A Federal Common Law in Australia?

L. J. Priestley

Supreme Court of New South Wales

Follow this and additional works at: https://scholarcommons.sc.edu/sclr

Part of the Law Commons

Recommended Citation

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact dillarda@mailbox.sc.edu.
A Federal Common Law in Australia?

The Hon. Mr. Justice L.J. Priestley

The title of this essay asks the question I set out to investigate, but a funny thing happened on the way to the conclusion — I came to realize there was less involved in the question than in its United States’ counterpart. I kept coming across related but different questions, touching on other aspects of common law in Australia. As these seemed to be relevant to the theme of the conference for which the essay was being written, I decided to give them a little space also. A clumsier but more accurate title for the paper would now be “Aspects of the Common Law of and in Australia and the States of Australia.”

Before moving into these topics, some words about the common law generally.

The Common Law Has Many Mansions

One of the first texts I used in law school was Glanville Williams’ Learning the Law. Early on, this very useful work described the common law in words simple and elementary, but of a significance I have really only begun to understand in later years. Of the common law Glanville Williams said:

(1) Originally this meant the law that was not local law, that is, the law that was common to the whole of England. This may still be its meaning in a particular context, but it is not the usual meaning. More usually the phrase will signify (2) the law that is not the result of legislation, that is, the law created by the custom of the people and decisions of the judges. Within certain narrow limits, popular custom creates law, and so (within much wider limits) do the decisions of the courts, which we call precedents. When the phrase “the common law” is used in this sense it may include even local law (in the form of local custom) which in meaning (1) is not common law. Again (3) the phrase may mean the law that is not equity, in other words it may mean the law developed by the old courts of common law as distinct from the system (technically called “equity”) developed by the old Court of Chancery. In this sense “the common law” may even include statutory modifications of the common law, though in

---

* A.B., LL.B., LL.M., Judge of Appeal, Supreme Court of New South Wales since 1983, and nonresident Judge of Appeal, Supreme Court of the Northern Territory. Formerly lecturer in bankruptcy, University of Sydney, and lecturer in comparative contract law, Marshall-Wythe School of Law, College of William and Mary.

1043
the previous sense it does not. Finally (4) it may mean the law that is not foreign law — in other words, the law of England, or of other countries (such as America) that have adopted English law as a starting-point. In this sense it is contrasted with (say) Roman law or French law, and in this sense it includes the whole of English law. — even local customs, legislation and equity. It will thus be seen that the precise shade of meaning in which this chameleon phrase is used depends upon the particular context, and upon the contrast that is being made. When I said . . . that our law is made up of common law, equity and legislation, I meant it in a mixture of senses (2) and (3), as the context itself showed.  

As many of the materials discussed in this Paper illustrate, lawyers using the term in their writings tend to move silently among its different meanings. This is particularly so with regard to some of the topics with which this paper is concerned.  

---

2. Id. at 25 (footnote omitted).

3. There is a family resemblance among the many definitions and descriptions of the common law, but the variations among them must make users of the term wary, as illustrated by the following passage:

By the common law we mean here the settled law of the king's court, common to all free men in the sense that it is available to them in civil causes if they will have it, and applicable against them in serious criminal cases whether they like it or not. It is easy and fruitless to argue about the details of such a definition, and about the exact date at which there can first be said to be a common law: what is clear is that it is a product of the twelfth century.

THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL xi (G.D.G. Hall ed. & trans., 1993). At the other end of the time span, the current edition of Hart and Wechsler, there appears the following definition: “We will use the term, federal common law, loosely, as most judges and commentators do, to refer generally to federal rules of decision whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional command.” HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 863 (3d ed. 1988). Professor M. Horwitz in THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, extracted the following view of the common law from the writings of J.C. Carter, who from 1883 onward was a leading spokesman of the New York Bar in its opposition to codification and in support of retention of a common law system:

For Carter, the common law “consists of rules springing from the social standard of justice, or from the habits and customs from which that standard itself has been derived.” The task of the judges was to “search to find a rule” from “the habits, customs, business and manners of the people.” Finally, he “tacitly assumed that the sense of justice is the same in all those who are thus engaged — that is to say, that they have a common standard of justice from which they can argue with, and endeavor to persuade, each other . . . .”

Law, then, or at least the private law “which governs the ordinary private transactions of men with each other . . . .” is identical with custom. “And it is well to keep constantly in mind that this law, being tantamount to the custom enforced by society, is an existing fact, or body or facts, and that courts do not make it, or
In approaching questions concerning the common law in Australia it is useful first to consider briefly how England's common law was exported to the colonies.

**Colonial Common Law Before the American Revolution**

Chalmers' *Opinions of Eminent Lawyers* collected opinions of English law officers up to about 1780. The term "the common law" occurs frequently in them. These opinions illustrate how the idea was understood in the eighteenth century. Many of the opinions reflect the understanding of that time as to how the common law was carried by settlers to English colonies. Section III of the book is headed: "How far the King's subjects, who emigrate, carry with them the Law of England: First, The Common Law; Second, The statute law."\(^4\)

Chalmers' introduction to the second opinion under the first subdivision of this heading describes it as: "The opinion of the Attorney, and Solicitor-General, Pratt and Yorke, that the King's subjects carry with them the Common Law, wherever they may form settlements."\(^5\)

What Chalmers meant by the words "the common law," is shown by the opinion, which says:

In respect to such places as have been or shall be acquired by treaty or grant, from any of the Indian Princes, or governments, your Majesty's letters patent are not necessary; the property of the soil vesting in the

---

pretend to make it, but to find and ascertain it, acting upon the true assumption that it already exists."

MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 120 (1992). An Australian High Court judge expressed a view not dissimilar to that of Hart and Wechsler in a case involving a serviceman injured by the negligence of another serviceman in an everyday peacetime situation:

Common law is decisional or judge-made law. It is that part of the law progressively created and adapted by judges to ensure a coherent system of law capable of providing answers to every legal question, and thus enabling the judicial system to discharge its function of settling disputes. Leaving aside constitutional law (where many constitutional controversies concern the elaboration of this common law element which accompanies the express and implied provisions of the Constitution) common law may be divided into two kinds. One is the body of rules developed in the areas which have been left entirely or largely to the judges by the legislatures, which may be described as general common law. Most aspects of contract and tort law are of this kind. Another kind ("the common law of statutes") consists of the rules which surround Acts of Parliament and fill their interstices.


4. GEORGE CHALMERS, OPINIONS OF EMINENT LAWYERS ON VARIOUS POINTS OF ENGLISH JURISPRUDENCE, CHIEFLY CONCERNING THE COLONIES, FISHERIES AND COMMERCE OF GREAT BRITAIN 206 (1858).

5. Id.
grantees by the Indian grants, subject only to your Majesty’s right of sovereignty over the settlements, as English settlements, and over the inhabitants, as English subjects, who carry with them your Majesty’s laws wherever they form colonies, and receive your Majesty’s protection, by virtue of your royal Charters.\(^6\)

Judging by the small number of opinions recorded by Chalmers in regard to the common law in the sense which contrasts it with the statutory law and the much larger number of opinions reported in regard to the carrying by colonists of the statutory law, it appears that much more difficulty was encountered in regard to the latter. The statement of the position by Blackstone\(^7\) in 1765 used many of the same terms as did the opinions collected by Chalmers, and these meanings became accepted as authoritative.

It became useful and customary for colonies to fix a date at which the common law should be taken to have been received in the colony. One example from many illustrates this process. In colonial Virginia the date to be taken as the date of common law reception was not agreed upon. One view was that it was 1662.\(^8\) The significance of the debate was that it was recognized as necessary to have a specified date. In 1776, at the time of the Declaration of Independence, the matter was reviewed by the Virginia Provincial Convention in the course of establishing a new independent government. An ordinance was adopted stating what law was to apply in the interregnum until a legislature was organized. This ordinance provided that:

\[
\ldots \text{the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the first, and which are of a general nature, not local to that kingdom, } \ldots \text{ shall be the rule of decision, and shall be considered as in full force.} \]

Thus, for Virginia, two “reception” dates were established, 1776 for “the common law,” and 1607 for statutory law. Once again, there was recognition of the need for specified dates for these matters.

