Chapter 1

Introduction

1.1 The interaction of common law, equity and statute

This work is about "the interaction between the rules of law, principles of equity, requirements of statute, and between legal, equitable and statutory remedies".[1] The High Court's 20 carefully chosen words reiterate the threefold distinctions between common law, equity and statute, and between *rules* of law, *principles* of equity and *requirements* of statute, and commence with the *interaction* between those three divisions. The High Court thereby identified a principal source of complexity in the Australian legal system, and the interaction may fairly be described as entangled.

It was not by chance that the High Court used the different language of "rules" and "principles" to describe common law and equity, and that both were different from statute's "requirements". Nor is it some elegant variation.[2] The different language reflects differences in substance between the three principal sources of law. The differences between common law and equity, which are far from merely historical, make it sensible in many (but not all) cases to distinguish the two. In particular, when required to rule on a question of law not foreclosed by authority, the court regularly inquires what was the position at common law, then turns to the separate position in equity, as steps informing the conclusion. Section 1.4 gives two examples, and half

1 *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660; [2005] HCA 46 at [27].

2 The deprecatory term coined by H Fowler and F Fowler, *The King's English* (Clarendon Press, 1906) and repeated with enhanced invective in *Modern English Usage* (Clarendon Press, 1926) for distractingly unnecessary use of synonyms when the same meaning is intended: "[S]entences in which the writer, far from carelessly repeating a word in a different application, has carefully not repeated it in a similar application; the effect is to set readers wondering what the significance of the choice is, only to conclude disappointedly that it has none." See p 131 of the latter work.

a dozen more are noted below;[3] they could readily be multiplied. The same may be seen in the Supreme Court of the United Kingdom.[4] It was natural to do so in England and Wales after the enactment of the Judicature legislation, and in other jurisdictions where that legislation was adopted. Indeed, it is so natural that the legislation itself may not be explicitly invoked. In a line of cases concerning the right to contribution between co-sureties, the High Court repeatedly contrasted the position at common law (with a right to contribution at law arising only after paying more than a fair share of the guaranteed debt) with the position in equity (where it sufficed that over-payment was imminent). Thus it was said in *Lavin v Toppi* that "in an action at common law, payment of a disproportionate amount is an essential element of the payer's cause of action against a co-surety for payment of money by way of contribution; but equity recognises and protects the co-surety's equity to contribution in a more flexible and comprehensive way".[5] Six years earlier, the joint judgment in *Friend v Brooker* had stated to the same effect that "Starke J explained that at common law an action for contribution cannot be maintained in advance of actual payment of more than the just proportion of the principal obligation; on the other hand, equity acts quia timet where the apprehended over-payment appears sufficiently imminent".[6] In none of these cases was the local equivalent

3 See for example *Brady v Stapleton* (1952) 88 CLR 322 at 336-339 (tracing at common law and in equity); *Lavin v Toppi* (2015) 254 CLR 459; [2015] HCA 4 at [48]-[50] (contribution at law and in equity); *Marcolongo v Chen* (2011) 242 CLR 546; [2011] HCA 3 at [10]-[11] (fraud at common law and in equity); *Nadinic v Drinkwater* (2017) 94 NSWLR 518; [2017] NSWCA 114 at [28]-[33] (rescission at common law and in equity); *Pham v Gall* (2020) 102 NSWLR 269; [2020] NSWCA 116 at [27]-[40] (setting aside judgments at law and in equity); and *Data Transfer Services Pty Ltd v White* [2023] NSWCA 16 at [29]-[38] (estoppel by deed at law and in equity). The ultimate appellate courts of Australia, Singapore and the United Kingdom have recently reached different views on the law of penalties, but all proceeded on the basis of an original equitable jurisdiction to relieve against penal bonds, which was adopted by the common law in light of statutes of 1696 and 1705 and thereafter developed: see *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; [2012] HCA 30 at [53]-[54]; *Cavendish Square Holding BV v Talal El Makdessi* [2016] AC 1172; [2015] UKSC 67 at [4]-[11]; *Denka Advantech Private Ltd v Seraya Energy Pte Ltd* [2021] 1 SLR 631; [2020] SGCA 119 at [74]-[90] (dealing with the position in equity) and [91]-[100] (turning to the position at common law); see M Leeming, "Penalties in Australia, the United Kingdom and Singapore – Storm-warnings, statutes and style" (2022) 51 *Aust Bar R* 377.

4 Examples from recent judgments of the United Kingdom Supreme Court include *Cavendish Square Holding BV v Talal El Makdessi* [2016] AC 1172; [2015] UKSC 67 at [4]-[11] (common law and equitable approaches to penalties); *Gavin Edmondson Solicitors Ltd v Haven Insurance Company Ltd* [2018] UKSC 21; [2018] 3 All ER 273 at [2] (contrasting solicitors' rights at law and in equity); *Test Claimants in the Franked Investment Income Group Litigation v Revenue and Customs* [2022] AC 1; [2020] UKSC 47 at [103]-[106] (common law) and [107]-[122] (equity); and *Guest v Guest* [2022] UKSC 27; [2022] 3 WLR 911 on proprietary estoppel at [4] (contrasting "two legal rules" about the enforceability of non-contractual promises and testamentary freedom with the fact that "equity may in such circumstances provide the promisee (here Andrew) with a remedy if a promise has been made to confer property upon him in the future, (or an informal assurance that the property is already his) in reliance upon which he has acted to his detriment").

5 (2015) 254 CLR 459; [2015] HCA 4 at [48].

6 (2009) 239 CLR 129; [2009] HCA 21 at [52], citing *McLean v Discount and Finance Ltd* (1939) 64 CLR 312 at 341.

of s 25(11) of the *Judicature Act 1873* (UK) invoked, for two quite separate reasons. In *Lavin v Toppi* and *Friend v Brooker* it was not in dispute that the conflict or variance between the position of co-obligees at common law and in equity was resolved in favour of the latter, and so no mention was made of the statute. No mention was made in *McLean v Discount and Finance Ltd*, but that was a New South Wales appeal brought directly from the dismissal of the surety's suit in the Equity Division of the Supreme Court of New South Wales, more than three decades before the Judicature legislation was enacted. Even so, the pre-Judicature decision remained authoritative. Those decisions illustrate one theme of this work, namely, that the Judicature legislation confirmed and entrenched the existing separate bodes of common law and equity and the way in which conflicts were resolved.[7]

The line of decisions also illustrates how law looks backwards, to decisions reached decades or centuries ago, especially in those cases where courts are asked to make law, as well as how the role of statute in the resolution of disputes can be simultaneously dispositive but also merely immanent or implicit.

Differences in substantive rules and principles are far from being the only reason for distinguishing common law and equity. There continue to be profound differences between identifying an issue so as to apply a common law rule, and exercising equity's auxiliary jurisdiction so as to issue a discretionary remedy where none is available at law. The differences reflect distinct historical modes of adjudication at common law and in equity. The procedure at common law was designed to produce binary issues of fact which could be determined by a jury, or else to raise a question of law. Equity's procedure (notably, the bill and answer and hearing before a judge alone) lent itself to an evaluation of the entire case so as to exercise a discretionary remedy, perhaps on terms, perhaps on a different or more limited basis than the plaintiff had sought. The essential distinction was identified two centuries ago:[8]

> A court of law works its way to short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case.

The joint judgment of Dixon CJ, McTiernan and Kitto JJ in *Jenyns v Public Curator (Qld)* elaborated the approach taken in equity as follows:[9]

> The jurisdiction of a court of equity to set aside a gift or other disposition of property as, actually or presumptively, resulting from undue influence, abuse of confidence or other circumstances affecting the conscience of the donee is governed by principles the application of which calls for a precise examination of the particular facts, a scrutiny of the exact relations established between the parties and a consideration of the mental capacities,

7 See Chapters 5, 6 and 7 below.

8 *The Juliana* (1822) 2 Dods 504 at 522; 165 ER 1560 at 1567, and see section 7.6 below.

