<sup>19</sup>

### **B *Discrete Bodies of Common Law***

A different view was given by Andrew Inglis Clark, who argued that each state would maintain its own common law. Clark was heavily influenced by the *United States Constitution*. In his design of the federal judicature under the *Australian Constitution* he proposed that the American model

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<sup>14</sup> Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 735, citing Victoria, Royal Commission on Intercolonial Legislation, *First Report* (1871).

<sup>15</sup> *Ibid* 736 (emphasis added).

<sup>16</sup> *Ibid* 785.

<sup>17</sup> Quick and Garran, above n 14, 785.

<sup>18</sup> Cf the interpretation of Priestley JA, who set out three possible interpretations of the assumptions underlying Quick and Garran’s reasoning: see Justice LJ Priestley, ‘A Federal Common Law in Australia?’ (1995) 46 *South Carolina Law Review* 1043, 1054.

<sup>19</sup> Sir John Quick, *The Legislative Powers of the Commonwealth and the States of Australia* (CF Maxwell, 1919) 89.

be adopted, subject to an ‘innovation’ that he thought would ‘prove acceptable to the people of all the colonies’, namely, that the High Court have final jurisdiction to hear appeals from the supreme courts of the states.<sup>20</sup> This would be in substitution for an appeal to the Privy Council from the supreme courts of the states. He suggested that this may also result in divergences from the superior courts in England justified by the ‘varying local exigencies’.<sup>21</sup> Clark recognised that local conditions may require different common law rules.

Clark later argued, in more opaque terms, that the appellate structure under the *Constitution* yielded a different conclusion from that reached by Quick and Garran:

As an appellate tribunal with authority to hear and determine appeals from judgments of the Supreme Court of the States, in cases arising solely under the laws of a State, the High Court will have jurisdiction to decide questions arising under whatever portion of the common law will from time to time constitute a portion of the law of any State.<sup>22</sup>

Clark suggested that the High Court’s jurisdiction in this respect was no different from the appellate jurisdiction exercised by the House of Lords over the judgments of the Court of Sessions of Scotland when dealing with questions of civil law, and no different from the United States Supreme Court’s jurisdiction over civil law questions arising from the judgments of the Supreme Courts of Louisiana and Florida.<sup>23</sup> Justice Priestley, writing extra-curially, took Clark to be making the point that ‘an appeal from a state involving common law would be decided by the High Court based on that state’s common law’.<sup>24</sup> This is likely given that Clark viewed the common law as belonging to each state.<sup>25</sup>

### C *A Legislative Assumption*

The single common law proposition was treated as an assumption in the drafting of the *Judiciary Act 1903* (Cth). Section 80 of that Act, in its original form, required all courts exercising federal jurisdiction to be governed by the ‘common law of England’ where the laws of the Commonwealth did not apply.<sup>26</sup> Professor Zines suggested that Parliament ‘was not using that term in contradistinction to the common law of Australia. The evidence by and large shows that at the time of

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<sup>20</sup> Printed letter by Andrew Inglis Clark, entitled ‘Australasian Federation’ dated 6 February 1891, reproduced in John Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005).

<sup>21</sup> John Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 356.

<sup>22</sup> A Inglis Clark, *Studies in Australian Constitutional Law* (CF Maxwell, 1901) 192.

<sup>23</sup> *Ibid.*

<sup>24</sup> Priestley, above n 18, 1055.

<sup>25</sup> Clark, above n 22, 194.

<sup>26</sup> This was later amended in 1988 to read ‘the common law in Australia’. See Gummow J’s identification of this ‘anachronism’ in *Adams v ETA Foods Ltd* (1987) 19 FCR 93, 95, which precipitated the amendment.

federation the common law was conceived as a single body of law'.<sup>27</sup> Section 80 was based on the premise 'accepted without question' in 1903 that the common law was 'universal and indivisible in character'.<sup>28</sup> In Quick and Groom's 1904 text they commented with respect to s 80 that the common law of England forms part of the laws of each state of the Commonwealth. Accordingly, the High Court, as a court of appeal, was made the final arbiter of the common law in all the states.<sup>29</sup> Quick and Groom concluded that while the states may modify the common law by statute:

[A]part from such modification, by virtue of the right of independent interpretation possessed by the High Court and of its appellate jurisdiction, a uniform system of Common Law will be administered throughout the Commonwealth.<sup>30</sup>

Hence, Quick and Groom saw s 80 as presupposing a uniform, if not singular, common law in Australia. Further, the original Bill of the *Judiciary Act 1903* was drafted by Sir Samuel Griffith, who had a view of the effect of the *Constitution* on the common law in Australia. He was well aware of the United States position and the issues raised by the then prevailing case of *Swift v Tyson*.<sup>31</sup> The effect of s 80 was to avoid some of the issues the United States federal courts had faced regarding competing conceptions of common law.<sup>32</sup>

### D *Early Cases*

Some of the early cases of the High Court addressed the issue of whether there existed a common law in Australia separate to the common law of the states. In *R v Kidman*,<sup>33</sup> Griffith CJ answered that, at least in respect of the rights and prerogatives of the sovereign:

The laws so brought to Australia undoubtedly included all the common law relating to the rights and prerogatives of the Sovereign in his capacity of head of the Realm and the protection of his officers in enforcing them, including so much of the common law as imposed loss of life or liberty for infraction of it.

<sup>27</sup> Leslie Zines, 'The Common Law in Australia: Its Nature and Constitutional Significance' (2004) 32 *Federal Law Review* 337, 340. But see Bradley Selway QC's contrary view: Justice Bradley Selway, 'The Australian Single Law Area' (2003) 29 *Monash University Law Review* 30, 31–2.

<sup>28</sup> *Adams v ETA Foods Ltd* (1987) 19 FCR 93, 95 (Gummow J).

<sup>29</sup> John Quick and Littleton Ernest Groom, *The Judicial Power of the Commonwealth: With the Practice and Procedure of the High Court* (G Partridge & Co, 1904) 206. The authors also contrasted the United States position, where the common law of a state 'may come in time to be widely different in time from the Common Law of another'.

<sup>30</sup> *Ibid* 207. The same position was maintained by Quick in his subsequent works: see Quick, above n 19, 89.

<sup>31</sup> 41 US 1 (1842). Section 80 was itself taken from the *Civil Rights Act of 1866* (US), 14 Stat 27, s 3.

<sup>32</sup> See Priestley, above n 18, 1052; see also Sir Owen Dixon, 'Sources of Legal Authority' in Sir Owen Dixon, *Jesting Pilate* (Law Book, 1965) 202.

<sup>33</sup> (1915) 20 CLR 425.

When the several Australian Colonies were erected this law was not abrogated, but continued in force as law of the respective Colonies applicable to the Sovereign as their head. It did not, however, become disintegrated into six separate codes of law, although it became part of an identical law applicable to six separate political entities.<sup>34</sup>

It is perhaps unfair to hold, as did Sir Zelman Cowen, that this conclusion was simply a mere ‘assertion’.<sup>35</sup> Rather, it was the consequence of a pithy process of reasoning there set out and the then prevailing fundamental conception of the common law as being singularly derived from, and equivalent to, English common law.

In the same case, Isaacs J gave a hint of his support for the single common law proposition. He denied a ‘special common law of the Commonwealth’ and instead spoke of ‘the common law of Australia’ recognising the peace of the King in relation to his Commonwealth ‘just as it recognises the peace of the King in relation to each separate State’.<sup>36</sup> Thus, in his opinion, the common law in Australia was a single body of law the same in terms of recognising the peace of the King whether qua sovereign of the states or Commonwealth.

Following from these opinions, Donald Kerr alluded to the likelihood of there being a common law in force generally throughout the Commonwealth.<sup>37</sup> He doubted Clark’s view that certain American doctrines would be applicable in Australia.<sup>38</sup>

#### IV Sir Owen Dixon and His Influential but Disputed View

##### A *An Inherited and Antecedent Corpus of Law*

Sir Owen Dixon viewed the common law as being the founding law in England and thus in the colonies, which derive their authority from the parliament at Westminster.<sup>39</sup> The common law in the colonies, subject to the laws in force in that colony, was the same as that in England. There was therefore a single common law throughout the colonies, where people ‘share[d] in the possession of the common law’.<sup>40</sup>

The sovereignty of the state, for Sir Owen Dixon, was therefore fundamentally different from the United States position. In the United States, as Holmes J explained in *Black and White Taxicab Co v Brown and Yellow Taxicab Co*, the common law enforced in a state is not the common law generally ‘but the law of that State existing by the authority

<sup>34</sup> Ibid 436 (Griffith CJ).

