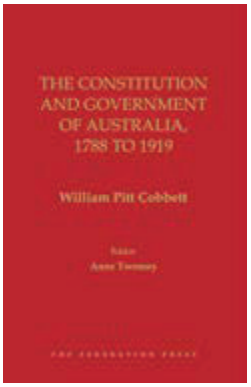
BOOK



The Constitution and Government of Australia, 1788 to 1919

William Pitt Cobbett (edited by Anne Twomey with Amanda Sapienza) (Federation Press, 2019)

Pitt Cobbett was born in Adelaide on 26 July 1853, but grew up in England where his father had taken up a position as vicar. He attended University College, Oxford where he graduated with a BA, BCL, MA and DCL before being called to the Bar in London in 1878, although he remained focussed on academia, publishing an internationally renowned text on international law in 1885.[1]

Upon the establishment of the Sydney Law School from the bequest by John Henry Challis in 1890, Cobbett was chosen to take up the Chair of Law and the Position as Dean of the Law School. He was the only full-time lecturer, teaching jurisprudence, constitutional law, Roman law and international law. Otherwise, the other lecturers were prominent practitioners of the day. In what was perhaps an early indication of a contrarian nature, he campaigned for changes to the University's by-laws to enable him to teach practical legal subjects in the tradition of the American law schools.

During the 1890s Cobbett played a peripheral role in the formation of the Australian Commonwealth. He provided advice to the NSW Government suggesting amendments to the draft Constitution Bill. He vehemently disagreed, however, with fundamental aspects of the Federal structure, such as the equal representation of the States in the Senate and the power granted the Senate in relation to financial matters, which he regarded as antithetical to the principles of responsible government. His disagreement with the Bill saw him addressing public meetings to rapturous applause. So concerned was Sir Edmund Barton about the populist interference by Cobbett that he sought the opinions of leading constitutional authorities from the UK to counter Cobbett's influence.

Cobbett retired from the University in December 1909 due to ill health. After travelling to London to secure publication of his latest work on international law and for medical treatment, he returned to Australia, settling in Hobart, where he devoted the remaining decade of his life to working on what was originally to be a two volume work on 'The Government of Australia'. Unfortunately, due to his deteriorating health, he was only able to complete the first volume, which focussed upon Australia's constitutional history, the federation movement, the Commonwealth Constitution, and the operations of the Commonwealth Government (the second volume was intended to be an analysis of the Constitutions and Governments of each of the Australian States).

In his will, Cobbett requested his trustee consult Jethro Brown, formerly a Professor of Law and then President of the Industrial Court of South Australia, with a view to completion and publication of his manuscript. It was, however, not published because the change in the High Court's jurisprudence following its judgment in the *Engineers Case* would have required substantial revisions to the manuscript to be of any currency.

The editors have taken up the task of preparing Cobbett's manuscript for publication. The original consists of small, loose pieces of paper covered in minute handwriting, with numerous deletions and annotations, text indistinguishable from footnotes, and the occasional missing page. The published edition corrects typographical errors, in some cases dissecting long incomprehensible sentences, and the enormous task of correcting and completing footnotes.

One might ask what is the utility of a work that was out of date almost as it was being written? As the editors note:

> Cobbett's work … is of particular interest because it covers the initial period in which [the 'original intent' of the Framers of the Constitution] was put into practice and faced all the operational difficulties of a new federal system of government and the strains of a World War. It shows, for example, how dependent the operation of the Constitution was on doctrines such as the immunity of instrumentalities and reserved State powers, which were swept away by the *Engineers Case* shortly after Cobbett's death. This renders hollow any modern attempt to apply original intent in interpreting the scope of the Commonwealth's legislative and executive powers, without doing so in the context of these abandoned doctrines.

The interpretation and implementation of the Constitution in the initial years of the Commonwealth was predominantly undertaken by those who had debated and drafted it. What is interesting is the analysis of the Constitution by a recognised intellect who was largely an outsider to its creation, providing a unique perspective as to its meaning and effect.

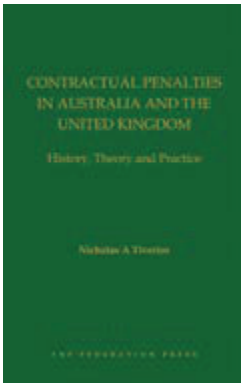
Federation Press, and the editors, are to be congratulated for bringing this interesting historical work of scholarship to life.

Dominic Villa

ENDNOTES

1. William Pitt Cobbett, *Leading cases and opinions on international law collected and digested from English and foreign reports, official documents, parliamentary papers, and other sources* (Stevens and Haynes, 1885).

BOOK



Contractual Penalties in Australia and the United Kingdom: History, Theory and Practice

Nicholas A Tiverios (Federation Press, 2019)

Commercial contracts commonly include provisions by which the parties agree upon the remedy that an innocent party may claim against a defaulting party. The central concern of the penalties doctrine is: when will a Court refuse to enforce a term of a contract because it impermissibly penalises a party to that contract?

In this latest work from Federation Press Dr Tiverios provides a detailed historical, doctrinal and philosophical analysis

of the foundations of the prohibition against contractual penalties. The central thesis is that the Australian penalties doctrine concerns agreed remedies that are characterised as being in the nature of security rights and prevents such rights from being enjoyed beyond the function or purpose of security, thereby preventing the imposition of an unjustifiable detriment or punishment on a contracting party. On the other hand, the English penalties doctrine regulates the parties' ability to determine the quantum of a secondary obligation that arises upon breach of a primary contractual obligation. The English rule prevents agreed remedy clauses which derogate too far from the state's jurisdiction to impose a remedy for breach of contract.