9 *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113 at 118-119 and *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392; [2013] HCA 25 at [122]-[123].

> processes and idiosyncrasies of the donor. Such cases do not depend upon legal categories susceptible of clear definition and giving rise to definite issues of fact readily formulated which, when found, automatically determine the validity of the disposition.

The occasion for doing so was to explain why an attempt to try a suit for rescission based on undue influence or unconscionability with a jury (as the law of Queensland then required) was "anomalous", "inappropriate" and "beset with difficulties and embarrassments". Pausing there, it is no small thing for two distinct modes of legal reasoning *addressing the same subject matter* to exist within the one legal system. We are well accustomed to a different mode of trial, standard of proof, composition of the court, rights of appeal and different procedural rules between criminal and civil proceedings. The significance of the differences in the common law and equity applicable to *the same civil disputes* (such as Ms Lavin's claimed entitlement to obtain contribution from her co-obligor Ms Toppi) is that the legal system will also require rules to resolve the conflict between those differences. Until relatively recently, there were different procedural rules (especially, different modes of pleading) and different modes of trial (notably, the presence of juries at common law and their absence in equity) which made the distinction between an action at law and a suit in equity palpable and obvious. Those distinctions have gone. That does not mean that the substantive differences identified in *The Juliana* and *Jenyns v Public Curator (Qld)* have vanished; indeed, the latter was decided three quarters of a century after the enactment of Judicature legislation in Queensland.

The rules of common law and the principles of equity were and are distinct from the requirements imposed by statutes. One point of distinction is that statutory requirements are derived by a process of statutory construction, rather than extracting rules and principles from judgments. Statutory requirements may be and often are rule-based, resembling common law. That said, there is a growing appreciation that it is important to conceptualise, analyse and (especially) regulate, by reference to principles and standards, as well as rules,[10] and that "certainty" is a chimaera in many complex situations,[11] leading on occasion to legislation expressed more generally or at a level of principle rather than rule. But while statutes are very flexible, the process of determining the legal meaning of a statute is quite distinct from the process of determining

10 A central paper is J Braithwaite, "Rules and Principles: A Theory of Legal Certainty" (2002) 27 *Aust J Leg Phil* 47. See also C Boussalis, Y Feldman and H Smith, "Experimental analysis of the effect of standards on compliance and performance" (2018) 12 *Regulation and Governance* 277; C Decker, "Goals-based and Rules-based Approaches to Regulation" (2020) *BEIS Research Paper* Number 8; C Diver, "The Optimal Precision of Administrative Rules" 93 *Yale LJ* 65 at 76 (1983); Y Feldman and H Smith, "Behavioural Equity" (2014) 170 *JITE* 137 (also available as Harv Pub Law Working Paper No 3-43); J Freedman, "Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle" (2004) *Brit Tax Rev* 332 and E Lees, *Interpreting Environmental Offences: The Need for Certainty* (Bloomsbury, 2015) ch 3. See further section 7.6 below "Rules as opposed to Principles".

11 See M Leeming, "The Role of Equity in 21st Century Commercial Disputes" (2019) 47 *Aust Bar R* 137.

the content of judge-made law. Statutes give primacy to the legislature's enacted language, and inevitably the process of statutory construction is far more textual than the process of identifying the rule or principle for which a line of judgments is authority.[12]

1.2 The complex entanglement of the interaction

The interaction between common law, equity and statute gives rise to a deal of complexity within the legal system. The interaction is complex because a common law *rule* interacts differently with an equitable *principle*, because both interact differently with statute, and because there is an immense variety of statutes. The answers to many legal problems turn upon the interaction of common law, equity and statute, and many if not most of the disputes in the legal system that lead to the making of new law involve the interaction between two if not three of common law, equity and statute.

There is also an important temporal dimension to the interaction. New decisions are constantly being delivered and new statutes are constantly being enacted. New statutes commonly react to and extend, modify or abrogate judge-made law, while every statute must, before it can be applied by a court, be construed, a process which commonly involves analysis of the judge-made law against which the statute has been enacted, and which creates more judge-made law.

An appreciation of the temporal dimension leads in turn to the phenomenon that may be termed "entanglement". Statute is commonly a reaction to judge-made law, and is itself the occasion for further development of the law, and after decades or centuries, "entanglement" is a fair description of the result.[13] Other metaphors have been used to describe the relationship between statute law and judge-made law,[14] including "a kind of legal partnership",[15] "a symbiotic relationship",[16] "bijuralism",[17] an "amalgam",[18] "woven into a seamless whole by the process of adjudication",[19] or "tort law is 'drenched' in statute".[20] One

12 See Chapter 4 below.

13 M Leeming, *The Statutory Foundations of Negligence* (Federation Press, 2019) 3, within section 1.1, "The entangled interaction of statute law and judge-made law".

14 See, generally, E Bant, "Statute and Common Law: Interaction and Influence in light of the Principle of Coherence" (2015) 38 *UNSWLJ* 367 and P Stewart and A Stuhmcke, "The rise of common law in statutory interpretation of tort law reform legislation: Oil and water or a milky pond?" (2013) 21 *Torts LJ* 127.

15 P Atiyah, "Common Law and Statute Law" (1985) 48 *Mod LR* 1 at 6.

16 *Brodie v Singleton Shire Council* (2001) 206 CLR 512; [2001] HCA 29 at [31].

17 L Moses and B Edgeworth, "Taking it Personally: Ebb and Flow in the Torrens System's In Personam Exception to Indefeasibility" (2013) 35 *Syd LR* 107 at 111.

18 J Beatson, "Has the Common Law a Future?" (1997) 56 *Camb LJ* 291 at 301.

19 HF Stone, "The Common Law in the United States" 50 *Harv LR* 4 at 12 (1936).

20 T Arvind and J Steele, "Introduction: Legislation and the Shape of Tort Law" in T Arvind and J Steele (eds), *Tort Law and the Legislature* (Hart Publishing, 2013) 1 at 13, adopting Dworkin's metaphor that law is drenched in theory: see R Dworkin, "In Praise of Theory" 29 *Ariz St LJ* 353 at 360 (1997).

thing the relationship is *not* is "oil and water".[21] I have previously written of this entanglement, in terms that apply to the present work:[22]

> One theme of this work is that the interaction between statute and judge-made law warrants greater attention that it receives, and indeed that much judge-made law is best seen as a response to or a consequence of statute. The two are *entangled*, so that to refer merely to a "line of authority" on a particular topic can distort the truth that the so-called "line" is really a series of decisions themselves responding to legislation enacted as a consequence of earlier decisions. Statute is commonly a reaction to judge-made law, and is itself the occasion for further development of the law. Entanglement has a familiar meaning applied to hair, rope, nets and other fibres. In physics, quantum entanglement refers to the interdependence of two separate particles, so that information about one cannot be provided in full without providing information about the other. Schrödinger defined entanglement "not … *one* but rather *the* characteristic trait of quantum physics".[23] It would be an exaggeration to regard entanglement as *the* salient facet of the relationship between statute law and judge-made law, but it is nonetheless vitally important.

