

Historical Foundations of Australian Law

By JT Gleeson, JA Watson and RCA Higgins (eds) | Federation Press | 2013

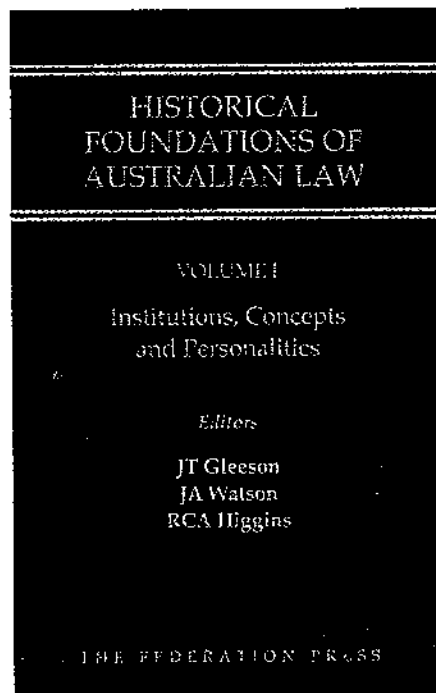
On 22 August 2013 Chief Justice Robert French AC launched *Historical Foundations of Australian Law*, vols I and II.

In this age of 'accountability' and 'transparency' it is necessary to pose, by way of disclosure, the rhetorical question: Is it appropriate to launch a book without having read it from cover to cover? The short answer is that it is no less appropriate than it is to launch a boat without having sailed in it. The great and the good do that all the time. That being said the purpose, arrangement and contents of the book, and the chapters I have read enable me to say that I am very pleased to launch it and look forward to exploring further its undoubted riches at leisure and from time to time.

The book, which is published by Federation Press, comprises two volumes. The first, edited by Justin Gleeson, James Watson and Ruth Higgins is entitled: *Institutions, Concepts and Personalities*. The second, edited by Justin Gleeson, James Watson and Elizabeth Peden is entitled *Commercial Common Law*. Each of the essayists is a person whose contribution is worth reading. Their work and its thematic arrangement creates an important and valuable resource and makes accessible to Australian lawyers, law students and judges in a convenient way, an array of materials which would otherwise require resort to a large range of disparate texts and law review articles.

In their introduction to the first volume the editors identify four themes:

1. The common law process was and still is organic. The early judges did not claim to pronounce on the whole of the common law. They decided the issues brought forward by the parties so that only over time did a body of authority on a point or related points accumulate.
2. It has always been a feature of the common law that judges would give reasons and that those



reasons would be made public. In the common law tradition the burden of acceptance is placed on the judges who follow.

3. The effect of an organic law, developed upon reasons, means that no single judge has or ever had the authority to decide the law for all time or to depart without reason from what has gone before.
4. Those appointed as judges have every reason to maintain a sense of modesty in the office. The best ones recognise this trait — this sense of legal history — as inherent in the fabric of the common law.

There is a practical dimension to the purpose of the book as it has been prepared with a view to the reintroduction of a course in legal history at a Sydney university. That is a purpose which I think worthy of general support, and not limited to universities in Sydney. There is no doubt legal history plays, and will continue to play, a significant role in adjudication certainly at the higher appellate levels although there are debates from time to time about how it is appropriately used.

History and the use of history have often been matters of contention within the law. Indeed, it was only recently when preparing an address for the Australian Bar Association conference in Rome that I became more conscious of the history wars over the question: Whether and to what extent Roman law had influenced the development of the common law. Henry Maine's denunciation of 'Bracton's plagiarisms' was one of the shots fired in those wars. It came 600 years after Bracton's tract setting out the law and customs of England which was published in the twelfth century. Maine said:

That an English writer at the time of Henry III should have been able to put off on his countrymen as a compendium of pure English law a treatise of which the entire form and

a third of the contents were directly borrowed from the Corpus Juris, and that he should have ventured on this experiment in a country where the systematic study of the Roman law was formally proscribed, will always be among the most hopeless enigmas in the history of jurisprudence...¹

