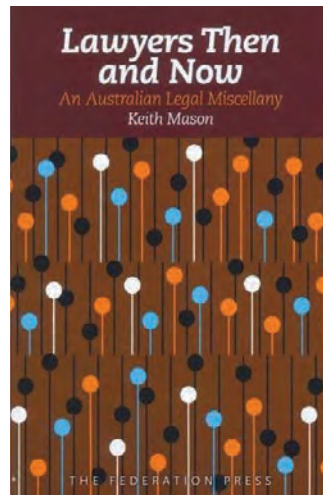


# Lawyers Then and Now: An Australian Legal Miscellany

By The Hon Keith Mason AC QC  
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Reviewed by Mr Roger Derrington QC\*

The Hon Keith Mason is one of Australia's great lawyers. He was the 'complete judge' as he was the 'complete barrister'. His work, *Constancy and Change*, was and remains an important and significant contribution to the understanding of moral and religious forces in Australian legal development. His academic scholarship in the area of Restitution is undoubted and his stewardship of the New South Wales Court of Appeal led that Court to being the most highly regarded of all appellate courts in the country. His judgments, as a member of that Court, will have an enduring impact on the development of Australian jurisprudence for years to come. They were, universally, both scholastically erudite and pellucidly clear. Despite reaching such astronomical heights in his profession he always has been, and remains, a humble man.



With that background, one can only wonder at what would possess Mr Mason to contemplate writing a legal miscellany; a work that one usually reaches for in the expectation of amusement and humour. Whatever might be the result of such an endeavour, it could not enhance his reputation as either a lawyer or an academic. Whilst humorists are often regarded as clever they are, in intelligent company, hardly ever taken seriously. Perhaps the answer can be found in the Preface where Mr Mason identifies that the idea of the book germinated in discussions with his close friend, the late Leslie Katz to whom the book is dedicated. On the other hand the reason might be discerned from the General Index of the book where, under the heading, 'Retirement, the opportunities and troubles it brings' appears the entry '*See also Lawyers Then and Now*'. That being, but one of a variety of 'index jokes' secreted in the General Index. It is ironic that the section in the book itself commenting on the propensity of others to include

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index jokes<sup>1</sup> in their works makes no reference to the author's own attempts.<sup>2</sup> One presumes that they will appear in the next edition of this work.

On the other hand, it may be that Mr Mason does not regard his work to be a work of humour in the same way as does Robert Megarry. It may be that, whilst he considers that the legal vignettes which he has gathered together offer some superficial amusement from their quirkiness and curiosity, the real import of the book is the light that it sheds upon the variety of legal persona which inhabit Australian legal history and the consistent and fallible human conditions which all of us, including judges, share. It is appropriate to specifically refer to the fallibility of judges. The foibles of the judiciary are a central themes of this work and a reader of this book cannot but be left with the resounding impression that the author believes that the history of judicial behaviour in Australia is not what it might have been.

Whatever the reason that led Mr Mason to try his hand at producing an Australian legal miscellany, it is a good thing that he did. A work of this nature is long overdue. There are myriad legal anecdotes which have arisen in the course of Australian legal history which ought to be shared with the present generation of legal practitioners and, thanks to the defamation laws not protecting the reputation of those who have passed on, many can now be told with relative impunity. Indeed, for the reasons which may, in part, have prompted Mr Mason to write his book, those stories must be passed on and retold. For when they are collected, sorted, categorised and published they provide a focus for inner reflection as to the persona of this country's legal profession as a whole and many a laugh as well. As time passes there will be room for further editions of this work. Mr Rahmetula's<sup>3</sup> collection of material presently being gathered as part of the Supreme Court of Queensland Oral History Project will surely provide a mountain of material for many volumes to come.