The legal system is unquestionably complex in the ordinary sense of that word, but it could also be characterised as a complex system in a more technical sense. There is force in Kauffman's observations about the common law:[24]

> What principles, if any, govern the coevolutionary assembly of complex systems such as … British common law, where a new finding by a judge alters precedent in ways that ricochet in small and large avalanches through the law? If new determinations by judges did not have any wider impact, the law could not evolve. If every new determination altered interpretation of precedents throughout the entire corpus of common law, the law also could not evolve.
>
> My rough bet is that systems capable of coevolutionary construction, such as British common law, can evolve and accumulate complexity because they are somehow self-organized …

It would in principle be straightforward to regard each provision of a statute and each superior court decision as nodes, with branches reflecting relationships (such as between definition and use of defined term and court decision construing that provision or applying an earlier court decision, or distinguishing or overruling an earlier decision).[25] The definition of a complex system is so

21 J Beatson, "Has the Common Law a Future?" (1997) 56 *Camb LJ* 291 at 300.

22 M Leeming, *The Statutory Foundations of Negligence* (Federation Press, 2019) 3-4.

23 E Schrödinger, "Discussion of Probability Relations Between Separated Systems" (1935) 31 *Proceedings of the Cambridge Philosophical Society* 555. See, for a popular account, A Aczel, *Entanglement: The Greatest Mystery in Physics* (John Wiley & Sons, 2003).

24 S Kauffman, *Investigations* (Oxford UP, 2000) 222. See also S Kauffman, *At Home in the Universe: The Search for the Laws of Self-Organization and Complexity* (Oxford UP, 1995) 169.

25 For example, see J Ruhl and D Katz, "Measuring, Monitoring, and Managing Legal Complexity" 101 *Iowa LR* 191 at 203 (2015) ("The highly interconnected architecture of such a system drives the way it behaves over time. An agency adopts a rule, which prompts another agency to enforce a different rule, which leads to litigation before a judge, who

broad that there are many ways in which elements of the legal system might be mapped to it. My instinct is that to do so would only be worthwhile if some metric were imposed upon the branches, and that is well beyond this work's scope. Thus the use here of "complex" and "system" is more traditional, with "complex" and "system" each bearing their ordinary non-technical meanings. Hopefully, that is reinforced by the decision to entangle "complex system" with the word "entangled" itself, reflective of the recursion and self-reference which is endemic within the legal system, as well as my admiration for Hofstadter's breathtakingly creative tour de force.[26]

Note also the distinctions between common law and equity, judge-made law and statute, rules and principles, and rights and remedies. To those *dualities* may be added form and substance, and text and purpose, which as will be seen naturally emerge from the interaction of common law, equity and statute. Much of the power of a conception of the legal system based on the interaction of legal rules, equitable principles and statutory requirements is that it succinctly captures many of the dualities which supply the suppleness which permits the law to maintain continuity whilst accommodating new and unforeseen issues.

1.3 This work's main claims

The first main claim of this work is that legal analysis in hard cases is assisted by recourse to common law, equity and statute and the interaction each has with the others. This mode of analysis is normally helpful, and sometimes the best way of explaining the law as it is. It is also often the best way of determining whether and if so how the law is to change. The two processes of examining the source of the challenged rule or principle, and determining if and how it is to be altered, are linked. Raz, echoing Selden,[27] recalled this "Janus-like aspect of interpretation", which "faces both backward, aiming to elucidate the law as it is, and forward, aiming to develop and improve it".[28] It is an essential aspect of the curial function, seeking to maintain legal continuity while admitting a capacity for incremental development and innovation.[29] As

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issues an opinion overruled by a higher court, which prompts a legislature to enact a new statute, and so on. The institutional agents follow procedural rules (eg, notice and comment), and even the instrumental agents have rules for rules (eg, canons of statutory construction), but there is no central controller pulling all the strings. There are hierarchies for various institutions (eg, courts) and instruments (eg, federal preemption). Yet there is no master agent controlling the system").

26 D Hofstadter, *Gödel, Escher, Bach: An Eternal Golden Braid* (Basic Books, 1979).

27 In 1610, John Selden described the common law as the "English Janus". Of this, it has been said that "[c]reation of law is the forward-looking element of the English Janus, while the backward-facing part is the very method of the common law, and it is just as important as the nature of its output": S McLeish, "Challenges to the Survival of the Common Law" (2014) 38 *Melb ULR* 818 at 822.

28 J Raz, *Between Authority and Interpretation* (Oxford UP, 2009) 354.

29 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560; [2014] HCA 14 at [107]; *White v Johnston* (2015) 87 NSWLR 779; [2015] NSWCA 18 at [98].

one judge and academic once said, courts "could change law, indeed make law, without arrogating to themselves undue power because they always seemed to apply past precedents or principles in new ways to situations *made* new by the world around them".[30] This work describes that process, and in doing so is intended to provide tools which will assist advocates to argue and courts to determine novel questions of law.

This work's second main claim is that statute must be at the forefront of analysis. This seems to be out of fashion. Readers of legal texts published before the 18th century will see many more references to statute than in most, more modern, texts. Many factors contribute to this. One was captured by Kirby J: "Lawyers hate statutes. They love judge-made law."[31] Another is that although judicial prose often plods it nonetheless contains a narrative,[32] while statutes never tell a story, and often they are not even very good at clearly presenting their main concepts in an orderly and concise fashion.[33] A third is that the precedential nature of the legal system favours the citation of a court decision which binds or constrains the judicial officer as to the meaning of a statute, rather than going directly to the statute; this is one way in which the illusion is created that judge-made law is relatively unaffected by statute law.[34] A fourth

30 G Calabresi, *A Common Law for the Age of Statutes* (Harvard UP, 1982) 13, original emphasis, cited in M Foran, "The Cornerstone of our Law: Equality, Consistency and Judicial Review" (2022) 81 *Camb LJ* 249 at 257.

31 *Conway v The Queen* [2001] HCATrans 486 (3 October 2001). See also *Lobban v The Queen* [2001] HCATrans 236 (1 June 2001) and *Vigolo v Bostin* [2004] HCATrans 107 (2 April 2004).

32 See B Boyd, *On the Origin of Stories* (Harvard UP, 2009) for evolutionary insights into the reason why "we spend so much of our time telling one another stories that neither side believes" (at 129), including by reference to Homer and Dr Seuss, and P Armstrong, *Stories and the Brain: The Neuroscience of Narrative* (Johns Hopkins UP, 2020). See also L Edwards, "Once Upon A Time in Law: Myth, Metaphor, and Authority" 77 *Tenn LR* 883 at 886 (2009) ("We have known for some time that stories are among the primary ways of making sense of the world, including the world of law").

33 "Cases have immediate human interest supplied by the facts; and the reasoning of the judges, while often complex, satisfyingly leads the reader from the facts through to a logical conclusion via the application of a rule of principle. Statutes, in contrast, have no facts and lay down rules without any reasoning. One commonly has to work forward from provisions to facts or imagined facts, and it is often hard work to understand what the words are aiming to achieve and what they mean": A Burrows, "The Relationship between Common Law and Statute in the Law of Obligations" (2012) 128 *LQR* 232 at 232.

34 This work seeks to demonstrate this "immanence" of statute in a number of ways. By way of example, see the references to "the 'but for test' in *Adeels Palace*" in the judgment under appeal reproduced in *Chester v WA Country Health Service* [2022] WASCA 57 at [85]. But the "but for" test was imposed by the civil liability legislation, altering the position reached at judge-made law, and indeed *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420; [2009] HCA 48 at [41] emphasised that the "first point to make about the question of causation is that, in these cases, it is governed by the *Civil Liability Act*". The attraction of reasoning by reference to cases rather than statutory provisions is such that that reliance is placed on a case which itself emphasised the pre-eminence of statute on the very point relied upon. This is doubly ironic because "but for" causation is neither necessary (having regard to s 5D(2)) nor sufficient (having regard to s 5D(1)(b)) although no doubt it is for practical purposes the determinative test in most cases.

is the influence of the case method of teaching.[35] A fifth is the enormous steps made systematising areas of common law and equity in the 18th and 19th centuries, when statutes were few and judicial innovation was at its height. A sixth is the illusion that "common law" is a reasonably adequate system for resolving controversies. The truth is that common law, considered apart from statute, was appallingly deficient, as is plain from the cases of any married woman, any slightly careless plaintiff suing in negligence, any joint tortfeasor or any assignee of a debt, to name but some of the situations where statutory reform was enacted decades ago.[36] Somehow the harshness of those aspects of common law has been forgotten along with the statutes which abrogated them. Whatever be the reason, "the statutory elephant in the room"[37] dominates the practical operation of the Australian legal system. Gageler commenced an influential paper thus:[38]

> Most cases in most courts in Australia are cases in which all or most of the substantive and procedural law that is applied by the court to determine the rights of the parties who are in dispute has its source in the text of a statute.