Lord Mansfield was attacked along similar lines by the pseudonymous Junius:

In contempt or ignorance of the Common law of England, you have made it your study to introduce into the Court where you preside, maxims of jurisprudence unknown to Englishmen.²

William Blackstone organised his *Commentaries* in categories which were inspired by Roman law. His story that a copy of Justinian's *Digest* was accidentally discovered at the siege of Amalfi in 1135, and that the discovery caused a revival of the Roman law was said by Pollock and Maitland to be 'regarded as apocryphal by modern scholars.'³ William Howes in his *Studies in the Civil Law* said that while all might admit his great ability as a lawyer and a lecturer 'it is manifest that history was not his forté'.⁴

Pollock and Maitland and Howes were, however, kinder to Blackstone than John Austin who, in his *Lectures on Jurisprudence*, heaped one insult after another upon him, saying of his manner of writing:

It was not the manner of those classical Roman jurists who are always models of expression, though their meaning be never so faulty. It differs from their unaffected, yet apt and nervous style, as the tawdry and the flimsy dress of a milliner's doll, from the graceful and imposing nakedness of a Grecian statue.⁵

There was also controversy about the role of Roman law and its concept of *aequitas* on the growth of equity jurisprudence in England. The question was: 'was this a case of one system influencing another or just legal minds thinking alike across the millennia?' My remarks on those topics to the Australian Bar Association in Rome were gathered from a variety of sources. I would have been much assisted by Arthur Emmett's chapter in the first volume of the book entitled 'Reception of Roman Law in the Common Law', not to mention the chapter on Glanville and Bracton, by Justin Gleeson, the chapter on Joseph Story by James Allsop and Amanda Foong, and the chapter on Mansfield by Ben Kremer which appears in the second volume.

The book has two very useful tables at the commencement of Volume 1. The first is a chronology of events relevant to legal history commencing from the foundation of Rome in 753BC and concluding with the passage of the Australia Acts in 1986. Scanning through the chronology, I was reminded of the definition of history offered by one of the young male characters in *The History Boys* as 'just one damn thing after another'. That having been said, it is very useful to have such a convenient historical framework within which to read all or any of the essays that follow. The second list is a selected glossary of terms. When looking through the list of the writs it is hard to avoid a sense of loss of the colour and movement of the law as it was, albeit it inflicted a heavy burden on those trying to decide in what form they should bring their claims to court. For some reason my eye alighted on the 'Writ of Darrein presentment', which is not often in the thoughts or upon the lips of members of the Australian legal profession. The 'Writ of Darrein presentment' also known as an 'advowson of churches' was available to enforce the right to present a candidate for a parsonage to the bishop. As the entry in the chronology points out, the parson of a parish church owned the land the church was on and had the right to collect tithes in the parish. The writ was linked to valuable rights. There seems to be little occasion for its invocation in contemporary society.

Various terms related to feudal rights, titles and obligations also appear. One of those is 'subinfeudation'. As the book explains, where the king granted tenure to a baron, and the baron to a mesne lord, and the mesne lord carved out of his grant a little more, the tenure was said to be subinfeudated. This was abolished by *Quia Emptores*. The glossary entry remarks that:

The preface to the second edition of *Meagher, Gummow and Lehane's Equity* suggested (obliquely, but sternly) that if the statute was ever repealed, subinfeudation would revive as a possible way to make land grants in England.⁶

There does not, however, seem to be a popular call for the reinstatement of this threatening sounding term which might now usefully be appropriated to name some uncomfortable medical procedure.

