

FOREWORD

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Thematic editions of law reviews have been around a long time. But, until the last decade, no commonality would have been perceived in four articles on property law, the equitable doctrine of election, the history of unjust enrichment and the place of statutes in the legal system. What could possibly link these topics spanning public and private law, obligations and remedies, law and equity, history and legal theory, statute and general law?

Conceptual coherence is the melody sounding throughout this thematic issue, with two alternative forms of coherence serving contrapuntal roles. The alternatives are coherence with logic and coherence with history (precedent). Those who exercise the judicial power of ‘developing the law, maintaining its continuity and preserving its coherence’¹ will draw on all three, not invariably and not necessarily consistently. Justice Mark Leeming reminds us in his article that logic has not always been the life of the common law, according to Holmes’ famous aphorism, and that legislators have never been constrained by orthodoxy of any kind. As for historical coherence based on the force of precedents, even canonical decisions will at times have their reasoning questioned, overturned, ignored or reinterpreted, as Warren Swain demonstrates when analysing the fate of *Moses v Macferlan*² in different jurisdictions and different eras.

In 2001, the High Court of Australia welcomed (conceptual) coherence as a tool of judicial method when explaining, in *Sullivan v Moody*,³ that decisions about the existence, nature and scope of a duty of care might be influenced by ‘the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships’. This analytical tool has since been employed on numerous occasions to justify limiting or expanding the scope of legal categories and maintaining or redrawing lines in the law. ‘Coherence’ has helped resolve tensions between principles where both are found in the general

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1 *Momcilovic v The Queen* (2011) 245 CLR 1, 156 [392] (Heydon J), quoting Sir Owen Dixon, ‘Concerning Judicial Method’ (1956) 29 *Australian Law Journal* 468, 475.

2 (1760) 2 Burr 1005.

3 (2001) 207 CLR 562, 580 [50].

law,⁴ where both stem from ostensibly conflicting statutes,⁵ and where one derives from the general law and another is constitutional⁶ or statutory.⁷ Unlike counterparts in England, New Zealand and the United States, the High Court of Australia in the last decade has shown much less enthusiasm about coherence as between legal and equitable doctrines.⁸

The jurisprudence of the American realists and (closer to home) the teachings of Professor Julius Stone exposed the fictions and fallacies of much that used to be passed off as strict legalism in the law of precedent. Recent backsliding under the banner of a purely ‘bottom-up’, incrementalist approach to precedents has been, in my opinion, unprincipled and selective.⁹ Even incrementalists are confronted with deciding what is ‘an increment too far.’¹⁰ When they do so, they are forced to look upwards to broad theories or outwards to alternative categories when making inevitable choices. Those choices may also involve deciding whether or not to allow plaintiffs to run alternative claims, for example claims in contract and unjust enrichment.¹¹

Striving for coherence requires the lawyers who teach, research, apply and ‘develop’ written and unwritten law to perceive the *true* (yet often-shifting) location of cases and statutes. The common law may be ‘more like a muddle than a system’ (in AWB Simpson’s words, quoted by Leeming), but its rules, categories and concepts need to be understood relative to one another if they are to be taught clearly and applied consistently and if standards of equal justice are to be met. Rules, categories and concepts may be the artificial constructs of academics and judges. But they also serve vital functions in suggesting the limits of a proposition, the exceptions it carries, and where it possibly intersects with other propositions.

Any case or statutory provision needs to find its conceptual location by means other than the alphabet, a section number or a medium neutral reference. The

4 See, eg, *Sullivan v Moody* (2001) 207 CLR 562, 581 [54] (perceived tension between defamation and duty of careful investigation of child-abuse allegations).

5 See, eg, *King v The Queen* (2003) 215 CLR 150, 168 [52] (Gummow, Callinan and Heydon JJ).

6 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566 (‘Of necessity, the common law must conform with the Constitution. The development of the common law in Australia cannot run counter to constitutional imperatives’).