Acceptance of the position thus established is typified by then Chief Justice Marshall’s 1808 statement:

\[\begin{align*}
6. & \text{ Id. at 206-07.} \\
7. & \text{1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 105 (1765).} \\
9. & \text{An ordinance to enable the present magistrates and officers to continue the administration of justice, and for settling the general needs of proceedings in criminal and other cases till the same can be more amply provided for. 9 Hening’s Statutes 126, 127 (Va. 1776).}
\end{align*}\]
... the common law of England was, and is, the common law of this country, and as an appeal from the courts of Virginia lay to a tribunal in England, which would be governed by the decisions of the courts, the decisions of those courts made before the Revolution, have all that claim to authority, which is allowed to appellate courts.\textsuperscript{10}

Marshall presumably also had in mind section 34 of the Act of Congress which became known as the Judiciary Act of 1789.\textsuperscript{11} When passed as Statute I of the first Congress, it was called "An Act to establish the Judicial Courts of the United States."\textsuperscript{12} Section 34 provided as follows:

\textit{And be it further enacted}, That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.\textsuperscript{13}

\textbf{The Australian Colonies}

The way in which English law was received in the Australian colonies, and later the way in which Australian federal courts were to apply the laws of the states closely followed what had happened in colonial North America. When New South Wales, originally comprised of approximately the whole eastern half of Australia, began to be settled in 1788 the fact that the settlers took with them English law, so far as applicable, was taken for granted. Practical difficulties in the application of this view led to the passing by the Imperial Parliament in Westminster of an act known as the Australian Courts Act 1828 which provided:

... all Laws and Statutes in force within the Realm of England at the Time of the passing of this Act (not being inconsistent herewith, or with any Charter or Letters Patent or Order in Council which may be issued in pursuance hereof) shall be applied in the Administration of Justice in the Courts of New South Wales and Van Diemen's Land respectively, so far as the same can be applied within the said Colonies ... \textsuperscript{14}

For the purposes of this Paper, I do not need to describe the detail of how the present states of Queensland and Victoria, and parts of the present state of

\textsuperscript{10} Murdock v. Hunter, 17 F. Cas. 1013, 1015.
\textsuperscript{11} Judiciary Act of 1789, ch. 20, 1 Stat. 73, 92.
\textsuperscript{12} Id. at 73.
\textsuperscript{13} Id. at 92.
\textsuperscript{14} Australian Courts Act, 1828, 9 Geo. 4, ch. 83, § 24.
South Australia, and the territory known as the Northern Territory became detached from New South Wales in the nineteenth century. It is sufficient to note that because the two colonies which became the states of South Australia and Western Australia both came into existence a little later than New South Wales, they received English law later than New South Wales although otherwise in much the same way. Because of the later reception dates, the English law they received was necessarily different from that of New South Wales, Van Diemen’s Land (Tasmania), Queensland and Victoria, even if only to a minor extent. This point is illustrated by statutory English law, and although less obviously, also by non-statutory English law (common law in Glanville Williams second sense). By the second half of the nineteenth century all six colonies were polities independent of one another and were largely self-governing within the imperial framework of the British Empire, and with some governmental functions carried out by and under the control of the Home Government at Westminster.

At the time of reception of the English law in the Australian colonies, and throughout the nineteenth century, there was no need, in either England or the colonies, to draw any distinctions between the various components of the non-statutory law. The only question was whether some particular rule was applicable in the circumstances of the colony.

The Position of Common Law When Common Law Jurisdictions Federate

In both the United States and Australia it became necessary to consider the relationship of the new federal entity to the common law when the constitution of the new entity began to operate. Attitudes toward and analysis of this relationship were influenced by events leading up to the commencement of operation of the new constitutions. There were significant similarities and differences between these events in the United States and Australia.

Each of the thirteen colonies which ratified the United States Constitution had operated for some time before ratification as a fully self-governing political entity independent of Great Britain and the other colonies. This position had been recognized by the Articles of Confederation, adopted by the Continental Congress in 1777, and in force on March 1, 1781.

The six Australian colonies made no declaration of independence and remained colonies until the Commonwealth was established and the Constitution of the Commonwealth took effect on January 1, 1901 by proclamation

15. In the case of Western Australia, out of territory never part of New South Wales, and in the case of South Australia out of territory part of which had never been part of New South Wales.
16. See supra text accompanying note 3.
made in the United Kingdom under the Imperial Commonwealth of Australia Constitution Act (1900). Thus, in Australia, there was no period prior to federation during which any state had full control of its own legislative and judicial functions, and no period during which the people of a state might contemplate its common law as a part of its legal system distinct from that of the United Kingdom and the other states.

A major similarity between the original members of both federations was that in every case the founding colonists brought the English common law with them. One consequence of this importing of English Common Law was that at the commencement of the operation of the federal constitution common law was already in operation throughout the geographical territory over which the legislative branch of the new federal system of government now had sovereign power to make laws with respect to a limited number of subject matters. Another consequence was that in the case of the federal entities that came into existence upon the commencement of operation of their constitutions, there was nothing to correspond with the law that colonists took with them upon settlement of a colony. Once a colony was effectively settled or otherwise established, a body of common law was in place in the colony by the fact of effective commencement. Effective commencement of the federal entities did not carry with it any corresponding body of law, except to the extent that either expressly or by implication the constitution adopted all or part of some pre-existing body of law.

**Different Components of the Common Law Discussed in the United States**

In the early years of the United States there was continuing debate about whether the application by federal courts of a federal common law might distort the balance between federal and state judicial power intended by the United States Constitution. In the course of this debate it became necessary to look at the components of the common law.

A fundamental question was whether the common law which the federal courts were to apply was federal common law, that is national law of the United States, or the aggregate of the common law of each of the member states. In the course of this debate, three aspects of the common law were recognized: the common law of crimes, local common law, and general common law.17

For a considerable period there appears to have been no problem with regard to what was recognized as the general (non-criminal, non-local) common law because it was accepted as being the same for all states. In

---

exercising diversity jurisdiction, particularly in commercial matters, the federal courts took it for granted that they had to apply this general common law. In doing so the federal courts decided for themselves what was the appropriate general common law rule. They did not regard themselves as bound by the version of the relevant rule accepted by the law of the state or states in question, because they were as well able as any state court to have recourse to the general body of common law which in their view was not anchored to any state.\(^{18}\)

In regard to local common law, the federal courts applied section 34 of the Judiciary Act and regarded themselves as bound by the authoritative rulings of the courts of the relevant states.\(^{19}\)

In regard to criminal law, a question of considerable significance was whether the United States could bring prosecutions in the federal courts based on the general common law of crimes or whether the only prosecutions which could be brought were for offenses against federal criminal statutes.\(^{20}\)

It is not necessary for the purposes of this Paper to consider further what happened in the United States in regard to federal criminal common law. What is relevant is that \textit{Swift v. Tyson}\(^{21}\) was decided on the basis of the distinction between local common law and general common law. The principal opinion, by Mr. Justice Story, stated that the Federal Courts were entitled to decide questions of the general common law for themselves.\(^{22}\)

\textit{From Swift v. Tyson to Erie Railroad v. Tompkins}

\textit{Swift v. Tyson} remained a leading case in its area for many years. According to Justice Holmes, writing to Sir Frederick Pollock in 1928, Justice Story's opinion was "quite indefensible but did not much harm when confined to what he was thinking of."\(^{23}\) However, according to Holmes, later decisions took the general principle too far. The decision which occasioned the comment in the correspondence was \textit{Black & White Taxicab & Transfer Co.}  


\(^{20}\) Fletcher, supra note 17, at 1521.

\(^{21}\) 41 U.S. (16 Pet.) 1 (1842).

\(^{22}\) Id.

\(^{23}\) HOLMES-POLLOCK LETTERS 219 (M. DeWolfe Howe, ed. 1946).
v. Brown & Yellow Taxicab & Transfer Co., in which Justice Holmes dissented. Pollock asked Holmes: "Does the decision mean that your Court may be called on to lay down that the rule in Rylands v. Fletcher e.g., now received in some States and not in others, is or is not good 'general law,' and require all Federal Courts to act on that ruling?" Holmes' reply was that the answer might well be yes.

I have not been able to find United States literature on federal common law discussing the history or effect of that part of section 3 of the Civil Rights Act of 1866 which became section 722 of the Revised Statutes of the United States at the same time as section 34 of the 1789 Judiciary Act became section 721. For purposes of subsequent comparison with the Australian adaptation of these sections I reproduce section 722 here; (section 721 was an almost exact repetition of section 34 set out above):

The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this Title, and of Title 'CIVIL RIGHTS' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Story's doctrine in Swift v. Tyson was overthrown, in accordance with Holmes's views, in Erie Railroad Co v. Tompkins. Section 722, which to an unpracticed eye would seem potentially relevant to the question, was not mentioned.