<sup>35</sup> Sir Zelman Cowen, above n 11, 29.

<sup>36</sup> *R v Kidman* (1915) 20 CLR 425, 445 (Isaacs J), 454 (Higgins J).

<sup>37</sup> Donald Kerr, *The Law of the Australian Constitution* (Law Book, 1925) 27.

<sup>38</sup> Ibid.

<sup>39</sup> Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses* (Law Book, 1965) 43.

<sup>40</sup> Sir Owen Dixon, ‘Two Constitutions Compared’ in Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses* (Law Book, 1965) 105. See also the discussion in Paul Finn, ‘Common Law Divergences’ (2013) 37 *Melbourne University Law Review* 509.

of that State without regard to what it may have been in England or anywhere else'.<sup>41</sup> In Australia, Sir Owen Dixon commented, we subscribe to a different doctrine: '[w]e conceive a state as deriving from the law; not the law as deriving from a State'.<sup>42</sup> He referred to the antecedent operation of the common law as giving the authority to the power of the states and to the Commonwealth. Thus, 'the whole and the parts exist under the law', behind which stands the 'constituent authority at the centre of the British Commonwealth of Nations'.<sup>43</sup> The consequence, for Sir Owen Dixon, was that we 'regard Australian law as a unit' and as a 'single legal system'<sup>44</sup> which includes the 'general common law' and that:

[W]e treat it as the duty of all courts to recognize that it is one system which should receive uniform interpretation and application, not only throughout Australia but in every jurisdiction of the British Commonwealth where the common law runs.<sup>45</sup>

Elsewhere he had spoken of Australia as being governed by a single legal system, which he described as 'a system or corpus composed of the common law'.<sup>46</sup> Under the Australian system the problems of jurisdiction experienced in the United States in cases such as *Swift v Tyson*,<sup>47</sup> and *Erie Railroad Co v Tompkins* were avoided.<sup>48</sup>

Sir Zelman Cowen did not agree with Sir Owen Dixon's reasoning. In his view, it did not necessarily follow that because the authority of the United Kingdom Parliament was derived from the common law, the common law should therefore be singular in all jurisdictions. Why could there not be differences of views in the jurisdictions?<sup>49</sup>

Sir Owen Dixon elaborated on some of his views in his seminal paper 'The Common Law as an Ultimate Constitutional Foundation'.<sup>50</sup> The title of this paper discloses his central thesis that the common law in Australia is conceived as an anterior body of law and provides a foundational basis for our legal system.<sup>51</sup> He acknowledged Sir Zelman Cowen's criticism,

<sup>41</sup> 276 US 518, 532–6 (1928).

<sup>42</sup> Sir Owen Dixon, 'Sources of Legal Authority' in Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses* (Law Book, 1965) 199.

<sup>43</sup> *Ibid* 201.

<sup>44</sup> *Ibid*.

<sup>45</sup> *Ibid* 199.

<sup>46</sup> Sir Owen Dixon, 'Address by the Hon Sir Owen Dixon, KCMG, to the Section of the American Bar Association for International and Comparative Law' (1943) 17 *Australian Law Journal* 138, 140 ('Address').

<sup>47</sup> 41 US 1 (1842).

<sup>48</sup> 304 US 64 (1938). Sir Owen Dixon, above n 42, 202. Dixon had been significantly influenced by the teachings of Sir Harrison Moore, who had made similar arguments: see, for example, Moore, above n 6, 5; Sir Harrison Moore, 'The Federations and Suits between Governments' (1935) 17 *Journal of Comparative Legislation and International Law* 163, 196–9.

<sup>49</sup> See Sir Zelman Cowen, above n 11, 29.

<sup>50</sup> Reprinted in Sir Owen Dixon, above n 40, 203.

<sup>51</sup> In this respect, Dixon's view of the legal system is similar to Kelsen's *grundnorm* concept: see Hans Kelsen, *The Pure Theory of Law* (University of California Press, 2nd ed, 1970). See especially the qualifications Kelsen places on that theory, which Dixon's theory appears to have also. Dixon relied on Salmond, who wrote of the law postulating 'one or more first

but proceeded to discuss the Australian judge's duty to 'administer the common law as an entire system'.<sup>52</sup> He said it was an 'unexpressed assumption' that 'the one common law surrounds us and applies where it has not been superseded by statute'.<sup>53</sup>

Sir Owen Dixon recognised that the appellate jurisdiction of the High Court under the *Constitution* provided a basis for the singular common law in Australia; but he suggested that the true reason for it was the common law existing as an antecedent system of jurisprudence.<sup>54</sup> Consequently, it was improper to speak of distinct bodies of common law in the states and Commonwealth when the source of the law was the same and the system was regarded as a singular unit.

### B *The Rejection of Sir Owen Dixon's View*

Despite being widely acclaimed and subsequently influential,<sup>55</sup> Sir Owen Dixon's view was not initially accepted as strictly logical and some cases treated the common law as involving separate bodies of law in each state.<sup>56</sup> Like Sir Zelman Cowen earlier, Professor Derham suggested that Sir Owen Dixon's conclusion was correct, but the true basis for that conclusion lay in the 'unified system of judicial authorities to declare what the common law is', rather than the existence of the single antecedent system of jurisprudence.<sup>57</sup>

Certainly, as identified by Sir Zelman Cowen, Professor Derham and Justice Priestley, there are problems with Sir Owen Dixon's analysis, the logic of which is not entirely unfolded. His thesis appears to conflate the *grundnorm* or source of the authority, the common law, with the substantive content of the common law rules. Further, it seems to give a fictitious meaning to the common law, different from its ordinary meaning as judge-made law. Sir Owen Dixon's analysis does not explain why there cannot be in the law of certain states divergences that are peculiarly adapted to the needs or exigencies of that state,

causes, whose operation is ultimate, and whose authority is underived': see Sir Owen Dixon, *Jesting Pilate*, above n 39, 207. Dixon was clearly aware of Kelsen's theory: see, for example, the commentary following his paper in Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240, 254. This may also provide an answer to Hayne J's query as to what Sir Owen Dixon may have meant by *an* Ultimate Foundation, rather than *the* Ultimate Foundation: see Hayne, 'Sir Owen Dixon' in Gleeson et al (eds), *Historical Foundations of Australian Law* (Federation Press, 2013) Vol 1, 394. The common law, as a foundational postulate, may be only one of other first causes.

<sup>52</sup> Sir Owen Dixon, *Jesting Pilate*, above n 39, 204.

<sup>53</sup> *Ibid* 205.

<sup>54</sup> *Ibid*.

<sup>55</sup> For example, see *ibid*, 246–54.

<sup>56</sup> See, eg, *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583, 587, 611 (Murphy J); *State Government Insurance Commission (SA) v Trigwell* (1979) 142 CLR 617, 653 (Murphy J); *R v Judge Bland; Ex Parte Director of Public Prosecutions* [1987] VR 225, 233–4 (Nathan J).

<sup>57</sup> Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240, 249 (Professor David Derham of Victoria).

notwithstanding that the source of the authority to decide this extent of adaptation is a postulate of an antecedent singular common law. After all, as the continent went from colony to nation, by a process of gradualism Australian common law diverged from English common law.<sup>58</sup>

Sir Owen Dixon's argument may be valid if the common law is conceived not as deriving from the same source, but rather as a body of law that is the same across the British Dominions—whether as the common law of England, as Sir Owen Dixon once claimed,<sup>59</sup> or by way of some more transcendent notion of common law. When Sir Owen Dixon was writing, this argument commanded much more force because of the way that he, in particular, viewed Australian common law as a part of the broader system of common law, which across the colonies of England was the same, as 'one august corpus', as Holmes J put it.<sup>60</sup> But from at least the 1960s the common law in Australia developed in its own way. We would now regard aspects of Sir Owen Dixon's conception of the common law as antiquated, involving the 'invocation of the common law in a temporal and institutional continuum'—a continuum that is 'no longer recognised'.<sup>61</sup>

For these reasons, some judges and commentators were reluctant, initially, to embrace Sir Owen Dixon's rationale for the single common law proposition. Also relevant to this reluctance was the embedded colonial mentality in some states and underlying sympathy for state sovereignty, as well as a confused attribution of law and courts with politics in a way that denied the integrated nature of the legal system.<sup>62</sup> As McHugh J later speculated, 'the validity of that [single common law] proposition is not as readily apparent to a state judge bound by the authority of his or her own Full Court or Court of Appeal as it is to a judge of a federal court who must apply the common law'.<sup>63</sup> Further, as Professor Zines observed (echoing some of the sentiments of Sir Owen Dixon with regard to state and federal jurisdiction), the error of those who sought to label the common law as primarily 'state' is based on the notion that all law must be either state or Commonwealth.<sup>64</sup> In some instances this creates a false dichotomy that has clouded the thinking of the

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<sup>58</sup> See Finn, above n 40; Justice Toohy, 'Towards an Australian Common Law' (1990) 6 *Australian Bar Review* 185; Sir Garfield Barwick, 'Precedent in the Southern Hemisphere' (1970) 5 *Israel Law Review* 1, 9–11.