The legal histories covered by the chapters of both volumes begin with that of the common law and

equity introduced by James Watson under the title 'A Sketch'. The great exponents of the common law, Glanville and Bracton, and their treatises, are dealt with in a single chapter by Justin Gleeson. Statutes which shaped the common law are discussed by James Emmett, and the development of the conscience of equity explained by Fiona Roughley. The introduction of the common law into Australia is described by Jeremy Stoljar and the development of Australian land law by Patricia Lane. Australia's constitutional evolution from colony to dominion and from dominion to nation is outlined by Susan Kenny. The role of doctrines of precedent is considered as an aspect of the common law tradition and as an aspect of Australian nation building. The conclusion offered by Geoff Lindsay who wrote the chapter on that topic is that:

The Australian legal system having come of age with confirmation of the High Court as its ultimate court of appeal, the 'moral' of this historical essay is that any legal researcher in search of an Australian 'doctrine of precedent' could do well, hereafter, to start there.⁷

Along the way, Mark Leeming, in an essay entitled 'Five Judicature Fallacies', creates the character of a mysterious 'Teacher' who guides two guileless students through shoals of misconception about equity and the effects of the Judicature Acts. It may be that the students are proxies for miscreant judges and others on the wrong side of fusion debates. There is a notional evaluation by the two students at the end of the class. One says 'I don't know what to think!', the other says 'Before we started today, I thought I understood this material completely.' The Teacher is evidently satisfied with the outcome, observing:

I overheard you both. I regard the class as a success.⁸

It was pleasing to see that the Teacher did not use 'Ashburner's metaphor' that:

The two streams of jurisprudence, though they run in the same channel, run side by side and they do not mingle their waters.⁹

— a metaphor which seems to challenge common sense and classical physics.

In a chapter entitled 'The Separation of Powers and the Unity of the Common Law', written by Justin

Gleeson and Robert Yezerski, the influence of Chief Justice Marshall's decision in *Marbury v Madison*¹⁰ upon Australia and particularly, via Andrew Inglis Clark, upon the inclusion of s 75(v) in the Constitution is discussed. The authors describe its period of dormancy in Australian law after federation and its restoration which began in 1975 with the judgment of Gibbs J in *Victoria v Commonwealth*.¹¹ As the authors observe:

Marbury has been generalised to a principle about the rule of law and its administration, asserting the primary role of the courts to review the actions of both co-ordinate branches of government, and to hold those branches to the norms of both constitutional law and now the ever-burgeoning administrative law.¹²

There is a chapter in the book written by James Allsop and Amanda Foong dedicated to Justice Joseph Story, whose contribution by way of his legal writings was not limited to the United States but travelled across the Atlantic to England and indeed to Australia where his works are still quoted in judgments of the High Court. The court has referred to Story in a number of decisions in recent years dealing variously with the equitable doctrine of contribution,¹³ the validity of control orders under anti-terrorism legislation,¹⁴ the unpaid vendor's lien,¹⁵ contribution between co-obligors,¹⁶ the common law doctrine of failure of consideration,¹⁷ unconscionable conduct¹⁸ and the notion that guardianship applies to property and not to persons.¹⁹

The second last chapter in the first volume, written by my colleague Justice Hayne, is about Sir Owen Dixon. In that essay, Justice Hayne quotes Robert Menzies at Dixon's farewell sitting:

when some student ultimately essays the task of examining your own work ... he will find that you, perhaps more than any other man, have woven the stuff of legal history into the fabric of modern statute and modern decision.²⁰

The final chapter in Volume I is by Ruth Higgins and is entitled 'The Jurisprudences'. It discusses those jurisprudential thinkers whose work has influenced the development of our law. The chapter ranges from the philosophers of ancient Greece and Rome to those of medieval Europe, the period of the Enlightenment and then the proponents of a scientific approach to jurisprudence. The Hart-Fuller

debate is covered and what the author describes as the 'post-modern departure'.