---

24. 276 U.S. 518 (1928).
25. Id. at 532.
27. Id.
28. Act of Apr. 9, 1866, ch. 31, s. 3, 14 Stat. 27 (codified in R.S. 722 (1873-74)).
29. 304 U.S. 64 (1938). Holmes was not the first person to express such views. See, e.g., Baltimore & O.R.R. v. Baugh, 149 U.S. 368, 390-411 (1893) (Field, J., dissenting).
Australia Borrows Sections of the United States Judiciary Act

At the time of the Australian constitutional conventions in the 1890’s, the coming into operation of the Constitution in 1901, and the enactment of the Australian Judiciary Act in 1903, Swift v. Tyson was the ruling authority in the United States. But the Australian Judiciary Act, the first draft of which was written by Sir Samuel Griffith, who had also been a principal author of the first draft of the Constitution, showed in sections 79 and 80 an awareness not only of section 721, but also section 722 of the United States’s Revised Statutes. Sir Samuel not only had a big hand in causing Chapter III of the Australian Constitution to be largely modelled on Article III of the United States Constitution, but was also directly responsible for a number of the Judiciary Act’s provision’s being modelled on sections of the United States Statutes dealing with the judiciary.

It is apparent that sections 79 and 80 of the Australian Act were modelled after sections 721 and 722 of the United States Revised Statutes:

79. The laws of each State, including the laws relating to procedure, evidence and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State in all cases to which they are applicable.

80. So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law of England as modified by the Constitution and by the statute law in force in the State in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

30. Sir Samuel Griffith, born 1845 was a leading barrister and politician in Queensland, and became Premier of that colony for most of the decade 1883-1893, and he was active in the establishment of the Federal Council of Australasia in 1885. In 1891 he was a dominant figure in the drafting of the draft constitution of that year, which later, with variations, was the basis of the Constitution of 1901. Sir Samuel became Chief Justice of Queensland in 1893, and he drafted the bill in 1901 which became the 1903 Judiciary Act, and in 1903 he became the first Chief Justice of the High Court of Australia. See generally R.B. Joyce, SAMUEL WALKER GRIFFITH (1984); A.W.B. SIMPSON, BIOGRAPHICAL DICTIONARY OF THE COMMON LAW 216-18 (1984).

31. Judiciary Act 1903 §§ 79, 80 (Austl.).
Varying Opinions on Australian Federal Common Law

A principal text on the Australian Constitution is the work known simply as *Quick and Garran.* The book is remarkable for a number of reasons. It is extremely copious and contains vast amounts of useful information and is frequently referred to by to-day's High Court. Yet it was written in 1900, before the Constitution began to operate. Its continuing usefulness says a good deal about its authors' luck and foresight. They themselves were well aware of the hazards of their venture: "We are fully sensible of the difficulty of attempting to expound a Constitution before it has been the subject of practical working or judicial exposition. It is impossible to foretell where the real difficulties will be found, or how they will be met."33

One of the many matters Quick and Garran discussed was federal common law. Knowing the history in the United States, they must have felt obligated to guard against the possibility of similar questions being raised in Australia. They addressed this matter under the heading, "Common Law Jurisdiction" stating:

The great question whether there is a common law of the Commonwealth involves three distinct inquiries: (1) whether the common law, as existing in the several States, is a "law of the Commonwealth"; (2) whether there is a federal jurisdiction over common law offenses; (3) whether there is a common law federal jurisdiction in civil cases.34

In discussing the first question, Quick and Garran referred to the United States situation and contrasted the position of the United States Supreme Court, which they said was a federal, not a national court, with the Australian High Court, which they said was a national, not a federal court of appeal, a reference to a fundamental difference between the jurisdiction of the two courts. The Australian High Court not only has much the same function in regard to constitutional interpretation as the United States Supreme Court, it additionally has jurisdiction to hear appeals in all matters from federal and state courts, including all state common law matters.36 Quick and Garran concluded:

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

33. *Id.* at iv.
34. *Id.* at 585.
35. *Id.*
36. AUSTL. CONST. § 73.
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.37

Their conclusion contains an ambiguity which has not proved to have (and may never have) much practical importance, but which is nonetheless relevant to this paper: “a common law of the Commonwealth” may mean (i), a common law operating throughout the Commonwealth in continuation of what was assumed to be the one common law operating in the colonies before Federation, (2) a common law consisting of all the common laws of the colonies, or (3) a federal common law distinct from (although very similar to) that operating in the colonies before Federation.

In regard to their second question, concerning common law offenses, after an extensive discussion of the history in the United States, Quick and Garran expressed the opinion that the sounder view in Australia, considering the terms of section 75 of the Constitution was that “within the scope of the judicial power, the common law may be resorted to, to give effect to the jurisdiction conferred by the Constitution.”38

Their answer to the third question was that in civil cases the common law could not be relied on as the source of jurisdiction, but that when jurisdiction was given, the common law attached so that the jurisdiction was to be exercised according to the rules of the common law.39

Next in the field was Studies in Australian Constitutional Law by A. Inglis Clark,40 a lawyer who, with Griffith, had a significant part in the drafting of the first draft of the Constitution in 1891,41 and who by the time of the publication of the first edition of his work in 1901 was a Judge of the Supreme Court of Tasmania. A second edition was published in 1905 in which Clark noted that as the British Crown was the supreme depositary of executive authority in the Commonwealth, it had prerogative rights and powers whose source was the common law. It thus followed that a portion of the common law attached to the Constitution but, in his view, “except in relation to the executive powers of the Crown, . . . there cannot be any federal common law in Australia and . . . the federal courts of the Commonwealth will not possess any jurisdiction under the common law.”42

Turning to the position of the High Court as a full appellate court from the state supreme courts, Clark argued that the High Court would “have jurisdiction to decide questions arising under whatever portion of the common

37. Quick & Garran, supra, note 32 at 585.
38. Id. at 588.
39. Id. at 788.
40. A. Inglis Clark, Studies in Australian Constitutional Law (1901).
41. See A.W.B. Simpson, supra note 30, at 115.
42. A. Inglis Clark, Studies in Australian Constitutional Law 192 (2d ed. 1905).
law will from time to time constitute a portion of the law of any State." 43 As I understand this part of his text, he was 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, not on a federal common law or some wider body of common law.

Then, moving to the different question of what federal courts might be empowered to do in cases of federal jurisdiction coming before them, Clark wrote:

... before any federal court of the Commonwealth can assume to administer any portion of the common law, it must find either a direct authority to do it in the Constitution or in legislation of the Parliament of the Commonwealth enacted in the exercise of a power conferred by the Constitution. In the provisions of the Constitution which confer original jurisdiction upon the High Court in matters arising between residents of different States, and in the provisions which empower the Parliament of the commonwealth to confer jurisdiction in such cases upon other federal courts, direct authority is found for the federal courts to administer in any such case, either immediately under the Constitution or under the legislation of the Federal Parliament, such portions of the common law as may be in force in any State under the law of which the case is to be decided. But in all such cases the portion of the common law which is applied is a portion of the law of the State, and it is not law which the Parliament of the Commonwealth can alter, except so far as it may be law relating to a matter in respect of which that Parliament has under the Constitution a dormant legislative power which it may exercise to displace the law of the State whenever it thinks fit to do so. 44

Clark then discussed in some detail the question whether there was a common law of the United States. He referred to various authorities which asserted there was such a common law, in the course of which he criticized Story’s views for reasons similar to those later used by Holmes. Clark concluded:

... that where a common or unwritten law of the United States exists it is based upon the language of the Constitution and the laws of Congress and derives its authority from them and not from any pre-existent and extraneous source either in the several States or elsewhere. 45

43. Id.
44. Id. at 194.
45. Id. at 204.
In aid of this conclusion he referred to section 722 of the United States Judiciary Act,\(^4\) as he had done in the first edition.\(^5\)

Clark then submitted that the position in Australia was the same as that which he had described in the United States.\(^6\)

By the time the second edition of Clark's book was published, the Australian Judiciary Act of 1903 was in operation, with section 80 based on the United States section 722. Presumably Clark took the adoption of the United States' precedent as confirmation of his views.

One of the few extended judicial discussions of an Australian common law occurred in The King v. Kidman,\(^7\) a case in the High Court concerning the

\(^{46}\) Id. at 204-05.

\(^{47}\) CLARK, supra 40, at 204-05.