<sup>59</sup> Sir Owen Dixon, above n 46, Address, 139.

<sup>60</sup> *Black and White Taxicab Co v Brown and Yellow Taxicab Co*, 276 US 518, 533 (1928).

<sup>61</sup> Justice WMC Gummow, 'The Constitution: Ultimate Foundation of Australian law?' (2005) 79 *Australian Law Journal* 167, 171.

<sup>62</sup> See, eg, Brendan Lim, 'Attributes and Attribution of State Courts — Federalism and the Kable Principle' (2012) 40 *Federal Law Review* 31, 38. Mr Lim argued that the integrated judicial system has an intermediate character between a unitary (Australian) judicial system and a 'categorically federal' system.

<sup>63</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 112. See also *Lipohar* (1999) 200 CLR 485, 507 (Gaudron, Gummow and Hayne JJ).

<sup>64</sup> Zines, above n 27, 347.

Australian legal system and may serve to present a ‘grave impediment’ to the administration of justice.<sup>65</sup>

## V The View of Wynes and Murphy J: State and Federal Common Law

Dr Wynes did not appear to be convinced by Sir Owen Dixon’s view. He favoured the existence of a species of federal common law applicable to the Commonwealth, at least insofar as it applied to Commonwealth statutes. For him, the common law of the Commonwealth was distinct from that of the states.<sup>66</sup>

This approach was also accepted by Murphy J, who was influenced by the American developments. He treated the common law of the states as separate and conceived of a discrete federal body of common law applicable to federal statutes.<sup>67</sup> His Honour later embraced the idea that in Australia there was a uniform common law, although he continued to develop the idea that there was an evolving body of federal common law that operated distinctly from state common law:

The High Court, as the federal Supreme Court, in its role as appellate court in matters of federal as well as state law, by its practice of declaring uniformly the common law in both spheres, has sharply distinguished Australia from the United States of America (where it has been held that there is no federal general common law) and appears to have evolved a federal general common law, indeed a general Australian common law applicable uniformly in federal and state areas except to the extent that it has been superseded by Acts or State Acts. But undoubtedly in Australia as well as in the United States there is federal common law surrounding federal Acts.<sup>68</sup>

But Murphy J, as well as others, also appears to have taken a similar approach to Dr Wynes by regarding the common law as broken up into state bodies particular to that state.<sup>69</sup>

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<sup>65</sup> See Sir Owen Dixon’s view presented at the Commonwealth, Royal Commission on the Constitution of the Commonwealth, *Minutes of Evidence* (1929) Part 3, 789.

<sup>66</sup> Wynes, above n 4, 59.

<sup>67</sup> For example in *Australian Broadcasting Commission v Industrial Court (SA)* (1977) 138 CLR 399, 420–1, Murphy J treated state common law as distinct from federal common law. In *Taylor v Taylor* (1979) 143 CLR 1, 21, *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, 435 and *Baker v Campbell* (1983) 153 CLR 52, 87, his Honour discussed the idea of a federal common law.

<sup>68</sup> *Groves v Commonwealth* (1982) 150 CLR 113, 135. For further commentary on Murphy J’s approach in this respect see Priestley, above n 18, 1064.

<sup>69</sup> For example, *Peacock v The King* (1911) 13 CLR 619, 672 (O’Connor J); *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583, 611 (Murphy J); *State Government Insurance Commission (SA) v Trigwell* (1979) 142 CLR 617, 653 (Murphy J); *R v Judge Bland; Ex Parte Director of Public Prosecutions* [1987] VR 225, 233–4 (Nathan J).

## VI Growing Conviction of an Australian Common Law

### A Introduction

Some, but not all, of Sir Owen Dixon's jurisprudence influenced the views of subsequent judges. It is clear that certain judges were persuaded by his view that Australian law forms part of a unified system. But with the exception of Deane J, there does not seem to have been much agreement, at least explicitly, with the majority of Sir Owen Dixon's reasoning.

The critics of Sir Owen Dixon were in part vindicated by developments of the common law in the 1960s, especially *Parker v The Queen* ('*Parker*')<sup>70</sup> and *Australian Consolidated Press Ltd v Uren*.<sup>71</sup> In these cases, there was discussion of the common law diverging from English common law. If it were accepted that, in *Parker*, Dixon CJ was declaring an Australian common law, it becomes necessary to ask when and how did Australia's common law become different from England's? Under Sir Owen Dixon's initial thesis the common law was to 'receive a uniform interpretation and application, not only throughout Australia but in every jurisdiction of the British Commonwealth where the common law runs';<sup>72</sup> any deviation was perceived to be an 'evil'.<sup>73</sup>

Barwick CJ recognised the inexorable growth in independence of Australian common law from that of England. In *Mutual Life & Citizens Assurance Co Ltd v Evatt*, his Honour spoke of the High Court's role in declaring the common law for Australia.<sup>74</sup> Shortly after this case, in an extra-curial speech delivered in Jerusalem, his Honour added that it 'could be said that there has emerged with a clarity not earlier perceived a common law of England and a common law of Australia'.<sup>75</sup>

In *Skelton v Collins*, Windeyer J wrote in broad terms of the common law of England becoming the common law of Australia, and of the High Court being 'the guardian for all Australia of the *corpus iuris* committed to its care by the Imperial Parliament'.<sup>76</sup>

This momentum was no doubt also brought about by a change in understanding of the judicial role. In Australia, where the High Court was already permitted to overrule its own decisions,<sup>77</sup> it became widely regarded circa the 1960s that judges did not just discover the law from some transcendent source, but that judges in fact had a role in making and

<sup>70</sup> (1963) 111 CLR 610, 632 (Dixon CJ).

<sup>71</sup> (1967) 117 CLR 221, 241.

<sup>72</sup> Sir Owen Dixon, above n 46, Address, 139.

<sup>73</sup> *Wright v Wright* (1948) 77 CLR 191, 210. Although compare the position today: Heydon, Leeming, and Turner (eds), *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths, 5th ed, 2014) xxii–xxiii.

<sup>74</sup> (1968) 122 CLR 556, 563.

<sup>75</sup> Barwick CJ, above n 58, 39.

<sup>76</sup> (1966) 115 CLR 94, 134. See also his Honour's earlier remarks in *Gartner v Kidman* (1962) 108 CLR 12, 23.

<sup>77</sup> See, eg, WN Harrison, 'Precedent in Australia' (1934) 7 *Australian Law Journal* 405.

defining the law.<sup>78</sup> With this understanding, the High Court was then more inclined to reformulate the law for Australian people and society.

Perhaps the most significant decision of this era for demonstrating the importance of a distinct Australian identity is *Viro v The Queen*.<sup>79</sup> This case involved a comprehensive assessment of the doctrine of precedent in Australia, particularly the role of the Privy Council. It was frankly acknowledged that Australian common law was not necessarily the same as English law and that the Privy Council would apply Australian common law.<sup>80</sup> Stephen J in particular recognised that legislative changes to Privy Council appeals, chiefly brought about by the *Privy Council (Limitation of Appeals) Act 1968* (Cth) and the *Privy Council (Appeals from the High Court) Act 1975* (Cth), which effectively precluded appeals to the Privy Council from the High Court, distorted the doctrine of precedent in Australia by permitting essentially two ultimate appellate courts.<sup>81</sup> For present purposes, the significance of these propositions is: first, that they confirmed that Australia would have its own common law; and, second, that the manner of its enforcement at this time was unclear.<sup>82</sup>

The passage of the *Australia Acts 1986* (UK) removed any remaining confusion regarding the role and function of the Privy Council. These Acts had the effect of affirming Australia's sovereignty and, importantly, removing the Privy Council from the Australian hierarchy of courts. It has been suggested that 'there was always a chance that different lines of lawmaking would create diversity in the common law in Australia as between that of an Australian jurisdiction and England and as between the several Australian jurisdictions'.<sup>83</sup> To the extent that there was any doubt, after the passage of these Acts the High Court conclusively stood alone at the top of the judicial apex in Australia. English common law, by this point, was foreign law.<sup>84</sup>

These developments placed more attention on the *Constitution* as being the *grundnorm* for the Australian legal system. British common law heritage was taken out of focus, with the 'basic law of the Constitution'<sup>85</sup> now seen to be the 'ultimate foundation of Australia law'.<sup>86</sup>

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<sup>78</sup> Sir Anthony Mason, 'Future directions in Australian law' in Geoffrey Lindell (ed), *The Mason Papers* (Federation Press, 2007) 16. However, as noted by Blackshield, certain notable English judges continued to yearn for uniform omnipresence: AR Blackshield, *The Abolition of Privy Council Appeals* (Adelaide Law Review Research Paper No 1, 1978) 78. (1978) 141 CLR 88.