In the second volume, which moves into the history of commercial common law, we begin with a 'sketch' by James Watson entitled 'Praecepta to Negligence and Contract'. There is a discussion of the *writs praecipue* and their relationship to modes of trial. The writs of trespass on the case and trespass on the case on *assumpsit* and the growth of the actions in negligence and contract are discussed, as are *quantum meruit* and *indebitatus assumpsit*. The history of the idea of debt is covered in the second chapter entitled 'A Note on the Curious Incidents of Debt', written by CJR Duncan and James Watson. A chapter by Mark Lunney on 'Trespass, the Action on the Case and Tort' follows, then 'Detinue Trover and Conversion' by John Randall and Brendan Edgeworth. 'The Sources of Defamation Law' is the title of Chapter 5, written by David Rolph, which begins correctly:

Defamation law is one of the most arcane areas of private law.²¹

The author quotes Ipp JA who described that field of the law as 'the Galapagos Islands Division of the law of torts'.²² There is a chapter on legal professional privilege by Peter Brereton and then more on negligence, this time in the nineteenth and early twentieth centuries by Barbara McDonald. Contract development through the looking glass of implied terms is discussed by Elizabeth Peden, followed by a chapter on the history of restitution by Ian Jackman and why it matters. A well-deserved place is found for Lord Mansfield in Chapter 10, written by Ben Kremer, which is followed by a history of money and bills of exchange written by Ann McNaughton who, in the following chapter, also sets out the history of cheques and banking. The history of assignment is discussed by Greg Tolhurst. The question of the assignment of choses in action in restitution was recently before the High Court in *Equuscorp Pty Ltd v Haxton*.²³ That decision merits an equivocal reference in footnote 127 against the proposition in the text that the interest necessary to support an assignment of a chose in action '... cannot flow from the assignment itself.' The footnote supports

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the proposition in the text by reference to a decision of the New South Wales Court of Appeal followed by the notation '... Cf *Equuscorp Pty Ltd v Haxton* ...' and a quote from the plurality judgment stating that 'the assignment of the purported contractual rights for value indicates a legitimate commercial interest on the part of the assignee.' The last three chapters cover the legal concept of agency written by Robert Dick, corporations by Michelle Wibisono, and the history of bankruptcy, and insolvency law by James Allsop and Louise Dargan.

I have two complaints about the book. The first is that it doesn't mention *Cadia Holdings Pty Ltd*,²⁴ not that there was a topic in any of the chapters that was directly relevant to it, save perhaps for the chapter on the reception of the common law into Australia. The entitlement of the minister for mines for New South Wales, considered in that case, to more than \$8,000,000.00 of royalties in copper mined from land at Orange, was linked to the content of the Crown's prerogative rights to the royal metals and statutes of the sixteenth and seventeenth centuries modifying that prerogative. The connection and the outcome were rather direct evidence in that context of the significance that legal history can sometimes have in contemporary litigation.

The other case not listed was *Bilbie v Lumley*.²⁵ It was a demonstration of the sometimes slender foundations of longstanding rules of judge-made law, in that case longstanding until the decision of the High Court in *David Securities Pty Ltd v Commonwealth Bank of Australia*.²⁶ In *Bilbie v Lumley*, Lord Ellenbrough asked counsel for the plaintiff, Mr Wood, later Baron Wood:

whether he could state any case where if a party paid money to another voluntarily with full knowledge of the facts of the case, he could recover it back on account of his ignorance of the law.²⁷

The report of the decision recorded that no answer was given. His Lordship went on to say:

Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case.²⁸

That dictum solidified into a rule with the blessing of Chief Justice Mansfield in *Brisbane v Dacres*²⁹ who accepted the proposition from *Bilbie v Lumley* observing:

Certainly it was not argued, but it was a most positive decision; and the counsel was certainly a most experienced advocate and not disposed to abandon tenable points.³⁰

And the rest, as they say, 'was history'.

This book is a rich source of learning and reference for students, practitioners and judges alike. I certainly hope that it will find its place, inter alia, in legal history courses in more than one law school. I congratulate the editors: Justin Gleeson, James Watson, Ruth Higgins and Elizabeth Peden for compiling these volumes and Federation Press for publishing them. We should be grateful to them and to the contributors. They have done a great service to us all.