\(^{48}\) CLARK, supra note 42, at 205. It is quite possible that Clark's views on these matters were influenced by Holmes, whom he admired and with whom he spent time during visits to the United States in 1897-98 and 1902-03. See John Reynolds: A.I. Clark's American Sympathies and His Influence on Australian Federation, 32 Aust. L. J. 62, 63-64 (1958). It seems safe to assume that Holmes was aware of Justice Field's opinion in the Baltimore & O.R.R. case. In that case Justice Field said:

There is no unwritten general or common law of the United States on the subject. Indeed, there is no unwritten general or common law of the United States on any subject. The common law may control the construction of terms and language used in the Constitution and statutes of the United States, but creates no separate and independent law for them.

Baltimore & Ohio R.R. 149 U.S. at 395 (citation omitted). Inglis Clark's view seems very close to this.

\(^{49}\) 20 C.L.R. 425 (1915). Since this case may not be readily available to all American readers, the relevant parts of the opinions are included in this note. The questions the High Court had to consider included (among others):

"1) Whether the Act No. 6 of 1915, so far as its provisions are retrospective, is within the competence of the Commonwealth Parliament;

2) Whether it is within the competence of the Commonwealth Parliament to confer upon the High Court original jurisdiction in respect of offenses against the common law;

3) Whether the Act No. 4 of 1915 confers upon the High Court jurisdiction to deal with such offenses.

Id. at 427. Five judges sat in the appeal. Four answered yes to the first question, and three of these four took the view that it was, therefore, unnecessary to answer any further questions. As a result, there was a court opinion only on the first question. However, the two judges who dealt with questions two and three were Chief Justice Griffith and Justice Isaacs, each of whom had directly participated in the creation of the Constitution and was highly respected in his own time and since as a constitutional lawyer. Their reasoning is relevant to this paper and well worth recording.

Chief Justice Griffith answered the first question no, and proceeded to the second question, which arose because indictments under the challenged Act had been presented in the original jurisdiction of the High Court. Griffith thought the question implied that the offense charged in the indictment was against the common law. He first asked whether that was so, an inquiry that in his view raised "a large and important question, namely, whether there is any common law in Australia independent of the common law which forms part of the law of the several States."
Id. at 435. Griffith began his answer to this inquiry by referring to the accepted view that British colonists carried their law with them so far as applicable. He then said:

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. 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. The same principles apply to laws of the United Kingdom of general application, such as the Statute of Treasons. In so far as any part of this law was afterwards repealed in any Colony, it, no doubt, ceased to have effect in that Colony, but in all other respects it continued as before. When in 1901 the Australian Commonwealth was formed, this law continued to be the law applicable to the rights and prerogatives of the Sovereign as head of the States as before, subject to any such local repeal. But, so far as regards - the Sovereign as head of the Commonwealth, the current which had been temporarily diverted into six parallel streams coalesced, and in that capacity he succeeded as head of the Commonwealth to the rights which he had had as head of the Colonies. It is not necessary to speculate as to what would have been the effect of a positive law passed in any of the Colonies making it lawful, e.g., to defraud or conspire to defraud the Colony, for no such law was passed. I entertain no doubt that it was an offence at common law to conspire to defraud the King as head of the Realm, that on the settlement of Australia that part of the common law became part of the law of Australia, that on the establishment of the several Colonies it became an offence to conspire to defraud the King as head of the Colony, and that on the establishment of the Commonwealth the same law made it an offence to conspire to defraud the Sovereign as head of the Commonwealth. Such a law, or to put it in other words, such a right to protection, seems, indeed, to be an essential attribute to the notion of sovereignty. I have, therefore, no difficulty in holding that the indictment in this case discloses an offence against the common law of Australia.

Id. at 435-36. The conclusion thus reached was an essential step in Griffith’s reasoning in upholding the validity of the indictment. He thought the incidental power in section 51(xxxix) of the Constitution enabled Parliament to put the common law into statutory form, which was what it had done by the challenged Act. The Act was thus declaratory only and its procedural provisions could operate retrospectively. Id. at 437.

Justice Isaacs thought the retrospective operation of the Act did not prevent its validity but nevertheless went on to consider the second question. To the argument that an offence at common law was not an offence against the King in right of his Commonwealth, but against the King in right of his state in the place where the offence was committed, Isaacs answered:

The common law of England was brought to Australia by the first settlers, and remains, as the heritage of all who dwell upon the soil of this continent, in full force and operation, except so far as it has in any portion of the land been modified by a competent Legislature. For State purposes and jurisdiction State laws may provide differently. But they cannot restrict the operation of the Constitution, and whatever it implies is the law of Australia, as much as if it were expressly so written. The necessary implication of unrestrictable right to perform its functions as a sovereign power — because in law it is the King who acts — carries with it the corollary that obstruction to the King in the exercise of his Commonwealth powers is, at common law, an offence with reference to the Constitution, and not with reference to any State
validity of a retrospective criminal statute passed by Commonwealth Parliament in 1915. Chief Justice Griffith, answering a question that a majority of the court did not reach, expressed the opinion that when the Australian Commonwealth was formed in 1901, those parts of the common law of England necessary to enable the Sovereign to protect the essential attributes of sovereignty came into force in the Commonwealth. For example, it became an offence at the common law of the Commonwealth "to conspire to defraud the King as head of the Realm."\textsuperscript{50} The indictment in \textit{Kidman} was for such an offence and Chief Justice Griffith had "no difficulty in holding" that it disclosed "an offence against the common law of Australia."\textsuperscript{51}

Justice Isaacs, who also expressed an opinion on the point, although in his case it was not necessary to his decision, said much the same thing:

> The necessary implication of unrestrictable right to perform its functions as a sovereign power - because in law it is the King who acts, carries with it the corollary that obstruction to the King in the exercise of his Commonwealth powers is, at common law, an offence with reference to the Constitution, and not with reference to any State law or the State Constitution.\textsuperscript{52}

Neither Chief Justice Griffith nor Justice Isaacs went beyond saying that by implication from the establishment of the Commonwealth by the Constitution, the Commonwealth must have those powers necessary to protect its sovereignty. To that extent, the Commonwealth could rely on the English common law rules by which United Kingdom sovereignty was protected. Those rules would be the English common law rules as they were at the inception of the Commonwealth, subject to any alterations subsequently authorized by the Australian Constitution. When they came to be applied at some later date, after the commencement of the Commonwealth, they would qualify as Australian common law rules\textsuperscript{53} and could be said to be not very different from what Inglis Clark had said.

law or the State Constitution. It is entirely outside the domain of the States. \textit{Kidman}, 20 C.L.R. at 445. He expressed the same idea somewhat differently by reference to the "peace of the Commonwealth," which he thought was a necessary incident of the existence of the Commonwealth and said that that peace depended not on "a special common law of the Commonwealth, but because the common law of Australia recognizes the peace of the King in relation to his Commonwealth, by virtue of the Constitution, just as it recognizes the peace of the King in relation to each separate State."

\textit{Id.} at 445.

\textsuperscript{50} \textit{Id.} at 436.

\textsuperscript{51} \textit{Id.} at 436.

\textsuperscript{52} \textit{Id.} at 445.

\textsuperscript{53} One commentator took Chief Justice Griffith to have gone further. See Zelman Cowen, \textit{Diversity Jurisdiction: the Australian Experience}, \textit{RES JUDICATAE} 1, 29 (1955).
To state their view in a general form (and perhaps somewhat more generally than they would all agree with), their view could be said to be that the whole of English common law as it was on January 1, 1901 did not become Commonwealth law on that day, but only so much of it did become Commonwealth law as was necessary to enable the rights and powers of the Commonwealth under the Constitution, to be enforced.

I add at this point that, as the courts decided litigation under such a limited common law, (which so far as I can see would have to relate to statutes made in exercise of the legislative power of the Commonwealth), a body of decisional law would inevitably grow up which could sensibly be called federal common law, but which would be a growth rooted in the Constitution. The Common law that would emerge would in no sense be either English common law, or common law of any of the states, although it would be likely to have a great deal in common with them, particularly as to method.

This position appears to me to be substantially that which obtains today in regard to Australian federal common law, as distinct from common law in force in Australia which is not the law of the Commonwealth. However, there has been occasional discussion since 1915 of matters relevant to both these aspects of common law in Australia, sometimes in contexts where there has been no need to distinguish clearly between them. I will refer to this discussion at this stage, before going on to discuss as a separate matter the position of non federal common law in Australia.