<sup>79</sup> (1978) 141 CLR 88.

<sup>80</sup> Ibid 94 (Barwick CJ), 119 (Gibbs J).

<sup>81</sup> Ibid 130. See the problems identified in *National Employers' Mutual General Insurance Association Ltd v Waind (No 2)* [1978] 1 NSWLR 466.

<sup>82</sup> *Viro v The Queen* (1978) 141 CLR 88 is considered in meticulous detail in Blackshield, above n 78.

<sup>83</sup> Justice M Kirby, 'Living with Legal History in the Courts' (2003) 7 *Australian Journal of Legal History* 17, 25.

<sup>84</sup> *Adams v ETA Foods Ltd* (1987) 19 FCR 93, 95.

<sup>85</sup> *Lange* (1997) 189 CLR 520, 564.

<sup>86</sup> See Gummow J, above n 61; see also *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 570–1.

However, the question remains: why could the High Court not then go one step further and recognise a divergent common law of a State? If Australian common law could be recognised as a species of common law, why not state and federal common law?

### **B *Mason CJ, Brennan, Deane, Toohey and McHugh JJ***

Against the background of these views, Australia's changed legal relationship with the United Kingdom, as well as a growing concept of 'nationhood',<sup>87</sup> from around the 1980s, the language of the High Court began to change and certain judges spoke with more conviction of a 'common law of Australia'. Contextually, this necessarily presupposed the existence of a singular body of common law in Australia, in contrast with the common law of England. This change represented an important step in the acceptance of the proposition.

Sir Owen Dixon's influence was explicitly recognised by Deane J in *Thompson v The Queen*, where his Honour supported the idea of a 'national law' that transcends internal state or territorial boundaries and operates, in Dixon's words, as an entire system.<sup>88</sup> One of the issues in that case involved the question of whether the deaths or the cause of deaths of the victims occurred in the Australian Capital Territory or in New South Wales. Deane J considered the local laws of the various states and territories to be components of a single national legal system and that the *Constitution* assumes the substratum of the common law upon which it was founded.<sup>89</sup> Deane J then employed a biblical metaphor to confirm his support for the single common law proposition:

Subject to the *Constitution* itself and to valid statutory provisions, the substantive law of Australia is the common law, which transcends internal State or Territorial boundaries and operates as 'an entire system'. ... That one body of law is the law of the Australian nation, which speaks with a single voice and not as a babel of nine different Commonwealth, State or Territory voices all speaking at the same time but saying different things.<sup>90</sup>

Earlier, Deane J had also explicitly relied on Sir Owen Dixon's jurisprudence in concluding that the *Constitution*, by federating the former colonies into a single nation, envisaged a unitary system of law.<sup>91</sup> However, in explaining this conclusion Deane J was somewhat guarded in fully accepting Sir Owen Dixon's complete thesis:

Regardless of whether the common law is seen as providing a source of constitutional authority or as having been incorporated in the legal system which the *Constitution* established, its pervading influence at all levels of the

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<sup>87</sup> See, for example, the discussion in *Davis v Commonwealth* (1988) 166 CLR 79, 110 (Brennan J).

<sup>88</sup> (1989) 169 CLR 1, 34–5.

<sup>89</sup> *Ibid* 34.

<sup>90</sup> *Ibid* 35, citing Dixon.

<sup>91</sup> *Breavington v Godleman* (1988) 169 CLR 41, 121.

national system is a powerful justification of the perception of that system as a unitary one in the sense that I have explained.<sup>92</sup>

This idea of a unitary system of law became partially realised after the regular vesting of federal jurisdiction in state courts and the development of cross-vesting legislation. These developments allowed courts to exercise a mixture of federal, state and territory jurisdiction and worked towards consolidating the idea in people's minds that the Australian legal system was notionally unified.<sup>93</sup> This provided another relevant contextual consideration to the development and ultimate acceptance of the single common law proposition.

Mason CJ, Brennan, Deane, Toohey and McHugh JJ were largely responsible, collectively, for the development and ultimate acceptance of the single common law proposition. More frequently in cases involving common law principles were phrases used such as 'chart the course for the common law of Australia';<sup>94</sup> 'whether the common law of Australia recognises';<sup>95</sup> 'reject the existence of such a rule as now part of the common law of Australia';<sup>96</sup> 'the common law of Australia'; or 'the Australian common law' more broadly.<sup>97</sup>

### C Concerns for the Judges of Intermediate Courts

This momentum presented some issues and created some concerns for the judges of intermediate courts. Justice Priestley, in a detailed and influential paper presented at a conference in the United States, argued for the existence of a discrete federal common law in Australia. He further argued that the common law was not only individual to each state, but that it might diverge from other states. Thus there could be different rules of common law applicable in different states in Australia.<sup>98</sup> Justice Priestley agreed with Sir Zelman Cowen's earlier criticism.<sup>99</sup> He added that it seemed impossible to deny that the common law in two states, for example, may be different, and he gave as an example the development of Mareva injunctions in Australia.<sup>100</sup>

<sup>92</sup> Ibid.

<sup>93</sup> See Sir Owen Dixon, 'The Common Law', above n 57. See also the discussion in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; and *Re Wakim, Ex parte McNally* (1999) 198 CLR 511.

<sup>94</sup> *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 201 (Wilson and Toohey JJ).

<sup>95</sup> *Jago v District Court (NSW)* (1989) 168 CLR 23, 25 (Mason CJ).

<sup>96</sup> *R v L* (1991) 174 CLR 379, 389 (Mason CJ, Deane and Toohey JJ).

<sup>97</sup> See *R v Rogerson* (1992) 174 CLR 268, 299 (McHugh J); *Secretary, Department of Health & Community Services v B* (1992) 175 CLR 218, 323 (McHugh J); *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 15 (Mason CJ and McHugh J), 29 (Brennan J); *Dietrich v The Queen* (1992) 177 CLR 292, 298, 305 (Mason CJ and McHugh J), 327 (Deane J); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 508 (Mason CJ and Toohey J) 556 (McHugh J).

<sup>98</sup> Priestley, above n 18, 1065.

<sup>99</sup> Ibid 1062.

<sup>100</sup> Ibid 1066–7.

At the same conference, Justice Gummow presented a paper in which he argued for the opposite conclusion of Justice Priestley, stating that ‘there is no distinct common law in one or the other state’.<sup>101</sup> Justice Gummow explicitly recognised the High Court’s changing language.<sup>102</sup> Brooking J of the Victorian Court of Appeal relied on the single common law to reject the submission that, with respect to the construction of collective agreements, the Victorian common law differed from that of New South Wales. Brooking J referred to the unifying power of the High Court and held that in ‘Australia the common law cannot differ from State to State except as a result of statutory modification.’<sup>103</sup>

Despite the various dicta of the High Court, the Full Court of the Federal Court in *Commonwealth v Mewett* (*‘Mewett’*),<sup>104</sup> like some earlier judges, did not share Sir Owen Dixon’s concept of the Australian legal system. Cooper J, with whom Spender J agreed, had indicated in passing a distinction between the common law of New South Wales and the common law of England as modified by the *Constitution*. In discussing whether there was a common law of the Commonwealth (a federal common law), his Honour accepted that there was no ‘body of law separate and distinct from the common law of the several states’, and that there was a common law of the state capable of being applied.<sup>105</sup>

Similarly, Lindgren J held that, on the facts of that case, the common law of Victoria was to determine the liability of the Commonwealth’s position.<sup>106</sup> His Honour also noted that the parties had proceeded on the basis that there was no Commonwealth common law of contract or tort as distinct from the common law of the states.<sup>107</sup>

### ***D Further Developments in the High Court***

Shortly after the Full Federal Court’s judgment in *Mewett*,<sup>108</sup> three significant cases were handed down by the High Court that clarified and developed the single common law proposition. In *Mewett*, on appeal to the High Court, Gaudron J thought it necessary to clarify an ‘incongruity which presents itself in cases of this kind’, that so far as the claim was based in tort, it should be determined by the common law of Australia, and not by ‘the common law of Victoria’.<sup>109</sup> Her Honour relied on dicta in two of those three significant cases to say ‘there is one common law, the common law in Australia, which may be modified in its operation in the

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<sup>101</sup> Justice WMC Gummow, ‘Full Faith and Credit in Three Federations’ (1995) 46 *South Carolina Law Review* 979, 989.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ryan (Receiver & Manager of Homfray Carpets Australia Pty Ltd) v Textile Clothing & Footwear Union Australia* [1996] 2 VR 235, 238.