Endnotes

1. Sir Henry Maine, *Ancient Law: Its Connection to the History of Early Society* (1883), p.48.
2. Thomas Scrutton, *The Influence of the Roman Law on the Law of England* (Cambridge University Press, 1885), p.180.
3. Sir Frederick Pollock and Frederic Maitland, *The History of English Law Before the Time of Edward I* (Cambridge University Press, 2nd ed, 1898) vol 1, p.23.
4. William Wirt Howe, *Studies in the Civil Law and its Relations to the Jurisprudence of England and America: With Reference to the Law of Our Insular Possessions* (Little Brown, 2nd ed, 1905) p.112.
5. John Austin, *Lectures on Jurisprudence: Or the Philosophy of Positive Law* (John Murray, 1895), p.69.
6. Justin Gleeson, James Watson and Ruth Higgins (eds), *Historical Foundations of Australian Law: Institutions, Concepts and Personalities* (Federation Press, 2013) vol 1, Selected Glossary xxxi.
7. Geoff Lindsay, 'Building a Nation: The Doctrine of Precedent in Australian Legal History' in James Gleeson, James Watson and Ruth Higgins (eds), *Historical Foundations of Australian Law: Institutions, Concepts and Personalities* (Federation Press, 2013) vol 1, p.267, p.296.
8. Mark Leeming, 'Five Judicature Fallacies' in James Gleeson, James Watson and Ruth Higgins (eds), *Historical Foundations of Australian Law: Institutions, Concepts and Personalities* (Federation Press, 2013) vol 1, p.169, pp.192-93.
9. Denis Browne, *Ashburner's Principles of Equity* (Butterworths, 2nd ed, 1933), p.18.
10. 5 US (1 Cranch) 137.
11. (1975) 134 CLR 338.
12. Justin Gleeson and Robert Yezerski, 'The Separation of Powers and the Unity of the Common Law' in Justin Gleeson, James Watson and Ruth Higgins (eds), *Historical Foundations of Australian Law: Institutions, Concepts and Personalities* (Federation Press, 2013) vol 1, p.297, p.328.
13. *Friend v Brooker* (2009) 239 CLR 129, 148 [38] (French CJ, Gummow, Hayne and Bell JJ).
14. *Thomas v Mowbray* (2007) 233 CLR 307, 357 n 199 (Gummow and Crennan JJ).
15. *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, 324 [21] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).
16. *Burke v LFOT Pty Ltd* (2002) 209 CLR 280, 316 [87], 318 [94] (Kirby J).
17. *Roxborough v Rothmans of Pal Mal Australia Ltd* (2001) 208 CLR 516, 552-553 [94] (Gummow J).
18. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 242-243 [93] (Gummow and Hayne JJ).
19. *Clay v Clay* (2001) 202 CLR 410, 428-429 [37]-[38] (Gleeson CJ, McHugh, Gummow and Callinan JJ).
20. Kenneth Hayne, 'Sir Owen Dixon' in Justin Gleeson, James Watson and Ruth Higgins (eds), *Historical Foundations of Australian Law: Institutions, Concepts and Personalities* (Federation Press, 2013) vol 1, p.372, p.373.
21. David Rolph, 'The Sources of Defamation Law' in Justin Gleeson, James Watson and Elisabeth Peden, *Historical Foundations of Australian Law: Commercial Common Law* (Federation Press, 2013) vol II, p.106.
22. See David Ipp, 'Themes in the Law of Torts' (2007) 81 *Australian Law Journal* 609, 615.
23. (2012) 246 CLR 498.
24. (2010) 242 CLR 195.
25. (1802) 2 East 469, 102 ER 448.
26. (1992) 175 CLR 353.
27. (1802) 2 East 469 471; 102 ER 448, 449.
28. (1802) 2 East 469, 473; 102 ER 448, 449-50.
29. (1813) 5 Taunt 143, 128 ER 611.
30. (1813) 5 Taunt 143, 163; 128 ER 611, 649.