An account of Australian tort law without the Civil Liability Acts, or criminal law without the Commonwealth Criminal Code and State and Territory Codes and Acts, or of Equity without the Trustee Acts, the Statute of Frauds, the Charitable Trusts Acts and a suite of related legislation, or of *any aspect of civil or criminal litigation* without regard to the Evidence Acts, the legislation governing civil or criminal procedure and the rules of court, would be seriously deficient.

Thirdly, this book takes seriously Sir Victor Windeyer's statement that "[t]he greatest quality of our system of law is in its capacity for development, 'in response', as Lord Radcliffe put it, 'to the developments in which it rules'".[39] It is remarkable that such a consummate judge and historian as Windeyer, who was not known for exaggeration, regarded the greatest quality of the common

35 On the case method introduced by Langdell at Harvard in 1870, see R Weaver, "Langdell's Legacy: Living with the Case Method" 36 *Vill LR* 517 (1991); J Fiocco and J Wallace, "The American Contrast: A History of American Legal Education from an Australian Viewpoint" (1980) 6 *U Tas LR* 260; B Kimball, "The Proliferation of Case Method Teaching in American Law Schools: Mr Langdell's Emblematic 'Abomination' 1890-1915" 46 *Hist of Ed Q* 191 (2006); or, best of all, K Llewellyn, *The Bramble Bush* (reprint of 1960 edition, Oxford UP, 2008) esp chs 2, 3 and 4. As James Thomson observed, it is deeply ironic that the leading casebook for Australian Constitutional Law in the 1970s and 1980s was that originally published by Geoffrey Sawer, who doubted as much as anyone that an understanding of the subject could be derived purely from the cases to the exclusion of other primary and secondary materials: J Thomson, "Zines, Lindell: Sawer's Australian Constitutional Cases" (1984) 10 *Syd LR* 469 at 474-475.

36 See section 2.5 below.

37 M Leeming, "Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room" (2013) 36(3) *UNSWLJ* 1002.

38 S Gageler, "Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process" (2011) 37 *Mon ULR* 1 at 1.

39 V Windeyer, "Unity, Disunity and Harmony in the Common Law" [1966] *NZLJ* 193, republished in B Debelle (ed), *Victor Windeyer's Legacy – Legal and Military Papers* (Federation Press, 2019).

law system to be its capacity to respond to change. One way in which the legal system accommodates change is through the dualities mentioned above. Another is through indeterminacy. Windeyer J also once explained that "it is misleading to speak glibly of the common law in order to compare and contrast it with a statute",[40] and the truth of that adage will be seen throughout this work. There is a large simplification in referring to bodies of "common law", "equity" and "statute" as though they are independent and self-contained and well defined. Lawyers should always be wary of simple explanations.[41]

Although this work treats equity as a foundational element within the legal system, there are many occasions when the critical distinction is between judge-made law (broadly speaking, common law and equity) and statute law. And indeed very frequently the term "common law" is used to embrace equity, and to contrast with statute. The "common law of Australia" to which the High Court referred in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,[42] an appeal about breach of fiduciary duty and equitable confidence, is one example among many.

Much "judge-made law" is based upon statute. Equity and common law continue to respond to, and be influenced by, statute, just as has occurred for centuries. The distinction between "common law" and "equity" is far from crisp, and indeed reflects evolutionary processes.[43] Then there are statutes and there are statutes, and their relationship with judge-made law is far from monolithic. Within the body of judge-made law it often but far from invariably makes sense to distinguish common law from equity, partly because there is often a different relationship with statutes.

Thus this book simultaneously asserts the importance of "common law", "equity" and "statute" while at the same time emphasising that those terms' boundaries are not clear-cut. That is central to this book's conception of the legal system. It reflects nothing more than that law exists in the real world, and real world phenomena are imprecise. The amateur biologist may think that the natural world is divided into distinct species, for is that not fundamental to measures of biodiversity? The professional knows that speciation is a process, that it can be useful to speak of "subspecies" although that term lacks an agreed definition, and that very often it can be difficult to identify whether there are

40 *Gammage v The Queen* (1969) 122 CLR 444 at 462; see also *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185 at 204-208, which are considered in detail in Chapter 9.

41 As was said in another context, "it is necessary to resist the temptation of elegance and simplicity if important distinctions are thereby obscured": *Winnote Pty Ltd v Page* [2006] NSWCA 287 at [364].

42 (2007) 230 CLR 89; [2007] HCA 22 at [135], discussed in Chapter 10 below.

43 For example, the jurisdiction to relieve against penalties was undoubtedly originally equitable, but came under the influence of statutes to be exercised by common law courts: see W Newland, "Equitable relief against penalties" (2011) 85 *ALJ* 434; P Turner, "Lex Sequitur Equitatem: Fusion and the Penalty Doctrine" in J Goldberg, H Smith and P Turner (eds), *Equity and Law: Fusion and Fission* (Cambridge UP, 2019) 254 at 256-267; and M Leeming, "Penalties in Australia, the United Kingdom and Singapore – Storm-warnings, statutes and style" (2022) 51 *Aust Bar R* 377.

one or two or more species.[44] Most laypeople know that there have been "mass extinctions" – periods when large numbers of species became extinct – yet even while there is a measure of consensus amongst specialists of the "big five" mass extinction events, definitions are unavoidably vague in terms of the extent of the reduction in living organisms and the timeframe over which an event occurs (a century, a millennium, a million years?).[45] But the vagueness in biological nomenclature does not prevent meaningful analysis. So too in law. This work contends that in a sufficiently large number of cases it is helpful to speak of "common law", "equity" and "statute", notwithstanding that the boundaries of those three terms are blurred and that they change over time.

1.4 Two examples of the interaction between common law, equity and statute

This work is written on the Aristotelian basis that the best way of explaining the complexity and entangledness of the legal system which it seeks to describe is by example. Many of the examples chosen by Dworkin, and even by so accomplished a barrister as Hart originally was,[46] are too simple to capture the complex messy reality of litigation. An account which simplifies the intrinsic complexity of the legal system is one which omits one of its defining features. Eighteen years at the Bar, but especially the ensuing decade of participating in more than a thousand civil and criminal appeals, and presiding over dozens of hearings at first instance, has provided the most immediate stimulus to this work, and few of those proceedings remotely resembled the simplicity of the examples often given in accounts of the legal system. Hopefully the following two examples will give a taste of the complex entangled system which is addressed in this work.

Statutory defence applicable to injunctive relief for nuisance?

Consider the analysis of the High Court in *Bankstown City Council v Alamdo Holdings Pty Ltd* which provided the 20 words introducing this work.[47] Drainage

44 See for example Y Huang et al, "Subspecies differentiation in an enigmatic chaparral shrub species" 107(6) *Amer J of Botany* 923 (2020). If cross-breeding two subspecies for a conservation purpose is acceptable, but not crossing two species, then are northern white rhinoceros and south white rhinoceros separate species or merely subspecies? See E Harley et al, "Comparison of whole mitochondrial genome sequences of northern and southern white rhinoceroses (*Ceratotherium simum*): the conservation consequences of species definitions" (2016) 17 *Conserv Genet* 1285. A (and perhaps the) classic work is E Mayr, *Systematics and the Origin of Species* (Columbia UP, 1942).