<sup>104</sup> (1995) 59 FCR 391.

<sup>105</sup> *Ibid* 401.

<sup>106</sup> *Ibid* 417.

<sup>107</sup> *Ibid* 418.

<sup>108</sup> (1997) 191 CLR 471.

<sup>109</sup> *Ibid* 526.

States and Territories by Commonwealth, State or Territory legislation'.<sup>110</sup>

Those three significant decisions were *Western Australia v Commonwealth (the 'Native Title Act Case')*,<sup>111</sup> *Kable v Director of Public Prosecutions (NSW) ('Kable')*,<sup>112</sup> and, importantly, *Lange*, where the proposition was addressed in more explicit terms. In *Lange*, the High Court spoke on this point in a single judgment. Having referred broadly to Sir Owen Dixon's conclusions the Court said:

There is but one common law in Australia, which is declared by this Court as the final court of appeal. In contrast to the position in the United States, the common law as it exists throughout the Australian States and Territories is not fragmented into different systems of jurisprudence, possessing different content and subject to different authoritative interpretations.

It makes little sense in Australia to adopt the United States doctrine so as to identify litigation between private parties over their common law rights and liabilities as involving 'State law rights'. Here, '[w]e act every day on the unexpressed assumption that the one common law surrounds us and applies where it has not been superseded by statute'. Moreover, that one common law operates in the federal system established by the *Constitution*. ... The *Constitution*, the federal, State and territorial laws, and the common law in Australia together constitute the law of this country and form 'one system of jurisprudence'.<sup>113</sup>

What one derives from these developments over three or so decades is a growing sense of conviction from the High Court that a duty reposed in it by the *Constitution* was to settle and declare a common law for the nation. It had become clear that the courts by this stage would not apply English common law or the law found from some 'brooding omnipresence', and the Court would not be declaring the common law for a particular state or territory.<sup>114</sup> From this time, the Court was making it clearer—overcoming the latent doubts from older days—that the common law in Australia was singular and now juristically, geographically and socially Australian in nature.

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<sup>110</sup> Ibid 526 (citations omitted).

<sup>111</sup> (1995) 183 CLR 373, 487, where six members of the High Court, in discussing whether the common law could be made a law of the Commonwealth, cited Sir Owen Dixon's speech in which he said that 'we act every day on the unexpressed assumption that the one common law surrounds us'.

<sup>112</sup> (1996) 189 CLR 51. McHugh J made no attempt to hide his view of the common law in Australia when he said 'that there is a common law of Australia as opposed to a common law of individual States is clear'. His Honour contrasted the United States position to argue that 'a unified common law' applies in each state 'but is not itself the creature of any State' (at 112–13).

<sup>113</sup> (1997) 189 CLR 520, 562–6 (citations omitted).

<sup>114</sup> *Southern Pacific Company v Jensen* 244 US 205, 222 (1917) (Holmes J).

## VII The Now Established View: The Appellate Structure Under the *Constitution* and the Doctrine of Precedent

### A *The Majority View in Lipohar*

The single common law proposition is now an entrenched view of law in Australia and, since *Lange*, numerous cases have confirmed this. However, that position was not reached on account of *Lange* alone. Despite unanimous support from the High Court, *Lange* did not completely settle the position of Australian common law. The reliance placed on Sir Owen Dixon's analysis, and the explication and elaboration by the High Court of that analysis, was not pellucid, and arguably still subject to dispute. That dispute was brought to the fore in *Lipohar*.

*Lipohar* was heard by the Supreme Court of South Australia one month after *Lange* was handed down by the High Court in *Lange*.<sup>115</sup> The case covered a conspiracy to defraud at common law where the elements of that offence took place in various states and overseas. There was an issue in this case about the connection between South Australia, the State where the offence was prosecuted, and the elements of the common law offence. The appellants argued that the indictment was not justiciable in South Australia under the law of the forum. The Full Court rejected that argument.

On appeal to the High Court, Gleeson CJ adopted what was said in *Lange* regarding the single common law proposition.<sup>116</sup> He continued, however, to explain that the common law recognises the states 'as separate jurisdictions, or law areas, where to do so is appropriate in the application of common law principles.'<sup>117</sup> As to the effect of this, he added:

The premise that there is but one common law in Australia, not fragmented between different States, does not require or justify the conclusion that, when a South Australian Act refers to a common law offence, it is referring to conduct occurring anywhere in Australia regardless of any connection with South Australia.<sup>118</sup>

Gaudron, Gummow and Hayne JJ considered the point in significant detail. Their judgment provides a persuasive constitutional and juristic basis for the single common law proposition. For their Honours, the focus was on the doctrine of precedent and the appellate structure in Australia. They discussed the importance of the doctrine of precedent to the understanding of the law in Australia, being 'that a court or tribunal higher in the hierarchy of the same juristic system, and thus able to reverse the lower court's judgment, has laid down that principle as part of

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<sup>115</sup> (1997) 70 SASR 300.

<sup>116</sup> *Lipohar* (1999) 200 CLR 485, 500 [24].

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid* 501 [26].

the relevant law'.<sup>119</sup> They then outlined the role of the High Court at the apex of the Australian judicial hierarchy by virtue of s 73 of the *Constitution*, concluding that:

This Court is the final appellate court for the nation. When an appeal is dealt with in this Court, and its reasons are published, those reasons will form part of the common law of Australia and will bind *all* courts in the country. The Court never has and never should seek to identify some common law rule that is peculiar to one or more of the States. And yet that is the role which would be assigned to it if there were more than a single common law of Australia.<sup>120</sup>

Additionally, their Honours rejected an analysis based on the sources of legal authority derived from the state as a body politic, saying that this 'kind of inquiry (or an analysis by reference to more abstract notions of sovereignty) is apt to mislead and it does not lead to any conclusion that there is more than one common law of Australia'.<sup>121</sup> By focusing on the doctrine of precedent and the appellate structure in Australia, and in the light of the divergence in Australian common law, the plurality judgment impliedly rejected Sir Owen Dixon's thesis that the antecedent corpus of common law, as an ultimate foundation of law, provided the source of the single common law proposition in Australia.<sup>122</sup> Instead, their analysis emphasises the centrality of s 73 of the *Constitution*.

Kirby J accepted the single common law proposition. However, he was reluctant to accept that what followed from that proposition was the consequence that, regardless of how tenuous the connection between the forum and the offence, 'a common law offence is committed in every jurisdiction of Australia and so may be prosecuted in any'.<sup>123</sup> Such a consequence, in Kirby J's view, was inconsistent with the federal structure prescribed by the *Constitution*.

## B The Sole Dissent

Callinan J rejected the single common law proposition. He felt that he was not bound by the unequivocal statement in *Lange* because it was obiter.<sup>124</sup> His Honour was firmly of the view that there existed in Australia separate bodies of common law for each state, just as there were different bodies of statute law for each state. Because of different conditions and exigencies in each state, the 'creative element in the work

<sup>119</sup> Ibid 506 [46], citing *Favelle Mort Ltd v Murray* (1976) 133 CLR 580, 591 (Barwick CJ). See also *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* (1988) 82 ALR 499, 504 (Gummow J).

<sup>120</sup> *Lipohar* (1999) 200 CLR 485, 507 [50] (emphasis in original). See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 574, where Gummow and Hayne JJ commented that there was a single common law in Australia because 'all avenues of appeal lead ultimately to [the High] Court' and that '[the High] Court, as the final appellate court for the country, is the means by which that unity in the common law is ensured'.