In 1939, the Chief Justice of New South Wales, Sir Frederick Jordan, presided over the Full Court of the Supreme Court of New South Wales in Washington v. Commonwealth.54 That case dealt with an action brought by a widow against the Commonwealth pursuant to the New South Wales Compensation to Relatives Act, 1897. The widow alleged that her husband’s death had been caused by the negligence of servants or agents of the Commonwealth, and claimed damages. The Commonwealth argued that the Act did not bind it. In the course of reaching the contrary conclusion, Chief Justice Jordan considered the question whether the Commonwealth was “bound by the law of torts, and if so to what extent.”55 In dealing with this question, he used language which adopted an approach very similar to that of Holmes in Black & White Taxicab Co.,56 and Justice Brandeis in Erie Railroad v. Tompkins.57 Chief Justice Jordan said:

54. 39 S.R. (N.S.W.) 133 (1939).
55. Id. at 139.
57. 304 U.S. 64 (1938).
[It] is necessary to remember that there is no one uniform law of torts applicable to the whole of Australia. With the establishment in Australia of several colonies each with a Government of its own, distinct laws of torts, similar in their general content, but tending to differ in matters of detail, came into existence in the separate colonies; and when the Commonwealth came into being at the commencement of the year 1901 the law of torts in Australia was made up of six different bodies of law, one applicable in each of the States. If one leaves out of account Federal territories, this is still the position, just as, with the like omission, criminal law in Australia is in the main made up of six bodies of law, one applicable in each State.  

The next statement of note on the subject was made in 1943 by Sir Owen Dixon (a Justice of the High Court from 1929, and Chief Justice from 1952 to 1964) in a paper delivered at Detroit. In it he referred to the fact that the framers of the Australian Constitution had used the United States Constitution as a model, but with some deliberate departures, which in the main did not arise from differences in fundamental legal conceptions. However, one variance was, he said, of deeper significance because it showed that the two countries were not at one in their conception of the unity of the legal system of the nation. He then cited the well-known passage from Holmes' dissent in Black & White Taxicab Co. Dixon then continued:

In Australia we subscribe to a very different doctrine. We conceive a State as deriving from the law; not the law as deriving from a State. A State is an authority established by and under the law, an authority possessing legislative and other power restricted territorially and qualified in point of subject matter. We do not of course treat the common law as a transcendental body of legal doctrine, but we do treat it as antecedent in operation to the constitutional instruments which first divided Australia into separate Colonies and then united her in a federal Commonwealth. We therefore regard Australian law as a unit. Its content comprises besides legislation the general common law which it is the duty of the courts to ascertain as best they may. But subject always to the binding authority of some disturbing precedent, we treat it as the duty of all courts to recognize that it is one system which should receive a uniform interpretation and application, not only throughout Australia but in every jurisdiction of the British Commonwealth where the common law runs. The anterior

59. Owen Dixon, Address to the section of the American Bar Association for International and Comparative Law, 17 AUSTL. L.J. 138 (1943), reprinted in Owen Dixon Sources of Legal Authority, JESTING PILATE 198 (Woinarski ed. 1965).
60. 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).
operation of the common law in Australia is not just a dogma of our legal system, an abstraction of our constitutional reasoning. It is a fact of legal history.61

In the first of the emphasized sentences, Dixon seems to have been indicating agreement with Holmes’ basic proposition, but then in the second, he seems to come close to Justice Story’s premise in Swift v. Tyson.62 It should be stressed, I think, that in this paper Dixon’s principal points were, first, the one made in the opening paragraph I have quoted, and, second, that Australian law could be regarded as a unit. Without stopping to examine these propositions, I would nevertheless note their validity does not depend upon the common law of first the Colonies and later the states being identical. (The same observations apply to Dixon’s subsequent paragraph.)

Dixon went on to contrast the source of the authority of the United States and Australian constitutions. The authority of the instrument of government giving effect to the union of the Australian States in the Commonwealth, he said, was not original. He continued:

It did not proceed from an extra legal transaction or an unexaminable source. It arose under the law, the law immemorially recognized. Does not this satisfy the requirement expressed by Mr. Justice Holmes in the passage I have read when he says “but law in the sense which courts speak of it today does not exist without some definite authority behind it?”

If what is sought is the organized force of the community, then ‘behind’ our law in that sense stands the federal system comprising State

61. Dixon, supra note 59, at 139. The text quoted above continued:
In spite of the ambiguous character of the first settlement of much of Australia, it was made clear at a very early stage of our development that the law of England had followed the colonists to the new land, throughout which, as a consequence, the all pervasive common law ran. The British conception of the complete supremacy of Parliament developed under the common law; it forms part of the common law and, indeed, it may be considered as deriving its authority from the common law rather than as giving authority to the common law. But, after all, the common law was the common law of England. It was not a law of nations. It developed no general doctrine that all legislatures by their very nature were supreme over the law. The doctrine of the supremacy of parliament related to the Parliament of Westminster. It meant that the latest authentic expression of the will of that legislature must be recognized without question or qualification as the law of the land. And when Britons settled a new country, just in the same way as the common law followed them and continued to govern them, so too did the authority of the Parliament at Westminster.

Id. Dixon went on to make his principal point by noting that each of the six colonies had been created by an exercise of the legal authority of a central legislative body (that is, I assume, the Imperial Parliament), and that the new Federation was brought into being by an exercise of the same “constituent power.” The basic proposition was, in terms appropriate to the time of the address that “the law of the British Commonwealth provides a constituent authority.” Id.

and Commonwealth, which Australian lawyers regard as something more than a combination of separate sources of legal authority. We are able to regard it as an entirety. We can do so, because the whole and the parts exist under the law; and "behind" that law, in the sense that it is anterior in time and in legal conception and recognition, stands the constituent authority at the center of the British Commonwealth of Nations.

These are the reasons which make it possible for an Australian to regard his country as governed by a single legal system. It is a system or corpus composed of the common law, modified by the enactments of various legislatures. Owing to the long history of the law now in force in Australia, the statutes of a surprisingly large number of successive legislative bodies contribute to the sum. The colonies were and the States are distinct jurisdictions and the enactments of their legislatures are confined in their territorial operation because a State is a fragment of the whole. In other States the recognition of its statutes depends upon the general common law principles governing the extra-territorial recognition and enforcement of rights, as affected by the full faith and credit clause. But it remains true that Australians regard the legal system of their country as a unit.63

A little later Dixon stated that the framers of the Australian Constitution felt that the American Constitution's treatment of judicial power and federal jurisdiction was integral to federalism and was accordingly closely copied. Nevertheless, "an instinctive faith in the unity of the system and in the consequent need of uniform interpretations was expressed by establishing the High Court of Australia as a general appellate tribunal for the Commonwealth with jurisdiction to hear appeals from State Courts as well as Federal."64 His final observation was that "under the Australian conception, while on the one hand there is neither need nor room for the doctrine of Swift v. Tyson, on the other hand the basal principle of Erie Railroad Co v. Tompkins is contradicted."65 This final observation was questioned by Professor Cowen in his article referred to earlier.66 Cowen fastened on what seems to me to be the key point, namely that it is not necessarily true that simply because the authority of the United Kingdom Parliament rested on the common law, the common law therefore produced singleness of result in all jurisdictions.67 He expressed the opinion that if the Swift v. Tyson—Erie Railroad v. Tompkins problem had no relevance for Australia it was not because the authority of the United Kingdom legislature rested on the common law but because of the other

63. Dixon, supra note 59, at 140.
64. Id. at 140.
65. Id. at 140-41 (citations omitted).
66. Cowen, supra note 53.
67. See id. at 29.
matter mentioned more or less incidentally by Dixon that section 73 of the Commonwealth Constitution conferred general appellate jurisdiction on the High Court.68

In a later paper,69 Chief Justice Dixon repeated, in a somewhat more elaborate way, the views he had expressed in his 1943 address to the American Bar Association. He referred to Professor Cowen's "divergent view" in a footnote, but did not deal with it directly. At one point he stated:

The Australian judge knows that he must give effect to the relevant statutory law of the appropriate State. If he is in doubt which is the appropriate State he turns, for the purpose of resolving his doubts, to that part of the common law called private international law. But, if there be no statutory law in the case, or subject to such statutory provisions as are material, he proceeds to administer the common law as an entire sys-

Dixon again cited Holmes in Black & White Taxicab & Transfer Co. bringing the quotation to an end with Holmes's sentence "It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any court concerned."71 It was against this idea of one corpus, which in another part of the passage Holmes had called "a transcendental body of law outside of any particular State"72 and, in an earlier decision, "a brooding omnipresence in the sky"73 that Holmes had