7 See, eg, *Sullivan v Moody* (2001) 207 CLR 562, 581 [55] (perceived tension between statutory duty to give paramountcy to welfare of child and posited duty of care to suspect under investigation); *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390, 407-9 [41] (Gummow, Heydon and Crennan JJ) (posited duty of care that did not ‘clash directly’ with legislative regimes was not imposed because it ‘did not sit well with them’). Recently, in *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, the High Court plurality (French CJ, Crennan and Kiefel JJ) regarded ‘coherence in the law’ as the ‘central policy consideration at stake’ (at 513 [23]). See also at 519 [37] where Birks’ related idea of avoiding ‘self-stultification of the law’ was also endorsed.

8 Cf *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205 and *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170.

9 See Keith Mason, ‘Do Top-Down and Bottom-Up Reasoning Ever Meet?’ in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010).

10 *Barrett v Ministry of Defence* [1995] 1 WLR 1217, 1224 (Beldam LJ).

11 Cf *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 (where a restitutionary fallback was allowed) and *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 (where it was not).

meaning and authority of a decision and the meaning of a statute will often depend on how it ‘fits’ within a changing legal landscape. It is little help to know that *Donoghue v Stevenson* involved a snail or even a tort.

Recent heightened concern about coherence and interest in legal taxonomy go hand in hand. Much activity on both fronts stems from the often controversial work of the late Professor Peter Birks who devised a map of the entire legal landscape while expounding a law of restitution that was about to be stripped of the fiction of implied contract and supplemented by topics previously parked under Equity or Admiralty. Birks’ aim was to show that an unjust enrichment concept was rooted in both historical and rational coherence, and generally unaffected by what he saw as a largely incoherent law-equity divide. In this issue, Leeming and Swain offer competing analyses of the ways in which ultimate courts of appeal have responded to these taxonomical challenges and their raft of contestable coherence issues.

Even if one knows where to start looking for the law in an area, some conceptual index or map is needed, not necessarily one covering the whole of ‘the law’. However, not all maps are appropriate or up to date. Not all concepts are authoritative or useful. The boundaries of some categories overlap or are porous. In the world where law is practised, legal propositions will be tested and contested, sometimes by jurists relatively insouciant of legal history or the scope of the concepts they use by instinct, sometimes by legislators who don’t care at all.

Logic, precedent and the challenging newcomer, conceptual coherence, will reinforce each other in some contexts and be at war in others. The authority and/or scope of a precedent may be undermined by fresh consideration about conceptual coherence.

Coherence concerns may restrict the expansion of a traditional right or remedy where this could undermine the policies underpinning the balance already struck in another area of the law. In other situations, for example restitution of money paid under mistake of law, coherence may drive in the direction of expansion, despite the opposing tug of precedent. ‘Coherence’ in this context does not directly¹² address the vertical pull of legal history or precedent. Rather, it looks horizontally as it were, at ‘rational’ similarities and dissimilarities across historical boundaries, including the boundaries constructed by the 19th century writers who brought us *the* law of *contract* and of *tort* (note the singulars).

Several factors have paved the way for the reception of this coherence tool for checking and developing the law in particular areas. With the waning of the declaratory theory of the common law, judicial ‘bold spirits’ have had marginally greater ascendancy in ultimate appellate courts in recent generations. Continuing reliance on legal fictions is unfashionable and perceived sightings in modern times

12 It does so indirectly whenever academic discourse and theory stems from close analysis of caselaw. In *Equuscorp*, the plurality were at pains to reassert the role of the unjust enrichment concept as a distillation from the case law and a guide to the future, using ‘the ordinary processes of legal reasoning’: (2012) 246 CLR 498, 515 [29] (French CJ, Crennan and Kiefel JJ), quoting *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 256–7 (Deane J). Directly addressing those of a different view, the plurality added that, while the concept was not a definitive legal principle according to its own terms, ‘nor was it such when first propounded in legal scholarship’: at 516 [29].

can expect to draw fire.¹³ The eras when forms of action and the separate administration of law and equity impacted mightily continue to fade slowly into a more remote past. Australian appellate judges have been encouraged away from legal formalism and from near exclusive reliance on English precedents as the source of jurisprudential rectitude. Appellate judges are much more aware of academic discourse than they were, or professed to be, in the past.