<sup>121</sup> *Lipohar* (1999) 200 CLR 485, 506–7 [48].

<sup>122</sup> See also Gummow J, above n 61, 171.

<sup>123</sup> *Lipohar* (1999) 200 CLR 485, 557 [179].

<sup>124</sup> Ibid 582 [251], 584 [261].

of Supreme courts in moulding the common law may operate to provide a different result in a different state'.<sup>125</sup> He disagreed with Sir Owen Dixon's view of the law and supported Justice Priestley's extra-curial views discussed above. In Callinan J's view, the High Court, as a final court of appeal for this country:

[O]wes its establishment (among other things) to a perceived need for the provision of an alternative final court of appeal to the Privy Council, which then, and subsequently, decided cases emanating from a diversity of jurisdictions with different histories, different conditions, and no doubt, in consequence, some differences in the common law applied in them.<sup>126</sup>

This was seemingly in response to Sir Owen Dixon's argument that the appellate structure in Australia was based around the acceptance of a single common law.

Callinan J accepted Justice Priestley's argument that the presence of the High Court will act as a brake on any developments but that in the meantime any pronouncement by a court of appeal or full court will be the law in the respective state.<sup>127</sup> This point, however, is answered by the plurality judgment, where they say that disagreement by intermediate appellate courts within a hierarchy will indicate that not all of these courts will have correctly applied or declared the common law:

But it does not follow that there are as many bodies of common law as there are intermediate courts of appeal. The situation, which arises is not materially different to that which arises where trial judges in different courts or within the same court reach different conclusions on the same point of law.

... Until the High Court rules on the matter, the doctrines of precedent, which bind the respective courts at various levels below it in the hierarchy, will provide a rule for decision. But that does not dictate the conclusion that until there is a decision of the High Court the common law of Australia does not exist, any more than before 1873 it would have been true to say that there was not one English common law on a point because the Court of King's Bench had differed from the Court of Common Pleas.<sup>128</sup>

With respect, the plurality's view is preferable as being more in keeping not only with the doctrine of precedent and the appellate structure of the Australian legal system, but also with the declaratory theory of the common law.<sup>129</sup> There may also be conflict of laws

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<sup>125</sup> Ibid 574 [231].

<sup>126</sup> Ibid 577–8 [241].

<sup>127</sup> Ibid 582 [250]. Justice Priestley's alternate view has indeed proved tenacious. More recently, the Solicitor-General for Victoria queried the logic of the plurality's conclusion in *Lipohar*: see Stephen McLeish, 'The Nationalisation of the State Court System' (2013) 24 *Public Law Review* 252, 262–3.

<sup>128</sup> *Lipohar* (1999) 200 CLR 485, 505–6 [45]–[46]. The same point was made earlier by Harrison: see Harrison, above n 77, 407.

<sup>129</sup> See, for example, Isaacs J's discussion in *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261, 275–6. See also *PGA v The Queen* (2012) 245 CLR 355, 420 [178] (Bell J); Allan Beever 'The Declaratory Theory of Law' (2013) 33 *Oxford Journal of Legal Studies* 421.

difficulties associated with the absence of an equivalent to s 109 applicable to common law under the *Constitution*, were divergent state law to conflict with a divergent body of federal common law.<sup>130</sup> Further, if there were a body of federal common law, there would be s 109 difficulties with state legislation intersecting with that federal law.<sup>131</sup> It is, rather, proper to conceive of the single Australian common law as an antecedent but evolved and extant body of law, subject to modification by the *Constitution* and a competent legislature, and not strictly a body of federal or state law. It is a nationally-applicable corpus, enforceable by federal, state and territory courts and overseen by the High Court. Were it otherwise, conflict or competition would be inevitable.

After *Lipohar*, and despite Callinan J's judgment, the position became clear.<sup>132</sup> There can no longer be any suggestion that the common law in Australia is divided into a 'mosaic of bodies' as between the states, with a potential for it to diverge in a particular jurisdiction.<sup>133</sup> And the previous arguments advocating the existence of a discrete federal body of common law no longer have any basis. The single common law has a constitutional dimension. The judgment of Gaudron, Gummow and Hayne JJ in *Lipohar* carefully sought to articulate in more detail than in *Lange* this constitutional and juristic element, grounded in the operation of s 73 of the *Constitution* together with the doctrine of precedent. However, it is difficult to disaggregate these concepts, and it may be said that the two are inextricably bound: each will inform the other.

### VIII Section 73 of the *Constitution* and the Doctrine of Precedent

There is a unified Australian judicial system of state and federal courts prescribed by the *Constitution*. Under s 73, the High Court exercises a supervisory role over the integrated Australian court system. Although earlier subject to the supervision of the Privy Council, which previously stood above the High Court at the apex of the judicial system, the High Court, by virtue of s 73 of the *Constitution*, binds all courts in Australia that are subject to that avenue of appeal.<sup>134</sup>

<sup>130</sup> *Lipohar* (1999) 200 CLR 485, 508 [53] (Gaudron, Gummow and Hayne JJ). The common law will not be a law 'of' the State. Murphy J had earlier opined differently on this point: *University of Wollongong v Metwally* (1984) 158 CLR 447, 468. But see the approach in relation to competing Commonwealth and State prerogatives discussed in George Winterton, *Parliament, The Executive and The Governor-General* (Melbourne University Press, 1983) 241.

<sup>131</sup> Curiously, there was an argument to this effect made, but rejected, in *Jones v John Fairfax Publications Pty Ltd* (2005) 67 NSWLR 434, 454–5 (Simpson J).

<sup>132</sup> Priestley JA, however, maintained a degree of scepticism: *R v KG* (2001) 54 NSWLR 198, 205–6 [36]–[37].

<sup>133</sup> *Australian Competition and Consumer Commission v Berbatis Holdings Pty Ltd* (2000) 96 FCR 491, 64 [11] (French J).

<sup>134</sup> *Contra* the position under the *Nauru (High Court Appeals) Act 1976* (Cth), which involves the original jurisdiction of the High Court: see *Ruhani v Director of Police* (2005) 222 CLR 489.

However, the unified appellate system was disrupted temporarily as a result of statutory changes in 1975. Prior to the statutory reforms, appeals to the Privy Council could be made not only from the High Court but also from state supreme courts. The *Privy Council (Appeals from the High Court) Act 1975* (Cth) effectively excluded appeals from the High Court to the Privy Council, while appeals from state supreme courts to the Privy Council remained. This situation caused some to question whether state supreme court judges could theoretically find themselves in the invidious position of being subject to conflicting authority — a decision of the High Court different from a decision of the Privy Council. Indeed, *Viro v The Queen* demonstrated the problem of there being two concurrent final courts of appeal.<sup>135</sup> Of course, the position changed with the passage of the *Australia Acts 1986*, where appeals to the Privy Council were practically removed entirely. But, as Gummow J stated in *Kable*, it was well established, even before the first of these legislative changes, that the High Court and the Privy Council, by whatever path an appeal came, settled the law for Australia.<sup>136</sup> Added to that should be Barwick CJ's comments to the effect that, as a matter of precedent, state supreme courts were not at liberty to disregard High Court authority where there was an apparently conflicting decision of the Privy Council.<sup>137</sup> Nevertheless, it was apparent that there was a temporary glitch in the doctrine of precedent, which assumes one superintending body at the top of the apex. The position today was explained by Gummow J in *Kable*:

Now, since the coming into force of the Australia Acts and the removal by section 11 thereof of the appeal from the Supreme Courts of the States to the Privy Council, section 73 of the Constitution places this Court in final superintendence over the whole of an integrated national court system. This ensures the unity of the common law of Australia.<sup>138</sup>

The existence of s 73 will mean that parties can always appeal from a state supreme court to the High Court, subject to special leave,<sup>139</sup> which will bind all the states that are subject to an appeal via s 73. Section 73 also provides for appeals from federal courts, subject to any exceptions or regulations as the Parliament prescribes. The operation of this appellate structure and integrated judicial system involves the doctrine of precedent as part of its machinery. If a court is subject to an appeal to a higher court, the higher court would be capable of making orders binding the lower court. The lower court would thus have to act in accordance with the rules of the higher court. If the lower court declined to follow those rules, the decision of the lower court would be reversed on appeal; such a decline 'would be both futile and mischievous'.<sup>140</sup>

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<sup>135</sup> (1978) 141 CLR 88.

<sup>136</sup> *Kable* (1996) 189 CLR 51, 138 (Gummow J).