68. See id. at 30.
70. Id. at 140-41 (footnote omitted).
71. Id. at 241 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co, 276 U.S. 518, 533 (1928)).
73. Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). Holmes expressed this idea again in a letter to Laski in 1926:

There is a tendency to think of judges as if they were independent mouthpieces of the infinite, and not simply directors of the force that comes from the source that gives them their authority. I think our court has fallen into the error at times and it is that that I have aimed at when I have said that the Common Law is not a brooding omnipresence in the sky and that the U.S. is not subject to some mystic overlaw that it is bound to obey. When our U.S. Circuit Courts are backed up by us in saying that suitors have a right to their independent judgment as to the common law of a State, and so that the U.S. Courts may disregard the decisions of the Supreme Court of the State, the fallacy is illustrated. The Common Law in a State is the Common Law of that state deriving all its authority from the State, as is shown by Louisiana where it does not prevail. But the late Harlan, Day, and a majority of others have treated the question as if they were invited to speculate about the Common Law in abstracto.
directed the criticism eventually accepted by the Supreme Court in *Erie Railroad v. Tompkins*. But Dixon, far from joining with Holmes in rejecting the idea of "the one august corpus" continued: "An Australian judge is not bound to resist this impression. He may have other notions, but at least he may declare the common law . . . ."\(^74\)

Here Dixon seems to have moved away from the statement in his earlier paper that "after all, the common law was the common law of England,"\(^75\) and to be asserting the idea of the general common law, with no visible anchorage. Transcendental may be a harsh word to apply to this idea, but it appears to be an accurate one.

From this time on the question of a federal common law does not appear to have surfaced in any High Court decision, or at least not to have been analytically considered in a way directly material to any decision. There is thus no authoritative material taking the question of federal common law further, nor any pressing occasion for its further examination. The position appears to be that there is no federal common law beyond that necessary to allow the Commonwealth to enforce governmental rights and powers in the Constitution.\(^76\)

---

75. Dixon, *supra* note 59, at 139.
76. See Ian Renard, *Australian Inter-State Common Law*, 4 Fed. L. Rev. 87 (1970) (a particular application of this view in characterizing the law by which disputes between states are decided).

Also, in regard to what I have called decisional law which could be called federal common law having its root in the Constitution itself, Justice Murphy in the series of decisions listed at the end of this paragraph developed the idea of a federal common law of statutes which appears in the citation in note three from Groves v. The Commonwealth, 150 C.L.R. 113 (1982).

Although this idea does not appear to have been discussed by other members of the High Court, it seems to me to be basically acceptable. When spelled out, there are two ideas involved. One is that when a court exercising federal jurisdiction interprets a federal statute it does so by common law principles of interpretation. The rule it uses in interpreting the statute involved must become a federal common law rule of interpretation. The second rule is that just as a court at common law has incidental powers to make effective its practices and decisions, courts exercising federal jurisdiction in regard to a federal statute have similar powers. Justice Murphy described these powers in different places as a common law of federal judicial power or federal common law attaching to federal statutory power, in other words a federal adjectival common law. See Stack v. Coast Sec. (No. 9) Pty. Ltd., 154 C.L.R. 261, 299 (1983); O'Reilly v. State Bank of Victoria Comm'rs, 153 C.L.R. 1, 27 (1983); Pyneboard Pty. Ltd. v. Trade Practices Comm'n, 152 C.L.R. 328, 347 (1983); Philip Morris Inc. v. Adam P. Brown Male Fashions Pty. Ltd., 148 C.L.R. 457, 519 (1981); Thomson Australian Holdings Pty. Ltd. v. Trade Practices Comm'n, 148 C.L.R. 150, 169 (1981); Moorgate Tobacco Ltd. v. Philip Morris Ltd., 145 C.L.R. 457, 483 (1980); Taylor v. Taylor, 143 C.L.R. 1, 21 (1979); Australian Broadcasting Comm'n v. Industrial Court, 138 C.L.R. 399, 418 (1977); The Queen v. MacKellar, 137 C.L.R. 461, 483 (1977).
There have, however, been developments concerning related aspects of the common law which may have relevance for future cases, to which I will now turn.

The Australian Common Law

There has been a tendency in the High Court to refer to "the Australian common law" or "an Australian common law." This has happened in circumstances where (a) there is no reason to suppose that, if the matter had been considered on the assumption that there were six bodies of state common law, there would have been any material difference in result, because there was no material difference, on the point in question, in the six bodies of common law; and (b) no attention was necessary to the distinction between Australian and federal common law; these references have been made without any examination of these questions; nothing has turned on them, and assumptions have simply been made that there is an Australian common law. Looked at broadly, there is no visible harm in such assumptions, but it is arguable that they are not strictly correct.

Divergences Between Common Law of States Possible Under the Present System

There is no reason why variant judicial decisions on common law rules may not occur in different states and thus create divergences in the common law of the states. The brooding presence of the High Court will act as a brake on any such divergence but until such time as any particular point is dealt with by the High Court, which may take some time or may never happen, the position will in fact be that the common-law rule on the particular point will be different in at least two states. This in itself is sufficient to show in theory


It would seem that it was on the basis of what Chief Justice Mason and Justice McHugh - said in Mabo, that the Australian Parliament, in the Native Title Act 1993, included section 12: "Subject to this Act, the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth." The Parliament, by this section, seems to have been acknowledging one Australian (non federal) common law, and giving it the force of a federal statutory law.
that there is not one common law throughout Australia, nor an Australian common law.\textsuperscript{78}

Consideration of the total law in force in a state at any time shows the strength of the foregoing argument. That total law will comprise the statute law (Imperial, Commonwealth and state) in force in the state and the decisional law there prevailing. This decisional law seems to me to be appropriately called common law for present purposes. The whole of the law in the state must be looked at in order to decide any particular case. It is only after looking at the whole that a court can be satisfied that the particular rule by which in the end it decides the case in hand is the appropriate one. (Experience, convention and occasional help from legal representation usually keeps this task, in theory almost impossibly onerous, within manageable limits.) That is, although it is possible to divide the law into the different areas of applicable statute and decisional law, what the court is seeking in any case is the rule thought to be most appropriate to be found in or derived from the global mass of all law in the state. For practical purposes, this is a seamless web (in a less romantic sense than that in which Maitland used the phrase). The totality is different in every state. Some statutory law is identical from state to state, much is substantially similar, but some is quite different. Even if the assumption is made that the decisional component of the overall law in every state was identical when, as a colony, its legal system began to function, it must follow that from the time any differences developed in statutory law applicable in the jurisdiction, the total effect of the decisional law in that jurisdiction necessarily became different from that in the others.

This was so in the colonies before Federation. One example concerns the rules relating to the admissibility of confessions in criminal cases. In Victoria, which separated from New South Wales in 1851, a provision was enacted in 1857 which narrowed the rules by reference to which confessions tendered in evidence in criminal proceedings were to be rejected. In 1858 in New South Wales a provision extending the operation of the common-law rules was enacted. Queensland separated from New South Wales in 1859. In 1867,

\textsuperscript{78} A well known example of this actually happening concerns the novel remedy of the Mareva injunction, named after the second of the cases in which it is recorded as having been granted. See Mareva Compania Naviera S.A. v. International Bulk Carriers S.A. [1975] 2 Lloyd's Rep. 509. See also R.P. Meagher et al., EQUITY DOCTRINES AND REMEDIES §§ 2185-2190 (ed. 1992) (discussing at some length the development of the Mareva Injunction in Australia). The jurisdiction to grant a Mareva injunction was recognized in Victoria in 1977 and in Queensland in 1979. Id. § 2190. In South Australia, the Full Court of the Supreme Court said the jurisdiction did not exist. Pivovaroff v. Chernabaeff, 16 S.A.S.R. 329 (1978). After some diversity of opinion the jurisdiction was recognized in New South Wales in 1982. The courts that recognized the jurisdiction did not agree in the doctrinal ground for it. In 1984 the Full Court of the South Australian Supreme Court reversed Pivovaroff and accepted the jurisdiction. Devlin v. Collins, 37 S.A.S.R. 98 (1984). It thus seems undoubted that for six years the judge-made law on an important topic was different in South Australia from what it was in other states.
Queensland enacted a provision similar to the New South Wales provision. Later, cases in Queensland that created dissatisfaction in the legislature with regard to the law prescribed by the statute and in 1894 the statute law was amended to bring the position into line with the common law position in England.\textsuperscript{79} Thus by 1894 the statutory position concerning the admissibility of confessions was different in the three colonies. It necessarily followed that the common law position concerning confessions was likewise different in each jurisdiction.\textsuperscript{80}