Mark Leeming contends strongly that statutes are an under-appreciated component in the academic literature on the Australian legal system – indeed the ‘elephant in the room’. Many parts of the law are constructed and dominated by statute. Leeming’s primary thesis is, however, that statutes are neglected even or especially in areas derived exclusively from judge-made law. This neglect stems from the lingering legacy of late 19th century Langdellianism, an academic movement which replaced the alphabetical ordering of the digests with rigid constructs designed for undergraduates at a time when ‘non-conforming’ decisions could be easily brushed aside and hopefully forgotten. Unlike even ‘leading cases’, unrepealed statutes have a certain durability. And statutes suffer from ‘relentless verbalism’ (Leeming) which makes them unattractive to teach and poor receptors for general let alone neat taxonomies. However, since enacted law is the ‘critical driver of change *and* restraint in the Australian legal system’ (Leeming’s words and emphasis), ignorance of statutes is nothing short of wilful blindness for the practitioner and the scholar.

The relationship between statutes and what is left of ‘common law’ is complex and symbiotic. This is not to say that it is chaotic, although Leeming’s paper is a wake-up call to academics (including academic judges) to lift their game in researching and propounding the ways in which conceptual coherence affects statutory interpretation, and how cases and statutes impact on each other. Leeming has himself made a major contribution to this enterprise elsewhere.¹⁴

The articles by Warren Swain (on unjust enrichment) and Qiao Liu (on equitable election) show that, while statutory impacts vary in their intensity across the law, the need for sound, practical taxonomies is universal. Where Parliament keeps away, there is by definition more scope for case law (even ancient case law) to retain sway taxonomically and otherwise. But the forms of action are now almost silent. And, as indicated already, even ‘leading’ cases need a conceptual framework. That framework may become contestable over time due to many factors. For a precedent to endure, to be developed, or even to be overruled, it must be possible to explicate what it currently ‘stands for’ in propositional, i.e. conceptual, terms.

In recognising that ‘the merits of unjust enrichment should not be determined by history alone’, Swain reminds us that this is a field where different jurisdictions have gone in very different directions and where academics have made major

13 In *Harriton v Stephens* (2006) 226 CLR 52 charges and countercharges of illogicality and resort to legal fiction were hurled in opposite directions by the justices. The dissident (Kirby J) also invoked Holmes’ aphorism about logic in the law (at 80 [85]).

14 See Mark Leeming, *Resolving Conflicts of Laws* (The Federation Press, 2011).

contributions in an often urgent, noisy debate over coherence in all its manifestations.

Swain traces the reception of the unjust enrichment concept in the United States, England and Australia. Probably the earliest sighting was in an 1802 commentary¹⁵ based on Lord Mansfield's judgment in *Moses v Macferlan*.¹⁶ In the United States, the concept was always viewed as the product of Lord Mansfield's felicitous blending of legal and equitable ideas; and it was nurtured as such by judges and scholars throughout the 19th century.¹⁷ Its centrality was unquestioned when the first *Restatement of the Law of Restitution: Quasi Contracts and Constructive Trusts* was issued in 1937. In England and Australia, by contrast, the two centuries since 1760 saw Mansfield's avowedly fusionist vision being variously castigated, dismissed and then ignored. All this changed when the demands of conceptual coherence *sans* fictions extirpated implied contract from the law of 'quasi-contract', creating a vacuum that helped suck Lord Mansfield back into centre stage. By this time, the concept had been developed by Goff, Jones and Birks, each of whom detected its outworking in additional fields of law, equity and admiralty. But, as Swain demonstrates, differences across the jurisdictions quickly opened up in the 21st century. These were fuelled by controversies about taxonomy itself, the conceptual bases for restitution, the place of equity within it, and the roles of scholars and theories in that debate.