<sup>137</sup> *Viro v The Queen* (1978) 141 CLR 88, 93 (Barwick CJ), 151 (Jacobs J).

<sup>138</sup> *Kable* (1996) 189 CLR 51, 138 (Gummow J).

<sup>139</sup> *Smith Kline & French Laboratories (Aust) Ltd v Commonwealth* (1991) 173 CLR 194, 204.

<sup>140</sup> *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1102, 1158 (Isaacs J).

Also important in this analysis is the fact that Australia inherited a single English common law, a consequence of which is that the High Court has always declared and applied common law from a single *corpus juris*, binding all courts below it. It was binding because a legal rule was being declared from the same corpus that applied across Australia. Any court seeking to rely on a common law rule would be bound by the High Court's interpretation of it; any court failing to adopt the High Court's pronouncement of that rule would be reversed on appeal. Indeed, this was an assumption on which the *Constitution* was founded. To revive an aspect of Dixon's analysis, this 'unexpressed assumption' formed part of the machinery by which s 73 was intended to operate.<sup>141</sup> So, where the High Court makes a determination that is 'final and conclusive'<sup>142</sup> it would not be open to any court subject to that avenue of appeal to ignore it. While aspects of Sir Owen Dixon's analysis have become doubtful, part of his analysis explains *why* the High Court has always declared a single common law in the sense discussed in *Lipohar*. Deane J's analysis of this 'pervading influence' in *Breavington v Godleman* is also useful in understanding why this is so.<sup>143</sup>

Given this fundamental assumption, it is a necessary implication of s 73 that there be a hierarchy of authority that yields a single body of common law in Australia. It is an implication drawn not only from the unified judicial system, but from the intent and assumptions of the drafters that there was only one common law to be applied within that system: at that time English common law. The notion that the states could develop their own common law ignores the fundamental assumption underlying s 73 of the *Constitution* and the role of the High Court in enforcing this single body of law, initially English, but later Australian. It would be radical to suggest that the High Court could later allow s 73 to have a fundamentally different operation by binding only the state from which the appeal was brought. Such a suggestion would also deny the uniting effect of the *Constitution*, which created 'one indissoluble Federal Commonwealth' with the body of law under the *Constitution* to be overseen by the High Court.

## IX Assessing the History

Five conceptual versions of the common law in Australia may be isolated from the history and development of the debate. First, there is the view of Clark, Justice Callinan and Justice Priestley, that there is no single common law in Australia and that the common law is divided as between each state and possibly the Commonwealth. Second, there is one interpretation of the Quick and Garran view, that each body politic has its

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<sup>141</sup> This, with respect, is another aspect of the 'constitutional imperative' doubted recently by the Victorian Solicitor-General: see McLeish, above n 127. Cf Deane J's discussion in *Breavington v Godleman* (1988) 169 CLR 41, 120–4.

<sup>142</sup> *Australian Constitution* s 73.

<sup>143</sup> (1988) 169 CLR 41.

own body of common law but there is *effectively* a single common law because of the Australian appellate judicial system, which keeps that law uniform. Third, there is Sir Owen Dixon's view, that there is a single common law, the basis of which lies in the corpus of law inherited by Australia and in the source of authority for the Australian legal system, namely the common law itself. Fourth, there is the Wynes and Murphy view, that there is a common law of the States and a separate federal common law. Fifth, there is the now accepted view, that there is only one body of common law in Australia because of the appellate structure in Australia and the doctrine of precedent.

No doubt part of the disagreement in the debate arose from the pre-existing colonial mentality — a confused attribution of law and courts with polities. Further, important to the change in debate was the shift in *grundnorm* in Australian law following Australia's development as a nation.

This shift is also reflected in three discernible stages in the evolution of the common law in Australia. In its first stage, from federation until the mid-20<sup>th</sup> century, the common law was singular, being English common law as declared ultimately by the Privy Council as the court then sitting at the top of the apex in the Australian judicial system. In its second stage, from around the 1960s, there was a degree of uncertainty as the High Court and Privy Council began to recognise Australia's independent or divergent common law. The third stage began with the passage of the *Australia Acts 1986*, which identified Australia as an independent nation and affirmed the High Court's view of the operation of the doctrine of precedent in Australia. From this point onward, the common law in Australia was categorically singular and distinctly Australian.

## X Consequences of a Single Common Law

The proposition that Australia has but one common law carries a number of consequences for the Australian federation, some of which are still being refined. Other consequences no doubt remain latent. These consequences can be seen in a number of different areas of the legal system.

One consequence arose in *Lipohar* itself. Given the law area provided by the single common law, it is possible a number of states and territories will have jurisdiction to hear offences based on the single common law in respect of a single set of facts.<sup>144</sup> The exercise of this jurisdiction, however, may depend on the connection between the impugned conduct and the state or territory in which the matter is litigated.<sup>145</sup> As Jeremy Kirk observes, the idea of a whole-of-Australia law area alters 'the way in which we conceive of many legal issues and actions', whether in

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<sup>144</sup> *Lipohar* (1999) 200 CLR 485, 514 [70], 522 [92]–[93] (Gaudron, Gummow and Hayne JJ).

<sup>145</sup> See Jeremy Kirk, 'Conflicts and Choice of Law in the Australian Constitutional Context' (2003) 31 *Federal Law Review* 247, 256.

defamation, breach of contract or breach of confidence, for example.<sup>146</sup> Suing under the single Australian common law (involving an Australia-wide law area) may change the nature of the formulation of a claim, but it will be subject to a constitutional and statutory connection between the alleged events and the court's jurisdiction.<sup>147</sup> Under the single common law there can be no question about conflict of laws: problems of conflict will be confined to statute.<sup>148</sup>

Common law principles may be implied as a matter of statutory construction and common law principles of construing statutes will affect the meaning and content given to legislation.<sup>149</sup> That there is a single common law obviates or at least eases the difficulties that would attach to this process were there multiple common laws,<sup>150</sup> where a complicated and no doubt unsatisfactory doctrine of federal common law may then need to be developed to avoid problems. The difficulties observed in the United States with the interpretation of federal statutes and filling in statutory gaps presents the risk that employing local laws of individual states will affect the interpretation of federal statutes.<sup>151</sup> A single common law gives greater certainty and uniformity to the operation of statutes than if that statute were interpreted using potentially diverse local common law.<sup>152</sup>

Other examples can be seen in administrative law. Principles applicable to federal courts will be applied to state courts with the result that, especially after *Kirk v Industrial Court of New South Wales*,<sup>153</sup> federal and state principles of administrative law will converge via the 'gravitational pull' of constitutional principles.<sup>154</sup> The concept of jurisdictional error under state administrative law, for example, now resembles jurisdictional error required under s 75(v) of the *Constitution*, and common law rules of administrative law in the states are now more aligned with the federal equivalents. This can also be seen in other state administrative law cases where the High Court employed federally applicable reasoning to state administrative law.<sup>155</sup>

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<sup>146</sup> Ibid 257.

<sup>147</sup> Ibid.

<sup>148</sup> See Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) 197.

<sup>149</sup> *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ). See also the comments of Gleeson CJ in *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 532 [31], regarding legislation and common law existing in a 'symbiotic relationship'.

<sup>150</sup> Justice M Leeming, 'The Riddle of Jurisdictional Error' (2014) 38 *Australian Bar Review* 139, 144.

<sup>151</sup> See, eg, C Nelson, 'State and Federal Models of the Interaction between Statutes and Unwritten Law' (2013) 80 *University of Chicago Law Review* 657, 662, 747–8.

<sup>152</sup> Cf *Chubb Insurance Co of Australia Ltd v Moore* (2013) 302 ALR 101, 132–3 [147] (Emmett JA and Ball J).

<sup>153</sup> (2010) 239 CLR 531.

<sup>154</sup> Chief Justice Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 77, 91.

<sup>155</sup> See, eg, Matthew Groves, 'Federal Constitutional Influences on State Judicial Review' (2011) 39 *Federal Law Review* 399; McLeish, above n 127.

This merging of principles can be seen as a result of an attempt — whether consciously or unconsciously — to maintain uniform concepts of common law doctrines, even though this may not be strictly necessary under the *Constitution*. As the High Court observed in *Kirk*, the principles of a state supreme court’s supervisory jurisdiction will be determined ‘according to principles that in the end are set by this Court’.<sup>156</sup> Although not necessitated by law, as a matter of practical consequence, jurisdictional error — and other similar principles — would receive a centralised and singular operation. That there is a single common law may help to explain this ‘gravitational pull’.