45 See A Hallam and P Wignall, *Mass Extinctions and their Aftermath* (Oxford UP, 1997) 1-4.

46 Stuart Hampshire told Nicola Lacey that he was told in the 1940s that Hart was "by far the most talented man at the Chancery Bar": N Lacey, *A Life of HLA Hart* (Oxford UP, 2004) 46, and see S Shapiro, "HLA Hart (1907-1992)" in A Martinich and D Sosa (eds), *A Companion to Analytic Philosophy* (Blackwell, 2001) ch 13. Despite holding a chair in jurisprudence, Hart held no degree in law or philosophy.

47 (2005) 223 CLR 660; [2005] HCA 46.

works owned by the Council had caused Alamdo's land to be inundated. Alamdo sued for, and obtained, injunctive relief in equity's auxiliary jurisdiction. The parties had also exchanged evidence concerning damages, but none were awarded. The only issue in the High Court was whether Council could rely on the defence created under s 733 of the *Local Government Act 1993* (NSW), which provided that a council "does not incur any liability in respect of" things done or omitted to be done in good faith concerning the risk of land being flooded. The trial judge and the New South Wales Court of Appeal had held that s 733 did not immunise the council from injunctive relief.[48] The High Court disagreed. The joint judgment said that the past conduct of the Council, constructing and operating the drainage system and its role in the urbanisation of the area had led to it "being liable to the exercise of the equity jurisdiction of the Supreme Court, together with its statutory jurisdiction conferred by s 68 of the *Supreme Court Act* [the equivalent of *Lord Cairns' Act* authorising damages either in addition to or in substitution for an injunction]".[49] Although an injunction would only be available as a matter of discretion, and irrespective of whether damages would also have been available for past inundations, the Council had "incurred a liability" within the meaning of s 733, because Alamdo had an "equity", which is to say a prima facie case for granting relief.[50]

The High Court rejected a narrower approach which would exclude *quia timet* injunctions from the statutory immunisation from liability for past events, on the basis that "the equity which the plaintiff has in such circumstances is not equated with an accrued right to sue on a cause of action at law in contract or tort. Equity responds to threats of future injury to legal or equitable rights".[51]

The High Court declined to give a narrower construction to s 733, explaining that the section was (a) not a provision which authorised government action which would otherwise be a trespass,[52] nor did it confer a monopoly for the provision of a public service,[53] nor was it a case where the general words of the immunity should be read down to exclude functions of an ordinary

48 The trial judge's finding that the Council had not acted in good faith for the purposes of s 733 was overturned by the Court of Appeal, and Alamdo's notice of contention seeking to restore that finding was rejected in the High Court: *Alamdo* (2005) 223 CLR 660; [2005] HCA 46 at [46]-[57] and [67].

49 *Alamdo* at [32].

50 An "equity" in the sense stated by Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63 at [8] ("When a plaintiff applies to a court for an interlocutory injunction, the first question counsel may be asked is: what is your equity? If a plaintiff, who has commenced an action seeking a permanent injunction, cannot demonstrate that, if the facts alleged are shown to be true, there will be a sufficiently plausible ground for the granting of final relief, then that may mean there is no basis for interlocutory relief"). See *Alamdo* (2005) 223 CLR 660; [2005] HCA 46 at [32] and [64].

51 *Alamdo* at [44], disagreeing with the reasoning in *Attrill v Richmond River Shire Council* (1993) 30 NSWLR 122, on which the Court of Appeal had relied.

52 Cf *Coco v The Queen* (1994) 179 CLR 427.

53 Cf *Suatu Holdings Pty Ltd v Australian Postal Corporation* (1989) 86 ALR 532.

character pursuant to an agreement with the consent of private citizens.[54] The words "in respect of" therefore were not to be read down having regard to the section's subject, scope and purpose.[55] Nor was the provision confined in its operation to pecuniary liability for damages. The joint judgment said that the Council was exposed to an order for damages under s 68 of the *Supreme Court Act* if an injunction had not issued, and that there was no basis for a construction which immunised the Council from damages but not an injunction which might be ordered in their place and which would likewise call for substantial expenditure of Council funds. "The legislation is concerned in s 733 with matters of substance and not merely with matters of legal or procedural form."[56]

The High Court reached that result without definitively construing s 733, stating:[57]

> It would be unsafe to attempt an exhaustive definition of a conception such as 'incur any liability' which is susceptible of various applications, given the normative complexity of the legal system, with the interaction between the rules of law, principles of equity, requirements of statute, and between legal, equitable and statutory remedies. Much must depend upon the subject, scope and purpose of s 733.

Thus, an awareness of the normative complexity brought about by the interaction of common law, equity and statute led to an acknowledgement by the ultimate appellate court that it would be unsafe to seek to define the ordinary words "incur any liability" exhaustively. That by itself speaks volumes about the complexity of language and of the legal system, and of curial minimalism – the appropriateness of courts determining only what is necessary to resolve the litigants' dispute.[58] The linguistic difficulty arose because "liability" can sometimes mean a liability established by a court but in other circumstances can mean potentially or contingently liable.[59] The word is "chameleon-hued";[60]

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54 Cf *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575; [1999] HCA 45 at [37].

55 *Alamdo* (2005) 223 CLR 660; [2005] HCA 46 at [28]-[29].

56 *Alamdo* at [31].

57 *Alamdo* at [27].

58 See *Clubb v Edwards* (2019) 267 CLR 171; [2019] HCA 11 at [137]; *Mineralogy Pty Ltd v Western Australia* [2021] HCA 30; 95 ALJR 832 at [58]; *Boensch v Pascoe* (2019) 268 CLR 593; [2019] HCA 49 at [7]-[8]; *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560; [2019] HCA 32 at [76]; *Obeid v Lockley* (2018) 98 NSWLR 258; [2018] NSWCA 71 at [225]-[229]; *Massoud v Nationwide News Pty Ltd; Massoud v Fox Sports Australia Pty Ltd* [2022] NSWCA 150 at [35]-[41].

59 As Windeyer J explained, "there are at least three main senses in which lawyers speak of a liability or liabilities. The first, a legal obligation or duty: the second the consequence of a breach of such an obligation or duty: the third a situation in which a duty or obligation can arise as the result of the occurrence of some act or event": *Ogden Industries Pty Ltd v Lucas* (1967) 116 CLR 537 at 584.

60 "But it is not necessary to be a disciple of Hohfeld, or wedded to the terminology of his analysis of legal rights and duties, to see that both words are, using his phrase, 'chameleon-hued'": *Ogden Industries*, above.

hence the significance of subject, scope and purpose. The complexity in the legal system in this instance arises from how a statutory defence framed in terms of "liability" applied to the discretionary refusal of statutory damages in equity (something foreign to common law).

It may be seen that the interaction of common law, equity and statute operated on a number of levels. The ultimate question was one of statutory construction. The statute applied to cases where the Council had "incurred any liability". That required an examination of the position at law and in equity, as modified by the local equivalent of *Lord Cairns' Act*. The broad construction upheld by the High Court after being rejected by the courts below was justified by an appeal to substance over form, which itself reflects a long-standing equitable maxim.[61]

It is no accident that the words which frame this work's title and themes were said by the High Court in the course of recognising both the complexity of the legal system and that it was unsafe to give definitive meaning to the superficially uncomplicated legal language of "incur any liability".

Rescission of a share sale agreement for misrepresentation

Suppose the purchaser of shares believes that the vendor has represented that the company is more valuable than it is. The purchaser wishes to rescind the contract. She believes she can establish that the vendor was either lying, or, at least, recklessly indifferent to the truth, when he induced her to buy the shares.

Those facts are scarcely atypical. Claims of fraudulent misrepresentations are not uncommon in commercial litigation. The legal system's response discloses the complex interaction between common law, equity and statute.

