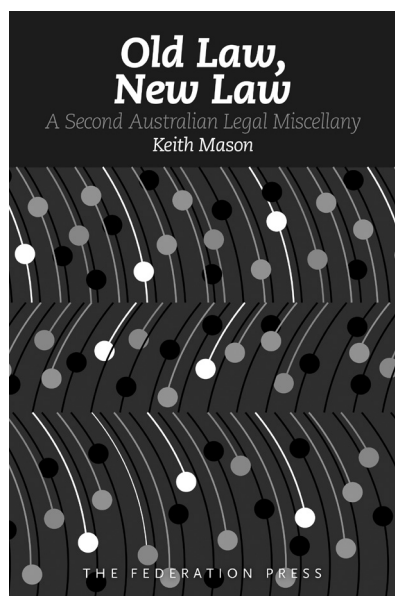


Old Law, New Law: A Second Australian Legal Miscellany

By the Hon Keith Mason AC QC | Federation Press | 2014



This kind of vast romp through more than two centuries of Australian legal and social history, its English precedents and comparative jurisprudence is done with Mason's characteristic brevity and good-humour.

Old Law, New Law: A Second Australian Legal Miscellany is a complement to Mason's earlier volume *Lawyers then and Now: An Australian Legal Miscellany* (Federation Press, 2012). It is a delightful read. With his deft combination of legal history, social commentary and ever-present appreciation of the humour in the historical record, Mason's style is part of the book's charm. So too is its integration of Australia's colonial past into key themes of Australia's (continuing) legal development. On this last point, *Old Law, New Law* fits within a welcome trend in recent legal scholarship to narrate, and recognise the importance of, the colonial and pre-Federation history of this country.¹

Old Law, New Law is divided into five parts: 'Men and Women', 'Essentials of Life', 'Law's Ways and Means', 'Guarding Patches', and 'Public and Private Wrongs'. Unsurprisingly given the nature and content of this book, some common themes traverse these divisions.

For this reviewer, the exploration across at least three of these parts of the evolving relationship in Australia

between the Executive and the courts was a particular highlight. Chapter 9 ('Appeal Courts') includes the story of the Tasmanian Executive Council in the 1870s assuming 'the non-existent powers of a court of appeal' and pardoning a person (Louisa Hunt) who had been convicted and sentenced to seven years' imprisonment for setting fire to a dwelling with intent to defraud her insurer. The attorney-general (an active member of that Executive Council) had been Louisa Hunt's defence counsel at trial. A scathing communication from the court to the governor followed, appealing (though not in terms) to principles resonating what has later become the constitutionalised separation of powers doctrine. In Chapter 13 ('The Rule of Law: Courts and the Executive') this theme receives more direct treatment, with particular focus on the Rum Rebellion of 26 January 1808, the open defiance by the Victorian Legislative Assembly in 1865 of the dictates of the Victorian Constitution Act and decisions of the Supreme Court that the imposition of a lawful tax requires the assent of both houses of parliament, and the stunning defiance by Sir Henry Parkes in 1888 of multiple decisions of the Supreme Court of New South Wales concerning the unlawful imprisonment of Chinese migrants. In Chapter 14 ('Exclusionary Conduct: Colourful Aspects of Constitutional Law') the tension between the Executive and the courts over the application of immigration laws in more modern times becomes the focus. That chapter, for example, narrates the story of the

unsuccessful attempts by the Executive in 1934 (and specifically the newly appointed first law officer, Sir Robert Menzies KC) to exclude the Czech, Jewish and Communist Egon Kisch from Australian shores, and also the more recent skirmishes between the Executive and Chapter III courts over the repulsion, detention and offshore processing of boat people.

This kind of vast romp through more than two centuries of Australian legal and social history, its English precedents and comparative jurisprudence is done with Mason's characteristic brevity and good-humour. The same qualities of writing make equally enjoyable Mason's treatment of two other themes that run throughout this book, namely the pervasiveness of law and legal history to all aspects of Australian life, and the fallibility of law, practitioners, and even judges. The ribbing is (largely) gentle; the stories about practitioners – as someone else has put it – often too good not to be true. Whether picked up to be read from start to finish, or for dabbling here and there, it is a book worth acquiring.

Review by Fiona Roughley

Endnotes

1. See, for example: Mason, *Lawyers then and Now – An Australian Legal Miscellany* (Federation Press, 2012); various chapters in Gleeson, Watson and Higgins (eds), *Historical Foundations of Australian Law* (Federation Press, 2013), Appleby, Keyzer and Williams (eds), *Public Sentinels: A Comparative Study of Australian Solicitors-General* (Ashgate Publishing, 2014) – see in particular the chapters by Mason and Hanlon.