That said, the book is a miscellany first and foremost. Whilst it claims to be a miscellany of *Australian* legal anecdotes and curiosities, it has a decidedly New South Wales focus and a tendency towards the folk lore that has arisen there.<sup>4</sup> The reasons for this may be manifold. It may simply be because the author had the misfortune to have lived and worked in that jurisdiction<sup>5</sup> such that tales of professional and judicial shenanigans are closer to mind. Or it may be that the manner of practice in New South Wales by some of its practitioners is, and has been, productive of more than that State's fair share of stories that might make other, less 'robust', practitioners (such as those in every other Australian State or Territory) raise a quizzical eyebrow. The book also tends to focus on the behaviour of the judiciary rather than the rest of the profession. That, of course, is to be expected. The volatile mix of pomposity, arrogance and ineptitude which, more than occasionally, appears in the judiciary is wonderfully productive of material for a work such as this. The proof, if it be needed, that the work is more about the New South Wales judiciary than anything else, can be found in the fact that discussion of the activities of Roddy Meagher consumes more lines, paragraphs and pages than any other individual. More of that later.

As an Australian miscellany the book meets all superficial expectations of that genre. It is, as with any work produced by Mr Mason, thoroughly researched, carefully constructed

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1 Pages 168–169.

2 There is no separate entry for 'Index jokes', however, the entry for 'Humour (actual, attempted and failed)' contains a reference which reads, 'See also Index jokes'.

3 The long serving Librarian of the Supreme Court of Queensland.

4 See, in particular, Part 9, Legal and Judicial Academics.

5 There are a sufficient number of gentle asides in the book directed to Queensland that justify this more than moderate retort.

and clearly written. Its contents traverse the complex tapestry of life in the legal profession as it has evolved over the centuries. Whilst necessarily the majority of the fodder for this book is provided by the judiciary and their interaction with each other and ‘outsiders’, there are a few topics beyond those matters. The second chapter, ‘Just Folks’, is one such example. There, a lot of the discussion concerns the personal life of some legal practitioners as revealed through their attempts at humour or modernity and their attempted forays into other fields such as poetry and writing. Similar personal revelations appear in chapter 12 concerning ‘Law and Religion’ and the roles that legal practitioners, including the author himself, play in religious affairs in Australia. Nevertheless, despite these forays into wider fields, it cannot be doubted that the work is one which has drawn more from the behaviour of judges than any other source.

However, the work is not poorer for its greater focus on the judiciary or, for that matter, on the judiciary of New South Wales. Perhaps the contrary is true. As Mr Mason had once held the office of one of the most senior judges in that State, there can hardly be anyone else better placed to highlight some of the idiosyncrasies and eccentricities of judges generally and of judges of New South Wales specifically. Moreover, as Mr Mason has been retired from the bench for some years now, he is at liberty to reveal his thoughts and observations in an unvarnished manner and in a way that those in the practising profession are not able to do. His comment on judicial humility is but one instance of this:<sup>6</sup>

For judges, long years of sitting literally on a pedestal where counsel invariably laugh outwardly at one’s jokes are poor training grounds for humility and frank self assessment.

The weight of that statement is enhanced, emanating as it does, from someone who has served long enough to have personally witnessed much evidence to support it. Indeed, as a judicial officer Mr Mason was, himself, often the undeserving victim of the coarser side of the Australian legal persona in respect of which, apparently, he still bears the scars.<sup>7</sup> Typically, however, the author tends to avoid passing judgment on his erstwhile fellow judicial officers. Rather, he merely presents the events as they have happened and allows the conduct to speak for itself. The section in chapter 2 entitled ‘Humorists and hip’sters’ is a good example. There one can find a variety of examples of attempts at judicial humour, often failed attempts at that, contained in judgments or judicial writings. Whether intended or not, the group of examples tend to portray the somewhat poor humour as little more than attempted intellectual one-upmanship, made all the more unattractive because often the authors were aware that little of it might be understood by many legal readers and probably none of it by lay readers. Indeed, the book is redolent with examples of judicial ‘in-house’ jokes made in the course of argument in Court or in the judgments of the Court, though almost invariably confined to the New South Wales Court of Appeal. In a somewhat more direct manner the chapter on ‘Cattiness on and off the Bench’ is also revealing of some judicial attitudes, as is the short but telling chapter entitled ‘Purists and pedants’. The discussion of the internecine disputation on the High Court over the years<sup>8</sup> continues this recurrent theme and makes for interesting reading whilst contextualising a variety of comments found in the CLR’s.

Part 4 of the book is called ‘Judicial Appointments and Disappointments’. It should be mandatory reading for all young lawyers. In thirty odd pages Mr Mason cites examples

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6 Page 51.