Rescission is available both at law and in equity for fraudulent misrepresentation.[62] Liability for fraudulent misrepresentation cannot be excluded by any contractual device.[63] A plaintiff will be required to make *restitutio in integrum* – essentially, to return what had been obtained under the rescinded contract. But rescission at law and rescission in equity were quite distinct conceptually, in ways that remain of the first importance today. Common law vindicated a purchaser's disaffirmation, in circumstances where title could thereby be revested, and held that it gave rise to other rights of action at common law (notably, an action for money had and received for moneys paid under the contract).

61 See for example *Parkin v Thorold* (1852) 16 Beav 59 at 66; 51 ER 698 at 701: "Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form" (Lord Romilly MR). See, generally, A Robertson and J Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing, 2019), esp B McFarlane, "Form and Substance in Equity" (ch 9).

62 The position at law in the case of deeds was rendered uncertain by Lord Abinger's decision to the contrary in *Mason v Ditchbourne and Sarson* (1835) 1 M & Rob 460. For the reasons given by D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (3rd ed, Oxford UP, 2023) paras 29.72ff, that decision should, notwithstanding its influence particularly in the United States of America, be regarded as erroneous.

63 *Commercial Banking Company of Sydney Ltd v RH Brown & Co* (1972) 126 CLR 337 at 344.

Thus, had the purchaser been acquiring a painting instead of shares, she could have disaffirmed the contract for fraudulent misrepresentation, returned the painting and sued for the amount already paid, and both a court of law and a court of equity would recognise the efficacy of her rescission. But while common law recognised that title to a chattel could be conveyed by delivery,[64] it had no mechanism by which it could itself recognise the revesting of the shares. Because the basic requirement of rescission – restoring the status quo ante – was impossible,[65] the purchaser could not validly rescind at common law.

Equity's approach was and is quite different. Rescission in equity has always been by order of the court, and for that reason equity was able through its facility to take accounts, to grant relief on terms, and even to require money to be paid,[66] to achieve *restitutio in integrum* and thereby to permit rescission in a much wider range of circumstances. Those differences were worked out following the Judicature legislation[67] and are preserved in the 21st legal system, not least by the High Court's decision in *Alati v Kruger* explaining the "difference between the legal and equitable rules":[68]

> The difference between the legal and the equitable rules on the subject simply was that equity, having means which the common law lacked to ascertain and provide for the adjustments necessary to be made between the parties in cases where a simple handing back of property or repayment of money would not put them in as good a position as before they entered into their transaction, was able to see the possibility of *restitutio in integrum*, and therefore to concede the right of a defrauded party to rescind, in a much wider variety of cases than those which the common law could recognize as admitting of rescission.

Subject to statute or subsequent decision of the High Court, that distinction between the legal and equitable rules continues to bind lower courts throughout Australia.

Thus rescission in equity is more widely available because it is the act of the court, not the party, and because it can be qualified, or granted on terms, or subject to discretionary defences, including delay.[69] Moreover, equity could intervene even if the purchaser failed to show that her vendor was dishonest or recklessly indifferent to the truth; equity regarded it as unconscientious

64 See *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 163 CLR 236 at 255 and the cases there cited.

65 The position would be different in the case of bearer shares, where legal title turns on possession, as opposed to registration.

66 *Newbigging v Adam* (1886) 34 Ch D 582; *McAllister v Richmond Brewing Co (NSW) Pty Ltd* (1942) 42 SR (NSW) 187 at 192; *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274 at 284-286; *Maguire v Makaronis* (1997) 188 CLR 449 at 467-468; *Nadinic v Drinkwater* (2017) 94 NSWLR 518; [2017] NSWCA 114 at [35].

67 Notably, by Viscount Haldane's speech in *Nocton v Lord Ashburton* [1914] AC 932.

68 See *Alati v Kruger* (1955) 94 CLR 216 at 224.

69 See *Senanayake v Cheng* [1966] AC 63 at 83 (the questions are "whether restitutio in integrum is substantially possible and whether rescission is timely and just and fair"); *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546.

for a vendor to maintain a bargain obtained through a misstatement, even if believed to be true when it was made.[70]

It will be seen that there are two meanings of the term "rescission", two meanings of the term "fraud", two conceptually distinct remedies – one the party's own act; the other the court's discretionary order yielding separate consequences for legal and equitable title, and capable of giving rise to a complex interaction in any particular case.

But advice confined to the unavailability of rescission at law and its availability in equity would be dangerously incomplete. Statute has intervened. The sale was almost certainly in trade or commerce. If the vendor's statement was misleading or deceptive, or likely to mislead or deceive, then he will have contravened federal law, and a purchaser who can show that her decision was affected by that contravention will be entitled to damages and to ask the court to exercise a statutory discretion making orders akin to rescission.[71] This may well be the stronger cause of action, because it is not necessary to prove dishonesty or reckless indifference to the truth, and the statutory discretion is less circumscribed than that in equity. Indeed, claims under statute are the dominant way in which claims such as this are litigated in the modern Australian legal system.

Yet even that is not an end to the example. In Australia and New Zealand, partial rescission has been recognised in equity,[72] and on one view that innovation (which is elsewhere controversial) has come about due to the influence of statute.[73] Further, the statutory remedy is discretionary, and the exercise of discretion (including whether to make the order, if so its form and whether to do so on terms) is informed by the position in equity.[74]

By way of summary: in order to answer a simply stated commercial problem, it is necessary to have regard to the position at common law, in equity and pursuant to statute. The statutory remedy is informed by equitable discretion, whilst equitable doctrine has been altered by the influence of statute. However, that does not render the principles at common law and in equity redundant, for the statutory discretion has been construed so as to be broader than, but informed by, the position in equity. The rules and principles at common law and in equity are supplemented by statute, but statute in turn draws upon the existing body of common law and equity.

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70 See *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315; [2003] HCA 57 at [25], endorsing the account of Sir George Jessel MR in *Redgrave v Hurd* (1881) 20 Ch D 1 at 12-13. However, equity would be more "ready to pull a transaction to pieces" in cases of fraud amounting to dishonesty: *Spence v Crawford* [1939] 3 All ER 271 at 288; *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 at 114.

71 Australian Consumer Law, s 18, and see *Jonval Builders Pty Ltd v Commissioner for Fair Trading* (2020) 104 NSWLR 1; [2020] NSWCA 233 at [36]-[37].

72 See section 4.7 below.

73 See J Dietrich and T Middleton, "Statutory remedies and equitable remedies" (2006) 28 *Aust Bar R* 136.

74 See the authorities collected in *Crystal Auburn Pty Ltd v IL Wollerman Pty Ltd* [2001] FCA 735 at [2].

1.5 Law-making by courts

Much of this work is about how courts make law. It refers throughout to "judge-made law", in contrast to statutes made by Parliaments or their delegates. Courts, and especially superior courts, make law all the time. However, even adopting the broadest view of "law-making", the occasions when courts make law are a small albeit important aspect of their work, and the choices are narrowly circumscribed. For the most part, the law-making involves selecting one of two or perhaps more reasonably arguable legal meanings for a statute, when the meaning is undetermined by authority and there is a dispute between the parties. And in all cases, save those based on the entrenched aspects of constitutional law, courts' decisions may readily be overturned by legislation.

There is much less law-making in the day-to-day operations of courts than may commonly be thought. As usual, Brian Simpson's comment is insightful:[75]

> I myself suspect that whereas at one time the beginning of wisdom in understanding the common law was to realise the extent to which judges make law, the position now is that we need to appreciate more fully the extent to which they do not.

That is so, even though this work adopts a broad view of "law-making" by courts. "Law-making" by courts refers to those occasions when a court is asked to determine a question of law where there is a dispute between the parties and an absence of binding authority. Many (and perhaps most) people would confine law-making to cases where courts *change* the law – by overturning some precedent or identifying a new right. The recognition of common law native title and the discovery of limitations of State legislative power based on the institutional integrity of State courts by majorities of the High Court in *Mabo v Queensland (No 2)*[76] and *Kable v Director of Public Prosecutions (NSW)*[77] are prime examples. And a reformulation of legal principle – such as the new way of approaching interstate trade and commerce in *Cole v Whitfield*,[78] would also be regarded as law-making by most people.