A class of cases of general importance in which divergence of the relevant kind could easily happen, if it has not already happened, is the class of cases involving injury to persons falling on spillages in premises to which persons resort, generally for business purposes (shopping malls and supermarkets, for example). In New South Wales a plaintiff is required to prove not only that the spillage was the result of a breach of duty by the occupant of the premises but also that the breach of duty was the cause of the plaintiff’s fall. In cases where the duty has been found to be one of periodical inspection and of necessary cleaning, it is often difficult for the plaintiff to prove a breach, because the plaintiff cannot show that the spillage happened before the time of the last inspection.\textsuperscript{81}

In England, however, the doctrine has developed that the occupant has the onus of explaining that the spillage was not negligent.\textsuperscript{82}

Cases in South Australia either have arguably adopted the English position or show distinct signs of moving towards it.\textsuperscript{83} Whether or not the English position has been reached in South Australia, both the fact that it has been reached in England and the possibility that it may be taken up in South Australia illustrate the point earlier made. When such a situation occurs, although it may be said that uniformity will be restored to the common law when the High Court has spoken on the point, it seems impossible to deny that, until that happens, the common law in the two states is in fact different.

\textit{Transcendental Common Law}


\textsuperscript{80} There must be numerous similar examples; one fairly recent one appears in \textit{Delehunt v. Carmody}, 161 C.L.R. 464, 471-73 (1986).


Another trend has been the tendency for judges in the High Court to refer to “common law” without any qualification and to treat that common law as a kind of natural law.

For example, in one case a magistrate held that a child welfare statute did not automatically confer upon a parent the right to be a party to proceedings concerning the child’s welfare but indicated that discretion ought almost always be exercised so as to permit the parent to be heard. The High Court reversed, holding that the statute did not sufficiently clearly exclude “the operation of the common law principle of natural justice affording to a parent a general right to be heard” and that “[i]t would offend the deepest human sentiments as well as a basic legal principle to permit a court to take a child from its parents without hearing the parents when they can be heard and when they wish to be heard in opposition to the making of an order.” In the High Court’s decision, the principles of natural justice were spoken of as being part of common law principle, “common law” being used in a completely general sense. That case did not cause a great deal of comment. It was an example of a court interpreting a state statute to produce a result with which most people (particularly those who did not study the terms of the statute) would probably agree. I will pass over other examples to come to a very recent

85. Id. at 458 (per Brennan, J.).
86. Lasswell and McDougal spell out the dangers inherent in this approach in reference to what they call the “natural law frame.” HAROLD D. LASSWELL & MYRES S. McDOUGAL, 1 JURISPRUDENCE FOR A FREE SOCIETY 220 (1992). After describing the lengthy history of the natural law idea and the enormous bequest of ideas it has conferred upon current thinking (for example in enabling the statement of community goals at highest level abstraction), they went on to say that

the meta-empirical or ill-defined empirical references in terms of which such preferred goals are commonly stated afford little guidance to the decision maker or observer in search of a more detailed specification of policies for application to particular instances of choice. When presented in the guise of revelation or of metaphysical absolutism, such projection of overriding goals may even impede the conscious, rational, and articulate discovery and assessment of alternative particular policies. From the point of view of an external observer, the expression of goals in such terms may appear merely as a statement of intense preferences for which one is not willing, or is unable, to assume personal responsibility.

Id. A similar point was made succinctly by Justice Field in Baltimore & O.R.R. v. Baugh, 149 U.S. 368 (1893):

I am aware that what has been termed the general law of the country — which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject — has been often advanced in judicial opinions of this court to control a conflicting law of a State.

Id. at 401. The Lasswell-McDougal comment is the harshest way of describing the way in which such notions are used. The notion of a general commercial common law could operate quite well, without any great mystification, so long as there was a general consensus in the various jurisdictions prepared to apply it. See Fletcher, supra note 12, at 1517-21.

87. Somewhat earlier than Theophanous (discussed below) and even more dramatic was Mabo
and far more dramatic one: *Theophanous v. Herald & Weekly Times Limited.*

In this case the Constitution that was interpreted, by reference, among other considerations, to values of the undifferentiated common law.

The case was one in which a member of the Lower House of Commonwealth Parliament, the House of Representatives, had brought defamation proceedings against a defendant who pleaded defenses based on an asserted freedom guaranteed by the Commonwealth Constitution to publish discussion of government and political matters, provided certain conditions were fulfilled. By a four to three majority the court held there was such a constitutional guarantee. The dramatic nature of this decision lay in the fact that the guarantee was based entirely on implication. The Australian Constitution has no direct counterpart to the United States’s Bill of Rights, consisting of the first ten amendments to the Constitution. The argument was made at the Constitutional Convention of 1787, and rejected by the ratification in 1791, that a Bill of Rights was unnecessary because these rights were contended to be common-law rights entrenched in the Constitution. This argument was also made at the Australian Constitutional Conventions and succeeded.

The undifferentiated common law was much referred to in the argument and opinions in *Theophanous* in relation to the question whether the Australian Constitution was written on the assumption that freedom of expression was protected by the common law. The references to the common law tended to

---

v. Queensland, 175 C.L.R. 1 (1992). In *Mabo* the High Court held, for the first time, and contrary to previous understanding, “that the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands...” *Id.* at 15 (per Mason, C.J. and McHugh, J.).

What was chiefly addressed in the elaborate reasoning of this case, so far as the common law was concerned, however, was the common law in 1788. It was not thought necessary, for example, to explore the question whether the amalgam of common law, prerogative instructions and statutes relating to the treatment of Aboriginals upon the foundation of South Australia in 1836 resulted in the body of law concerning Aboriginals in that colony being different from that in force in New South Wales.

Another recent example is the reliance by Justices Deane and Toohey in joint reasons in *Leeth v. Commonwealth*, 174 C.L.R. 445 (1992) upon their view that if the Australian Constitution had adopted the common law’s doctrine of the separation of judicial power from executive and legislative powers, then that common-law doctrine had to be taken into account in understanding what the judicial power of the Commonwealth was, and that that involved “the underlying or inherent theoretical equality of all persons under the law.” *Id.* at 485.

The possibility of a similar line of thought was mentioned by Justice Toohey in an extra curial paper. *A Government of Laws, and Not of Men?*, 4 Pub. L.R. 158 (1993). Toohey raised for discussion the possible argument that the conferral of legislative power by the Constitution upon the Commonwealth Parliament was not intended to “extend to invasion of fundamental common law liberties.” *Id.* at 170.

89. *Id.* at 10.
be to the system of values inherent in the common law. The majority,90 in a joint opinion, dealt with the question on this footing. They said: “At that time the common law recognized the importance of debate on matters of public interest but, notwithstanding that recognition, rejected the view that bona fide belief in truth without more afforded a good defence in the absence of privilege.”91 The same use of the concept appears a little later:

The framers of the Constitution, influenced by the writings of Professor Dicey on Parliament and sovereignty, no doubt considered that the ultimate protection of freedom of expression, along with other important rights, might be found in the common law and in the exercise by the legislatures of the powers which they possessed.92

Cross-vesting and Remitter

Two other developments are a little easier to come to grips with. One concerns the cross-vesting legislation and the other the High Court’s powers of remitter. The cross-vesting scheme and its effects on forum shopping and choice of law rules as between the different intra-Australian jurisdictions have recently been dealt with very fully by Professor Johnson.93 Broadly speaking, what happened was that, in reliance upon provisions in the Australian Constitution, all states purported to vest federal courts with jurisdiction to entertain state cases and the Commonwealth vested state courts with federal jurisdiction in a very broad range of federal matters, reserving however a few heads of jurisdiction which were thought to be of peculiarly federal concern. As a result, cases which previously could only have been heard in state courts may be commenced in federal court and cases which previously could have been heard only in federal court may be commenced in State courts. Once a case is commenced, the cross-vesting statutes permit application to be made for transfer to the court in another jurisdiction.94 Because of differences in state law, both statutory and common law altered by statute, the choice of jurisdiction and the fate of an application to transfer from one jurisdiction to another may have a significant effect on the outcome of a case.

Similarly, the High Court’s power of remitter, which is exercised by reference to as yet unsettled methods of approach, and which sometimes involves the High Court choosing between the courts of different jurisdictions

90. Id. Mason, C.J., Toohey and Gaudron, JJ.; Deane, J., (the other member of the majority), wrote a separate opinion.
91. Id. at 16.
92. Id.
as the court to which the proceedings will be remitted, may have a significant bearing on the outcome of the case.