A single common law has an effect on legislatures, which presents a not insignificant limitation whose contours are yet to be fully understood. Other writers have considered this question in passing, but it has not yet been comprehensively considered.<sup>157</sup> One point to note is that the Commonwealth Parliament cannot legislate to give the common law the force of law of the Commonwealth in an attempt to engage s 109 of the *Constitution*, for this would undermine the legislative power of the states secured by s 107 of the *Constitution*.<sup>158</sup> In other words, the Parliaments of the States would be denied the legislative power to change those common law rules sought to be made a law of the Commonwealth.

It must be admitted that there is a certain irony in the common law being able to limit legislative power in this manner. However, that consequence is the product of the distribution of powers under a rigid *Constitution*. Reasoning from Diceyan notions of parliamentary sovereignty in the Australian context would be misleading.

It has also been suggested that it is unlikely that a parliament could direct courts to develop the common law in a certain direction where that would result in the development of a common law divergent from the common law elsewhere in Australia. It appears this constraint lies in the inability of one parliament to control the direction of the single common law. This federal constraint means that a law of an Australian parliament could not ‘embrace a directive from the State Parliament that the principles of the common law are to be developed by reference to a set of external principles mandated by the Legislature’.<sup>159</sup> This influences the design of human rights legislation in Australia, compared with that of the

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<sup>156</sup> (2010) 239 CLR 531, 581 [99].

<sup>157</sup> See, eg, Wynes, above n 4, 60; Bernard O’Brien, ‘The Law Applicable in Federal Jurisdiction (Pt 2)’ (1977) 2 *University of New South Wales Law Journal* 46, 60–3; Graeme Hill ‘The Common Law and Federal Jurisdiction — What Exactly Does Section 80 of the Judiciary Act Do?’ (2006) 34 *Federal Law Review* 75; Pamela Tate, ‘Protecting Human Rights in a Federation’ (2007) 33 *Monash University Law Review* 220, 244. See also *R v Kidman* (1915) 20 CLR 425, 447–8 (Isaacs J); *Lipohar* (1999) 200 CLR 485, 501 [26] (Gleeson CJ); *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 535 [70] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 557 [140]–[142] (Kirby J).

<sup>158</sup> *Western Australia v The Commonwealth* (1995) 183 CLR 373, 487–8. The statutory adoption of common law rules has been the practice of the federal legislature for many years: see Quick, above n 19, 42.

<sup>159</sup> Tate, above n 156, 244.

United Kingdom, for example.<sup>160</sup> If correct, this would be a significant fetter on the legislative power of Australian parliaments. But in this example, at least, it may also be possible to characterise the legislative ‘directive’ just as any other, such as for example the factors to be considered in sentencing or awarding damages. On this characterisation, the common law would operate subject to the legislative provision operating in that State, and any divergence in the common law in that State as a consequence of the ‘directive’ would arise from applying the legislation itself. On this view, the single common law would not be fragmented.

Another practical consequence is that, as a matter of precedent, intermediate courts of appeal are effectively bound by decisions of other intermediate courts of appeal regarding matters of common law and equity unless the decision is plainly wrong.<sup>161</sup> This is probably more of a customary, as opposed to a logical, consequence, no doubt tied to a goal of predictability and consistency of the law.<sup>162</sup> Indeed, in the United States the different circuits of the Federal Courts do not necessarily follow the precedent of other circuits. The view generally taken is that only the *en banc* court or the Supreme Court may overrule the settled law of a circuit.<sup>163</sup> The United States aside, as a matter of judicial policy it would seem to follow that as many courts will be applying the one law, the interests of stability, respect, predictability and certainty, and public confidence in the integrated judicial system require that courts of a certain level apply laws as best as possible in a uniform manner.

A related consequence is that there is a single doctrine for precedent and the overruling of decisions in Australia.<sup>164</sup> This also entails that trial courts are effectively bound by the intermediate courts of appeal in other jurisdictions, and possibly that trial courts should follow decisions of other equivalent trial courts, subject to the plainly wrong stricture.<sup>165</sup> If the doctrine of precedent itself were part of the common law, then it would seem to follow that in Australia there is a singular operation of that doctrine.<sup>166</sup>

<sup>160</sup> See *Momcilovic v The Queen* (2011) 245 CLR 1, 49–50 [49]–[50] (French CJ), 89 [155]–[156] (Gummow J). See also Tate, above n 156, 244–5.

<sup>161</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). See also *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390, 412 [50] (Gummow, Heydon and Crennan JJ).

<sup>162</sup> Cf *S v Boulton (Examiner, Australian Crime Commission)* (2006) 151 FCR 364, 370 [26] (Black CJ) eschewing the word ‘comity’ in this context.

<sup>163</sup> See, eg, *CG Willis, Inc v Director, Office of Workers’ Compensation Programs*, 31 F 3d 1112, 1115 [8] (11th Cir, 1994).

<sup>164</sup> *Patrick Stevedores Holdings Pty Ltd v DPP* [2012] VSC 31 [85].

<sup>165</sup> See *Duckworth v Water Corp* (2012) 261 FLR 185, 191 [27]–[31] (Edelman J).

<sup>166</sup> An old distinction sometimes invoked between ‘rules of practice’ and ‘rules of law’ in this respect has been removed after *Farah*: see, Blackshield, above n 78, 74.

Another related effect is how the common law will be developed by reference to statutory changes or analogies, where those changes or analogies are not national in character.<sup>167</sup> It is far from clear that common law development should be hindered in this respect—reasoning by analogy or broad policies will always be a matter of context and judgement. There is, however, the unfortunate consequence that if a statute in a particular jurisdiction manifests a general policy, the single common law may prevent the courts of that jurisdiction from developing the common law by reference to that general policy.<sup>168</sup> Certainly, a restriction in this respect runs against the notion of experimental federalism. But that is the consequence of the system prescribed. The jurisdiction affected would, of course, maintain the ability to remedy any perceived deficiencies in the implementation of its policies by enacting further legislation.

These consequences may have the effect of stifling innovation of the common law, or at least restricting its development in a conservative manner. Singularity, it seems, may ‘come at the expense of innovation and change’.<sup>169</sup> But some aspects of the single common law may provide a centralised focus on certain core legal principles, such as the principles relating to judicial review, statutory interpretation, and precedent. These effects may also serve to improve the certainty and predictability of the law in the Australian federation, and singularity may also assist the ease with which the law may be ascertained.

## XI Conclusion

The history of the debate reveals five conceptual versions of the common law in Australia. The clearest and most persuasive conceptual grounding for the single common law in Australia is found in the doctrine of precedent and its application under the hierarchy of courts prescribed by the *Constitution*. Section 73 of the *Constitution* was always intended to operate with respect to a single body of common law, previously being English common law. However, the debate on the issue has not always been clear and many distinguished jurists have disputed this conclusion.

In part, the history of this debate can be explained by pre-existing colonial mentality—a confused attribution of law and courts with politics. But the shift of the grundnorm in Australian law following Australia’s development as a nation also plays an important part. This

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<sup>167</sup> *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, 62–3 [25]–[27] (Gleeson CJ, Gaudron and Gummow JJ), 86 [97] (Kirby J). See also *Tofilau v The Queen* (2007) 231 CLR 396, 496 [322] (Callinan, Heydon and Crennan JJ); *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, 669.

<sup>168</sup> Elise Bant, ‘Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence’ (2015) 38 *University of New South Wales Law Journal* 367.

<sup>169</sup> Matthew Groves, ‘Federal Constitutional Influences on State Judicial Review’ (2011) 39 *Federal Law Review* 399, 411. By virtue of the special leave requirements, there are further limits on the extent to which the common law will be developed by the High Court.

shift was also reflected in the three stages of development of the common law in Australia: from when it was English and subject to Privy Council supervision; to when growing notions of Australian sovereignty in the 1960s and statutory developments in the 1970s resulting in two concurrent final appellate courts created uncertainty; and finally to the High Court being conclusively placed, alone, at the top of the judicial apex.

However, each stage — although more opaque during the period when there were two concurrent final courts of appeal — cannot escape the reasoning of the plurality in *Lipohar* and the fundamental assumption underlying s 73. In each stage it was and is a single corpus juris being declared and applied by the High Court. Any purported development of the common law by a state court applying that body of law would either be a correct or incorrect development, depending on a declaration ultimately made by the High Court.

While it is true that the single common law is an implication unexpressed in the Constitution, it is a necessary one, firmly grounded in history and context, and one with important but varied consequences for the Australian federation.