The definition of law-making to be applied in this work is broader than those instances (although they unquestionably fall within the definition). Recognising that courts make a choice when they *reject* a submission inviting change of law as much as when they *accept* the same submission, it includes cases where the *status quo* is maintained, but a reasonably arguable submission for legal change is rejected. On this approach, a judge of the Supreme Court or the District Court faced with a formal submission contrary to binding authority

75 ABW Simpson, "Innovation in Nineteenth Century Contract Law" in *Legal Theory and Legal History: Essays on the Common Law* (A & C Black, 1987) 171 at 171. This reflects Holmes' conception of the "interstitial" law-maker in *Southern Pacific Co v Jensen* 244 US 205 at 221 (1917), and see H Hart, "American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream" 11 *Georgia LR* 969 at 974 (1977).

76 (1992) 175 CLR 1.

77 (1996) 189 CLR 51.

78 (1988) 165 CLR 360, which must now be regarded as superseded or qualified by what has been held in *Palmer v Western Australia* [2021] HCA 5; 95 ALJR 229.

of the Court of Appeal would not make law, but the Court of Appeal faced with the same submissions would make law, even if it refused the application to reopen that court's earlier decision. The result of the decision of the Court of Appeal is that the rule or principle remains unchanged, but that does not mean that law has not been made. Until the court's decision is delivered, one does not know the result, and thus the submissions made by the parties and the considerations weighing upon the court will be of the same character irrespective of whether a litigant's application to change the law is acceded to or rejected.

Importantly, this definition includes occasions where the court is required to determine the construction of a statute. It is convenient to use the United States terminology adopted by Burton Crawford and Meagher, and refer to such decisions as "statutory precedents".[79] The prospects of there being no binding authority on a point of statutory construction vastly exceed the prospects of there being no binding authority on a point of common law or equity, especially if the statute is new.[80] Much that occurs in courts is procedural (interlocutory applications in advance of trial, and rulings on evidence and other applications during a trial), and thus a very large number of courts' decisions will concern legislation governing evidence, civil and criminal procedure and court rules. Where those decisions involve the resolution of competing submissions on that legislation in the absence of binding authority, then the courts are making law. The judgments will influence and perhaps bind other courts interpreting the same or similar provisions. It may be thought to be less glamorous than the landmark judicial decisions which attract academic attention and commentary, but, if it is not law-making, what is it?

A definition which turns on determining a "question of law" is less than ideal. What precisely is a "question of law" is much more debatable than might at first be thought, despite its centrality to many questions in civil and criminal trials,[81] not to mention the scope of rights of appeal and review. "No satisfactory test of universal application has yet been formulated."[82] French J once suggested it was one of Julius Stone's categories of meaningless reference.[83] That does not make the distinction useless. In the same sentence, French J said that the capital/revenue distinction was equally vexed, but that does not prevent the concepts of capital and revenue from performing a useful, meaningful role in analysis.

No differently from the meaning of any other language, the meaning of "question of law" is informed by context and purpose. "[T]he distinction between matters of fact and of law depends upon, is influenced by, and differs

79 L Burton Crawford and D Meagher, "Statutory Precedents under the 'Modern Approach' to Statutory Interpretation" (2020) 42(2) *Syd LR* 209.

80 This is quantified three paragraphs below.

81 It is a "vital distinction in many fields of law": *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 394.

82 *Agfa-Gevaert* at 394.

83 *Nizich v Commissioner of Taxation* [1991] FCA 426; 22 ATR 438.

with the circumstances in which the questions arises."[84] How does this work in practice? In New South Wales and Tasmania, a defendant is not liable in negligence for harm suffered as a result of the materialisation of an "obvious risk" of a "dangerous recreational activity".[85] "Dangerous recreational activity" is defined to mean a "recreational activity that involves a significant degree of risk of physical harm to a person", but there are materially different definitions of "recreational activity". In Tasmania "recreational activity" is (now) defined inclusively to include "any pursuit or activity engaged in for enjoyment, relaxation or leisure".[86] In New South Wales, the same term also includes "any sport (whether or not the sport is an organised activity)".[87] Is a defendant liable for harm suffered in a fall by a professional jockey racing a thoroughbred? The question is very important in practice, for catastrophic injuries from horse riding are (from the perspective of the participant) more common than motorcycle riding or automobile racing,[88] and most injuries will be the result of the materialisation of an obvious risk of horse-racing.[89] New South Wales and Tasmanian courts answered the same question differently, with the Tasmanian legislation thereafter being amended to confirm the different approaches.[90] It is clear that whether a professional jockey participating in a race is engaged in a "recreational activity" for the purposes of the *Civil Liability Act* is a question of law, despite the seeming factualness of the question. More generally, it is tolerably clear that any attempt to count cases where courts have "made law" under the definition proposed will have some contestable entries and omissions at the margins.

Most law-making concerns statutes. Sir Henry Maine wrote that the "capital fact in the mechanism of modern states is the energy of legislatures",[91] and more than a century later the enthusiasm of legislatures has not diminished; far from it.[92] *Most* of what lawyers advise, counsel argue, and courts decide, is the

84 *Da Costa v The Queen* (1968) 118 CLR 186 at 194.

85 *Civil Liability Acts 2002* (NSW and Tas), s 5L (NSW) and s 20 (Tas).

86 Section 19.

87 Section 5K.

88 See R Cripps, *Horse-related injury in Australia* (AIHW Cat No INJ26), reviewing hospital presentation rates ("Estimates of injury rates based on exposure (riding hours or horse riding participation) among all classes of horse riders combined are generally of the order of one injury per 1000 riding hours. This rate suggests horse riding is more dangerous than motorcycle riding and automobile racing").

89 Some risks may not be obvious, especially if the risk is characterised narrowly. This work passes over the complexity in the generality or abstraction involved in characterising the relevant "risk of harm" in such cases, as to which see G Perry, "Obvious risks of dangerous recreational activities: How is risk defined for *Civil Liability Act* purposes?" (2016) 23 *Torts LJ* 56 and *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* (2022) 273 CLR 454; [2022] HCA 11 at [61]-[64] and [106]-[119].

90 *Goode v Angland* (2017) 96 NSWLR 503; [2017] NSWCA 311; *Singh bhnf Ambu Kanwar v Lynch* (2020) 103 NSWLR 568; [2020] NSWCA 152; *Dodge v Snell* [2011] TASSC 19. The Tasmanian legislation was amended following *Goode v Angland* to ensure that the result held in *Dodge v Snell* was maintained.

91 H Maine, *Early History of Institutions* (Henry Holt, 1875) 398, cited by R Pound, "Common law and legislation" 21 *Harv LR* 383 at 403 (1908).

92 See section 3.3 below.

construction and application of statutes.[93] There are occasions where a "pure" proposition of law or equity arises for determination. I can think of a handful in more than 1000 civil and criminal appeals in which I have participated. May a named party to a written contract enforce any promise by another party which is recorded in it?[94] Is a beneficiary who is entitled to a strategic shareholding in a private company entitled to bring part of the trust to an end, against the opposition of the other beneficiaries?[95] Is the "dishonest and fraudulent design" in the formulation of liability in *Barnes v Addy* for knowing assistance satisfied by a breach of fiduciary duty which is not trivial or excusable?[96] Is dishonesty involved by a person liable for procuring a breach of trust?[97] May the Supreme Court review an acquittal in the exercise of its supervisory jurisdiction?[98] May one have regard to post-contractual evidence to determine the identity of the parties to a written contract?[99] There are also questions of application of a "pure" question of law to the facts, such as whether an ICAC investigator is a "public officer" for the purposes of the tort of misfeasance in public office.[100] It does not really matter whether such questions (essentially, questions of law whether the facts fully found fall within some rule or principle of judge-made law) are counted or not, or whether I have inadvertently overlooked some, because on any view the questions which do not turn on statute are a tiny minority of law-making. In my experience, they are less than 1% of the volume of cases which proceed to hearing in the Court of Appeal.