Qiao Liu examines the concept of election in both legal and equitable discourse. Examining the case law, he identifies a 'general theory' of election that 'binds all similar acts of choice into a conceptual unity', there being four constituent elements (1) a communicated unilateral act; (2) involving a choice between alternative, inconsistent options; (3) that is informed, conscious and deliberate; and (4) a consequential finality in that the election is binding and irrevocable. This fourth element illustrates the 'normative conception' of Liu's doctrine of election in the sense of being an internally rationalised system that furnishes in itself a justification or explanation for the irrevocability of the choice. The bindingness of choices explicable by resort to other notions, such as a declaration of trust, estoppel, affirmation, or the judicial exercise of 'discretionary powers' to regulate proceedings or avoid abuse of process, must find justification in alternative normative forces.

Liu acknowledges that court decisions about 'election' point to a different taxonomy, particularly cases illustrating 'equitable election'. In this alternative universe, the 'normative conception' explaining the outcome of cases involving the first three elements is to be found outside the general theory of election already described. Liu argues that the case law shows that the bindingness of the party's

15 William David Evans, *Essays On the Action for Money Had and Received, on the Law of Insurances, and on the Law of Bills of Exchange and Promissory Notes* (Merritt & Wright, 1802).

16 (1760) 2 Burr 105.

17 See Gummow J's analysis in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 548–50 [84]–[86]. The fact that the action for money had and received involves a blending of legal and equitable notions, with a consequential reluctance to exclude notions of conscience, is an enduring aspect of the Australian law of restitution that distinguishes it from the current English model.

choice turns upon 'better-anchored doctrines and concepts such as estoppel and benefit-retention'. Equitable election is therefore to be excluded from the general theory out of considerations of 'rationality and justice'.

Illustrative of the themes of the issue as a whole, we see the process of legal reasoning being applied by an academic lawyer to a body of cases huddling under a common label with some of them appearing more disparate the closer they are examined. This analysis results in a contestable yet defensible theory that leads to the inclusion of some situations and the exclusion of others. As this happens, the label (in this case, 'election') ceases to be as useful as previously thought. Liu's scholarly contribution is not purely 'academic', because it helps determine the scope and boundaries of the categories truly within the 'general theory' and those needing to derive their historical and conceptual justification elsewhere. Since law is constantly developing (hopefully improving as well) this process helps point the way forward, conceptually-speaking at least.

Paul Babe calls for an 'organising theme' that truly depicts property in its Australian context. For him, property is best understood as sovereignty, itself a public law concept. It is both a state grant of power over scarce goods and resources and a means of ensuring that the individual's control 'does not bear detrimental outcomes for the common welfare of a society'. This conceptualising permits one to see a unity in seemingly unrelated topics such as Crown land, indigenous land rights, personal property, commercial property interests, security interests, intellectual property, water resources, minerals and the human genome .

Babe's particular bogies are (1) reasoning that is ahistorical in the form of irrelevant English land law; (2) failure to understand the full implications of the Crown's radical sovereignty in Australia; and (3) property law being taught as 'a loose collection of largely English subtopics without any unifying theme' and as 'simply a set of arcane, historical, black letter rules'.

Babe's justifications for the exercise are pedagogical and 'theoretical'. No criticism is intended when I observe that this places his article at a different point on a spectrum dealing with theoretical and practical jurisprudence, when compared with the other articles.¹⁸ But this tension is as old as time and wrestling with it remains as important as ever.

Each of the articles shows why the academy and the court must continue to speak and listen to each other. Some constructs, concepts and taxonomies may be useless or outdated. Others remain vital or are in a healthy embryonic condition. Striving for rationality in all its forms is a very human trait and its attainment as far as practicable is part of justice itself.

18 See, eg, the quotation at the start of the Leeming article, page 1002.