In a number of the remitter cases the High Court has implicitly recognized the point I made earlier concerning the difference in a global sense between the laws of various states. The remitter power has been held to extend, in a case commenced in the original jurisdiction of the High Court, to the remitter of that case to a court which would not have had jurisdiction to entertain it had it been commenced in that court in the first instance. In deciding in such cases between the different courts to which the matter might be remitted, the High Court has taken into account the different law applicable in the candidate jurisdictions.

One point involved in these cases, as earlier explained, is that any difference in the global law must involve a difference in the overall common law component of the common law of the particular jurisdiction at the time. The substantial reason why the parties contest these cases is usually to obtain a more favorable applicable law. Another point is that as the number of such cases grows (and also of cases where the High Court decides to which of two courts both having jurisdiction a case is to go) a body of truly federal decisional law will come into existence, not having anything to do with English common law as it was in 1901, but no doubt heavily influenced by ideas stemming from that law.

Also in the federal court it seems possible that real *Swift v. Tyson* as against *Erie Railroad v. Tompkins* questions may arise. A federal court exercising cross-vested jurisdiction in, for example, a supermarket slipping case (let us assume that a South Australian plaintiff is suing a New South Wales defendant, and that there is a difference in the onus of proof) would presumably decide what the appropriate common law rule was by reference to what it thought the High Court would decide, but if the point were never taken to the High Court, what would the position be? Perhaps genuine Federal common law, *a la Story*. Such cases are not likely to be frequent, but the possibility is at the least intriguing.

---

96. See, e.g., State Bank of New South Wales v. Commonwealth Savs. Bank of Aust., 154 C.L.R. 579 (1984). The case was remitted to the Federal Court, which could not award interest on a large money claim, and not to the New South Wales Supreme Court, which could award interest. The amount in question was expected to be in the millions. The single justice of the High Court who decided the remitter question, Chief Justice Gibbs did so on a stated basis, the applicability of which, in the particular circumstances of the case, was debateable. The merits of the debate do not matter for present purposes. The immediate question is the description of the rule. It is a federal decisional rule, which could be called a common-law rule in one often used sense of that term. In terms of distinction I have been drawing in this paper, if it is to be called an Australian common-law rule, it would be an Australian federal common-law rule, not an Australian state common-law rule.
Another development was that in 1988 section 80 of the Judiciary Act was amended. The phrase "the common law of England" was removed and replaced by "the common law in Australia." (The use of "in" is interesting.) All that was said in the legislature about this change was that it was needed because "in some respects the common law of Australia has diverged from the common law of England."97 The amendment was apparently among those thought necessary to "tidy up, correct or update existing legislation."98

The Republic

A further development, which if it goes forward is bound to have truly fundamental legal consequences, is the movement toward changing Australia from monarchy to a republic.

Early discussion of this topic was directed toward replacing Queen Elizabeth II, the current Head of State of the Australian Commonwealth, with a non-hereditary official, such as a president. The idea was to do no more than remove all traces of monarchy from the Constitution, and otherwise to leave the system of government unchanged from the present system, which in fact is virtually indistinguishable from republicanism.

As the discussion developed, however, it began to become clear that even such an apparently simple program might have problems. One matter to which attention turned was the position of the monarchy in the Australian states. The governor of each state is appointed upon the advice of the premier of that state to the Queen. Some alarm was expressed in regard to the possibility that not all states would follow the example of the Commonwealth if the Commonwealth substituted a non-hereditary official for the Queen.

The political realities at the moment are such that if the Commonwealth took that step, it is not impossible that at least two states would retain the Queen as their Head of State even if the others turned themselves into republics in the same way as the Commonwealth. The discussion caused by this possibility eventually focussed attention on the nature of the states as they are at present. The usual conclusion is that the states are all monarchies, in the same way as the Commonwealth is, so that Australia at the moment can be described as a heptarchy.

Analysis of this general kind has always been open, and particularly so since the passing of the Australia Acts in 1986, but the discussion of what

98. Law and Justice Legislation Amendment Bill 1988; Explanatory Memorandum page 16 ¶ 57.
might be involved in the possible change to republicanism has considerably sharpened interest in the topic. Realization of this separateness of the states seems to be quite likely to focus more attention on the separateness of the states and of the common law of each state.

**Conclusion**

First, there is the question I set out to consider, whether there is a federal common law. The materials indicate that there is some federal common law, of the kind implicitly necessary to safeguard the essential institutions created by the Constitution in their functions. However, because diversity jurisdiction was conferred by the Constitution on the Australian High Court, resulting in the lower federal courts’ lacking such jurisdiction when their life began in earnest in 1977. The same situation came about in the United States, with federal courts below the Supreme Court exercising diversity jurisdiction and (a) thereby bidding, at least until *Erie Railroad*, to bring into being a considerable, (and potentially unlimited) body of common law properly classifiable as federal, and (b) the possibilities thereby created of having two different versions of common law operating within the one state on the same subject matter. These issues never came to be thought of in Australia as a major problem of power sharing between the Commonwealth and the states.

Instead, in Australia the current idea is that there is one Australian common law, which is not federal common law, and is operative in all states, even although it is difficult to support this notion either on logical or historical grounds. Nevertheless, the fact that the High Court is a court of general appeal and the further fact that it, along with the federal legislature, seems to have adopted the Australian common-law theory, means that the common-law theory may well become accepted doctrine, if it is not already. Such a result may not cause many problems. The common law in each state is in many respects strikingly similar to that in all other states. Many detectable differences between state common laws are likely insignificant. The High Court is also likely to unify any differences that do emerge. If past trends continue, any differences in the totality of the laws operative in particular states, which the High Court recognizes as beyond unifying, will be said to be due to the different statutory provisions on the point, without any recognition that the common law must also now be different. Thus, the way will be clear for members of the court, in appropriate cases, to draw upon the resources of underlying principle thought to be available in the undifferentiated, or general, common law.

The coming of the cross-vesting legislation, which has the effect of conferring on federal courts a jurisdiction wider than the diversity jurisdiction of the United States federal courts, may well bring to the surface cases in which the differences between the common law of two states become material.
The coming of the republic (if and when that occurs) may provoke greater self-consciousness among states of their particular common law.99

Even if the common law is not a looming omnipresence, the High Court, in a very real sense, most emphatically is; further, it is the antithesis of transcendent. The significance of the High Court in the Australian legal system has always been obvious. Recent events, particularly the Mabo case and the free speech cases (Theophanous had a number of companions), and the consolidation of the position that the High Court may appeal to what I have called undifferentiated or general, and what Holmes would call transcendent, common law, have demonstrated its present power. Reflection on the role (among the many others) assigned to the High Court by the Constitution as the final common-law appeal court brings more clearly into view another fundamental dimension of its importance.

99. One question that may require closer examination of possible differences in common law doctrine in the different States than has been necessary up to now is that relating to native communal title. In Mabo it was said “the common law of this country recognizes a form of native title.” Mabo, 175 C.L.R. at 15. The implication was that the common law recognition was uniform throughout Australia. In Milirrpum v. Nabalco Pty. Ltd., 17 F.L.R. 141 (1971), Justice Blackburn rejected the proposition later accepted by the High Court in Mabo, that the common law recognized native communal title. Among the arguments he dealt with was one concerning the establishment of South Australia in 1836. He referred to a considerable body of material suggesting that by 1836 it was recognized in England that native groups in South Australia had proprietary title to land. Id. at 257-58. Blackburn examined at length an argument that by 1836 the common law recognized native communal title in South Australia, and rejected the argument. See id. at 274-83 Mabo’s reversal of the central finding in Milirrpum could well lead to an attempt in future litigation to argue that common law recognition of communal native title in South Australia, on its foundation in 1836, was on a more generous basis than that dealt with in Mabo, which concerns recognition as of 1788. It is impossible to foretell the fate of such an argument, but it seems highly likely that attempts will be made to have the High Court consider it. Mabo, although a dramatic breakthrough in some ways for aboriginal interests, makes it very clear that stringently difficult criteria must be satisfied before an aboriginal claim can be upheld. It will be surprising if cases do not eventually reach the High Court in which land claimants attempt to modify the requirements of proof which Mabo seems to impose. In such cases it seems likely that the High Court will have to give detailed consideration to the possibility that some parts of the common law are different in different parts of Australia.