Chapter 8

Statutes in a Web of Law

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Introduction

From the moment statutes are enacted, they enter, like newborns, a world of pre-existing assumptions and understandings, including the broader body of law with which they merge. This somewhat obvious fact[1] generates a range of questions for those interpreting statutes. Unless the statute does so explicitly, interpretation will be required to determine how any rights created by the statute interact with other established rights and doctrinal categories. The deeper question, however, is the extent to which the general law background can inform the task of interpretation. The statute itself may provide clues: it is generally easier for drafters of legislation to use terminology with which lawyers are already familiar rather than crafting new expressions.[2] This practice will tend to favour interpretations more in line with the pre-existing law, although not necessarily. Further, even where a statute's terminology or substance differs from past usages, new words are often understood in light of known common law or equitable concepts.[3]

A question often asked of a statute in this context is whether it constitutes a 'code' with respect to some area of law, in the sense of representing the entire corpus of legal rules and principles governing it. A good example of the approach is provided by Gummow J in *Wik Peoples v Queensland* where he speculated whether the Crown lands legislation in that State had the effect of entirely displacing the common law's land law doctrines. He concluded, along with other members of the majority, that they did not.[4] Similarly, a justification often offered for enacting statutes is to avoid a complex tangle of common law and equitable rules and principles, so as to abrogate them completely. In this chapter, we argue that statutes do not operate in ways that are oblivious to the

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1 See AS Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 *Law Quarterly Review* 232, 234 ('it is hard to think of any statute in this area which is entirely self-contained').

2 This is similar to the observation of Jenny Steele in Chapter 6 in this volume around the path dependence of legislative change.

3 See *Conway v The Queen* [2002] HCA 2; 209 CLR 203, [5]. As a specific example, Rosemary Teele Langford, in Chapter 9 in this volume, makes the point that directors' duties in Australia, despite distinct language, are sometimes treated as if they are equivalent to general law fiduciary obligations.

4 *Wik Peoples v Queensland* (1996) 187 CLR 1, 197.