Decisions on the construction of statutes are much more common, and the very large majority of cases where courts make law involve statutes. It was said towards the end of the 19th century that "[l]egislation tends with advancing civilisation to become the nearly exclusive source of new law",[101] and the same seems true in the 21st century. For example, in 94 judgments in civil appeals in which I participated in 2020, 23 decided novel questions of law as opposed to being the application of undisputed principle to the facts of the case, and of the 23, only two involved "pure" questions of law, with the remaining 21 involving questions of statutory construction.[102] Of course, if the legislature disagrees with a court's construction, it may (unless the construction is of an entrenched constitutional provision) amend the legislation, as occurred in

93 See S Gageler, "Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process" (2011) 37 *Mon ULR* 1 at 1 quoted above.
94 *Wollongong Coal Ltd v Gujarat NRE India Pty Ltd* [2019] NSWCA 135.
95 *Beck v Henley* [2014] NSWCA 201.
96 *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609; [2014] NSWCA 266.
97 *Pittmore Pty Ltd v Chan* (2020) 104 NSWLR 62; [2020] NSWCA 344.
98 *Safework NSW v BOC Ltd* [2020] NSWCA 306.
99 *BH Australia Constructions Pty Ltd v Kapeller* (2019) 100 NSWLR 367; [2019] NSWSC 1086 (a (rare) example of a question of general law not determined by appellate authority).
100 *Obeid v Lockley* (2018) 98 NSWLR 258; [2018] NSWCA 71.
101 T Holland, *Elements of Jurisprudence* (8th ed, Macmillan & Co, 1896) 66.
102 They are listed in M Leeming, "The Modern Approach to Statutory Construction" in B McDonald, B Chen and J Gordon (eds), *Dynamic and Principled: The Influence of Sir Anthony Mason* (Federation Press, 2022) 45 at 46-47.

the Tasmanian definition of "recreational activity". This is not infrequent in Australia. Likewise, there may be a legislative response to a decision which indicates that a provision is uncertain, or needlessly problematic.[103] But the main point is that confining attention to the law-making function of courts only in cases which do not involve statute is like studying the tip of the iceberg which is visible from above, and ignoring the overwhelming majority of the phenomenon.

There is more to judicial law-making than determining novel questions of law. From time to time, courts explicitly invite legislative reform. A court will not infrequently note that a point was *not* argued, and one reason for doing so is to flag that point as a candidate for attention in a later case.[104] French CJ's statement in *Momcilovic v The Queen* that there was "much to be said for the proposition" that State laws applied to courts exercising federal jurisdiction of their own force, rather than (as a series of appellate decisions at that stage held) by virtue of federal statute is an example,[105] which anticipated the reformulation in *Rizeq v Western Australia* considered in Chapter 10 below. The tone with which a point is resolved can, at least to a sophisticated audience, convey strong indications of the court's attitude to that point and likely attitude to similar points in future cases. In short, the law-making aspect of the craft of judging is more nuanced than has been indicated. However, that is outside the scope of this work, which instead takes the same approach as did Cardozo a century ago, concluding the fourth Storrs Lecture delivered to a crowded auditorium at Yale:[106]

> [T]here remains a percentage, not large indeed, and yet not so small as to be negligible, where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. These are the cases where the creative element in the judicial process finds its opportunity and power. It is with these cases that I have chiefly concerned myself in all that I have said to you.

1.6 Conclusion

Examples of legal reasoning addressing the interaction of common law, equity and statute could readily be multiplied. Consider the masterly exposition of

103 For example, s 12A of the *Defamation Act 2005* (NSW) confirmed that a statement of claim could not constitute a "concerns notice", overturning what had been held in *Zoef v Nationwide News Pty Ltd* [2016] NSWCA 283; (2016) 92 NSWLR 570 at [92] and *Mohareb v Booth* [2020] NSWCA 49 at [11]. Page 5 of the explanatory note for the *Defamation Amendment Act 2020* (NSW) which made the amendment is explicit as to this.

104 Another may be to ensure that the decision is not regarded as authority for the unargued point.

105 (2011) 245 CLR 1; [2011] HCA 34 at [99].

106 B Cardozo, *The Nature of the Judicial Process* (Yale UP, 1921) 165. See A Corbin, "The Judicial Process Revisited" 71 *Yale LJ* 195 at 197-198 (1961) ("The next day, each student must have brought a friend. The hall was jammed, with many more pushing to get in; and we transferred the lecture to the near-by Lampson Lyceum, with some 500 seats").

the protection at law and in equity of common law leases in light of statutory intervention between 1677 and 1930 by Jordan CJ in *Dockrill v Cavanagh*[107] or the exercise of a power of sale by a mortgagee of land under Torrens title.[108] Even humdrum matters such as the court rules governing the discretion to reopen a judgment entered in the absence of a party reflect the interaction over many decades of common law, equity and statute.[109] The familiar claim of a family member who has remained on a farm and made various sacrifices following statements that he or she would own the land[110] involve the unavailability of contract (not least, because of the Statute of Frauds), the engagement of equitable principle based on the unconscientious exercise of legal rights, the amenability of land held under Torrens title to equitable relief, and an exercise of discretion informed by the unavailability of relief at law, with the possibility of claims under testators family maintenance legislation looming in the background.

That said, most litigation in most courts does not require the sort of analysis given above, or anything like it. Most of the time, the applicable legal rules and principles are agreed, and the question is as to the application of the law to the facts proven by the evidence, and the real dispute is as to those facts, the legal conclusions to be drawn from them (is the defendant liable; is the accused guilty) and the appropriate exercise of a discretion (imposing sentence, assessing damages, granting equitable or statutory relief). It is just as well that is so, otherwise litigation would be slower and more expensive than it is. But this work is directed to that minority of cases where law is made, rather than merely applied. Cardozo's language reflects the measured style of a different age, but his point that law-making is a small constrained aspect of what courts do remains sound:[111]

> Obscurity of statute or of precedent or of customs or of morals, or collision between some or all of them, may leave the law unsettled, and cast a duty upon the courts to declare it retrospectively in the exercise of a power frankly legislative in function. … We must not let these occasional and relatively rare instances blind our eyes to the innumerable instances where there is neither obscurity nor collision nor opportunity for diverse judgment. Most of us live our lives in conscious submission to rules of law, yet without necessity of resort to the courts to ascertain our rights and duties. Lawsuits are rare and catastrophic experiences for the vast majority of men, and even when the catastrophe ensues, the controversy relates most often not to the law, but to the facts. In countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps. We shall have a false view of the landscape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful.

107 (1944) 45 SR (NSW) 78.

108 *Coroneo v Australian Provincial Assurance Association Ltd* (1935) 35 SR (NSW) 391.

109 See *Pham v Gall* (2020) 102 NSWLR 269; [2020] NSWCA 116 (the statute being rules of court).

110 See for example *Giumelli v Giumelli* (1999) 196 CLR 101; [1999] HCA 10, *Sidhu v Van Dyke* (2014) 251 CLR 505; [2014] HCA 19 and *Guest v Guest* [2022] UKSC 27.

111 B Cardozo, *The Nature of the Judicial Process* (Yale UP, 1921) 128-129.

This work focuses on the "catastrophic experience" that is litigation, and the "waste spaces" where law is made. Its focus is no different from almost the entirety of decisions on undergraduate reading lists, reported decisions which are taught because they went beyond the ordinary role of courts applying settled law to the facts, and in some way developed the law. But rather than explaining what the law is, the focus of this work is to explain the processes which inform its development.