7 See for example footnote 70 on page 152.

8 Pages 93 to 100 as an example.

of 'shabby deals', 'political jobbery', disappointed 'non-appointments' and controversies surrounding judicial appointments throughout Australian history. These incidents are sufficient to disabuse even the most naive young professional of the myth that judicial appointments, particularly the most senior, are always based on merit. Even more distasteful are the identified examples of judicial officers attempting to orchestrate their own promotion through political lobbying. A similar theme is carried over into Part 5 which is entitled 'Judicial Shenanigans'. There, a variety of examples are identified of judicial officers carrying their politics with them to the Bench. Rounding off this extended, but fully justified, exposé of judicial imperfection, chapter 6 which is entitled 'Judges: The Good the Bad and the Sacked', contains a section headed 'The Good and the Bad'. That is an unusual heading for a section that contains nothing but a gallery of rogues who, unfortunately, found their way into judicial office. The 'Good' judges are not identified, even in the most general of terms. Nevertheless, this chapter depicts the antics of persons who might colloquially be described as 'colourful characters' who, often through foul means, assumed a position on the Bench. There, their behaviour did not improve, with the result that many were ultimately removed from office. Thankfully those specifically identified only occupied positions on the Bench in the 19th century and the aggregation of such personages on the Bench in that period of Australia's history is probably the result of the colony's then remoteness and rudimentary legal system. That said, eccentric behaviour or ambitious lust for power are both human conditions which are not confined temporally to history.

Whilst the remainder of the book is concentrated less directly upon the conduct of the judiciary, it nevertheless concerns the relationship between the judiciary and others in the legal profession, be they professionals or academics. Such of those relationships as are discussed, as humourous as they may be on occasion, also reveal the consequences of effective unbridled authority as is the nature of judicial power in the superior courts. This might be seen in the chapter entitled 'Equity Wars', where the author considers the historical accident whereby New South Wales' aversion to the *Judicature Act* led to it becoming the epicentre of a puritanical approach to Equity and a vanguard of its vehement defence against all perceived adulteration. Whilst the author, no doubt, sustained collateral damage in that jurisprudential conflict, it would appear that the most acerbic vituperation was reserved for foreigners. Mr Mason sketches the skirmish between the authors of Meagher, Gummow and Lehane's *Equity Doctrine and Remedies*, most particularly Meagher JA on the one hand and the Oxford academics Simon Gardiner and Peter Birks on the other. Whilst at one level one can see humour in the sometimes wry and witty exchanges which occurred, in the cold light of history, none of it can be said to have raised the standard of Australian jurisprudence or the level of intellectual debate.

The final chapter of the book is slightly apologetic for the errors of those whose conduct has been shown through the pages of the work to be worthy of opprobrium. To some extent the title of the chapter 'Fallible All', seems to attempt some exculpation of the wrongdoings of those identified in the book on the basis that all humans make mistakes and that is an inevitable part of life. Mr Mason says:<sup>9</sup>

One constancy is that folly marches forth in every generation. Every generation is also privileged with wonderment at the ignorance of forebears, sometimes with justification.

Later he writes that it is inevitable that a practitioner will encounter an episode that they regret which will remain 'on the record' ever more and perhaps the inevitability of that should be a matter of comfort and a reason to avoid asperity when declaring the errors of others. As true as those sentiments may be, they neither excuse past conduct nor do they lessen the need to strive to achieve better standards of behaviour from the profession, including from those who occupy positions on the bench. Whilst Mr Mason correctly observes that the passing of time has seen the end of some particularly egregious forms of conduct by the profession, that ought not to militate against the need for constant self reflection and assessment by those who practice the law.

*Lawyers Then and Now* is a worthy addition to any collection of legal miscellanies. It can easily stand on an equal footing besides Robert Megarry's five similar works. Like all well written books of this genre it is a 'good read' and a wonderful source of legal anecdotes. No doubt those tales will re-surface in after dinner speeches at Bar Dinners for many years to come. However, Mr Mason's work is more than merely a book of humorous and curious legal anecdotes. As the title suggests, it shines a light on Australian legal culture, both as it was and as it is.