Exploring Private Law

Edited by **Elise Bant** and **Matthew Harding**

CAMBRIDGE

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For Michael Bryan

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FOREWORD

I am delighted to be invited to contribute a foreword to *Exploring Private Law*, which celebrates the breadth of Michael Bryan's scholarly interests and the influence of his work on former students, academic colleagues and members of the judiciary.

The purpose of a foreword is often to provide an overview of the material which follows. In this case, however, the excellent introduction by Elise Bant and Matthew Harding describes the intellectual terrain covered by the book, considers the topics examined by the 24 contributors and identifies the intersecting issues explored in the various essays. In these circumstances it would add little to describe the scope of the work or discuss the contents of particular essays. Instead, I will briefly mention three broad conceptual questions which underpin the book, and make it such an original and interesting contribution to legal scholarship.

Until recently, most legal texts examined subject areas defined by reference to recognized common law categories (for example criminal law, contract, property and torts) or (less frequently) by reference to an area of statute law (for example trade practices law). Legal and equitable remedies were often discussed separately from substantive legal principles. By contrast, this book aims to explore the intersections, gaps and inconsistencies between principles which have traditionally been treated as falling within the boundaries of distinct legal and equitable doctrines.

Thomas Kuhn's theory that revolutionary changes in science are prompted by shifts in guiding paradigms[1] has been widely accepted in the social and human sciences. By analogy, the identification of different approaches used to resolve questions within different subject boundaries

[1] T Kuhn, *The Structure of Scientific Revolutions* (3rd ed, University of Chicago Press, Chicago 1996).

may help to generate new questions, and result in new ways of 'seeing' and resolving particular legal problems.

There is increasing scholarly recognition that creative development of the law requires recognition and rationalization of overlaps and inconsistencies between principles which may lead to different outcomes, depending on the category of legal principle which is applied. This book is an important example of that approach, thus contributing to more adventurous legal scholarship, which will assist practising lawyers and judges. A number of the essays adopt a comparative law approach, which may lead to recognition of different ways of analysing and resolving problems which are common to many legal systems. Consistently with Michael Bryan's reputation as a challenging and thoughtful teacher as well as a rigorous and creative legal scholar, the way the essays in this book cut across conventional legal boundaries will also encourage new approaches to teaching students about the law.

The second theme, which is explicitly explored in the first part of the book, concerns the techniques of legal reasoning which are available to resolve novel disputes in private law and the shared (and sometimes contested) understandings of lawyers about the legitimacy of various judicial approaches.

It is trite to observe that syllogistic logic does not always provide a legally authoritative or just solution to a novel legal question. Julius Stone identified the limits of logical reasoning processes many years ago. He said:

> [p]erhaps the simplest illustration of these limits has reference to cases where two or more competing principles are available, each yielding different results; ... 'there are comparatively few cases' said Lord Wright, 'in which the relevant rules of law are uncertain. What is more often uncertain is, what is the right rule to apply'.[2]

Much of the development of common law and equity has come about through the incremental extension of rules laid down in decided cases, to cover new situations. (The recent decision of the Victorian Court of Appeal in *Giller v Procopets*,[3] discussed in Michael Tilbury's essay, is an example.)

[2] Lord Wright, *Legal Essays and Addresses* (Cambridge University Press, Cambridge 1939) 343, cited in Julius Stone, *Legal System and Lawyers' Reasonings* (Maitland, Sydney 1964), 56.

[3] [2008] VSCA 236.

However the process of deducing a specific rule from a broader general principle is also a familiar legal technique. Both approaches have played a part in the development of law and equity and each may assist in providing just solutions to new legal problems. Imagine, for example, how torts law might have evolved without the development of liability for reasonably foreseeable injury. To my mind, debate about the proper limits to the application of both techniques of judicial reasoning is more interesting than debate about the legitimacy of 'top-down' compared with 'bottom-up' reasoning. As Keith Mason observes in his essay, 'the two concepts inevitably meet in the day to day exertions of any conscientious judge, whether or not he or she is prepared to admit it'.[4]

Legal scholars may have more opportunities than practising lawyers and judges to stand back and discern the emergence of broad principles from a series of individual examples. While practising lawyers are sometimes dismissive of legal theory, history shows that it can have an important influence on the development of the law. This book's combination of theoretical discussion of broad principles and fine-grained analysis of particular cases will be valuable to all those interested in the development and application of private law.

The final theme, which is most explicitly addressed in the essays of Justice Paul Finn and Michael Tilbury, concerns the interaction between common law and statute in the future development of private law.

One of the questions which is implicitly raised by many of the essays in the book is the extent to which the principled development of private law doctrine can be achieved by judicial decision. Whatever view is taken of the appropriateness of particular forms of legal reasoning, the role of the judge is to resolve particular disputes. This imposes limits on judges' capacity to survey an area of the law and systematically rationalize competing legal principles. Almost all of the essays in this book raise questions about the limits to judicial creativity.

As Justice Finn suggests in his essay on developments in contract law, there is an important place for use of law reform bodies, including *ad hoc* committees of legal scholars, practising lawyers and judges, to examine and rationalize particular areas of the law. In the future legal educators will need to think about the best ways of equipping tomorrow's lawyers to participate in law reform. The necessary skills include the ability to think creatively and systematically, to draw insights from judge-made

[4] 40.

and statute law from a variety of legal systems and, sometimes, to look to disciplines outside the law.

This fine collection of scholarly essays is a deserved tribute to Michael Bryan, which will stimulate thinking about the ways legal and equitable doctrines and statute law can, and should, change in the future.

The Hon Justice Marcia Neave AO
Melbourne
30 March 2010

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TABLE OF CASES