The book begins with an historical overview of the development of the law of penalties from its progenitor rules in the 14th century through to the present day. It then provides a comparative analysis between the penalties doctrines in Australia (following *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205) and in England (following *Cavendish Square Holding BV v Makdessi* [2016] AC 1172). In doing so, Dr Tiverios demonstrates the sharp divergence between the approaches adopted in those two cases notwithstanding that the jurisdictions share a common starting point. That then leads into a more philosophical consideration of the underlying moral justification for the law of penalties in both England and Australia which accounts for the key differences.

Finally, the author bridges the gap between theory and practice, and the second half of the book looks more closely at the directly applicable legal rules to illustrate how the different penalties doctrines function in particular circumstances. Here Dr Tiverios breaks the analysis up into three stages: does the impugned clause attract the operation of the penalties doctrine; is the impugned clause in fact punitive; what are the remedial consequences of a finding that a clause is penal.

Perhaps bravely, the book concludes with what is described as a 'Codified Guide to the Penalties Doctrine', intended to be a restatement of the penalties doctrine (there is one for each of Australia and England) which provides an overview that can be worked through in order to identify the issues that arise at each stage of the penalties inquiry. Usefully, this codification is cross-referenced to the main body of the work, directing the reader to the more detailed commentary considering each of the issues in the restatement.

The scholarship of this book is evident, and while some of the introductory chapters will hold little interest for the busy practitioner, the bulk of the book provides a clear and concise description of the penalties doctrine in each jurisdiction. While the parts of the book dealing with the English doctrine will be of little direct relevance, they nonetheless assist (if only by way of contrast) in providing a thorough understanding of the practical operation of the doctrine. As Justice Edelman records in his Foreword, 'its clear and concise style and sections concerning the practical application of a doctrine based upon slippery foundations … make it essential reading for all commercial lawyers in Australia and England.'

Dominic Villa

BOOK

Fleishman Is In Trouble

Taffy Brodesser-Akner
(Wildfire, 2019)

Toby Fleishman awoke one morning inside the city he'd lived in all his adult life and which was suddenly somehow now crawling with women who wanted him.

So begins Taffy Brodesser-Akner's witty first novel *Fleishman Is In Trouble.* Fleishman is a neurotic, 41 year old, Manhattan liver specialist who, after 13 years of marriage, is estranged from his wife Rachel with whom he has two small children. And he's in trouble. Why? Because Rachel dropped off their children to his apartment unexpectedly in the early hours one morning and now won't return his calls and he doesn't know where she is. And if an uncontactable, estranged wife isn't bad enough when you are trying to juggle two children and a senior position in a hospital, Fleishman is also in trouble thanks to his recent foray into the world of online dating. Bewitched by the apparent avalanche of women in New York who are suddenly keen to date him and bewildered by the unprompted, explicit photos they send him, Fleishman is a man in uncharted waters. Then there's the fact that he is also in trouble professionally. He just doesn't know it yet.

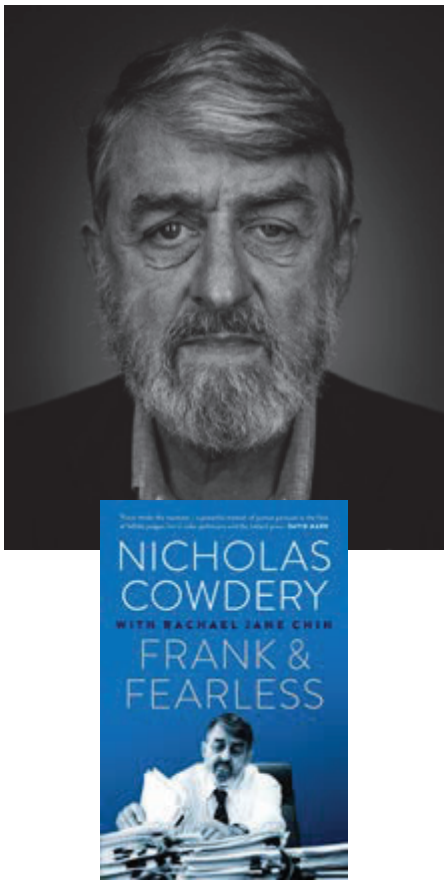
We learn of Fleishman's various troubles – and his often hilarious meditations on them – through his college friend Libby, a former staff writer for a men's magazine (as was the author before she became a staff writer at *The New York Times Magazine*). As she observes: 'Life is a process in which you collect people and prune them when they stop working for you. The only exception to that rule is the friends you make in college.' Libby dips in and out of the narrative, providing a suburban foil to the affluent, class-conscious, athleisure-clad social circles in which Rachel moves and against which Toby (who is hepatologist-rich, not financial-district-rich) constantly rails. Through Libby we are reminded of the fact that there are two sides to every coin – something which, after experiencing Fleishman's highs and lows and neuroses so intimately, is surprisingly easy to forget.

This is a sassy, sometimes brash, entertaining novel; I sent several friends quotes from it, and some of the scenes still make me giggle inwardly when I think of them (such as Fleishman's invocation of the Hippocratic oath in an awkward moment during a date). At other times it is extremely poignant; it makes you wonder about a society in which earning USD275,000 per year is seen as not really 'making it', and what 'making it' actually means. The fact that this is a story ostensibly about a man's experience of marriage, estrangement and single parenthood yet it is written – and narrated – by a woman, adds another dimension to it again.

This book is undeniably, unapologetically, a book for and of our times. And in the days before Kindle you would have seen it rapidly multiplying on your daily commute. If you are looking for something to read on the beach, poolside or in a hammock this summer, that will keep you engaged and entertained without being either too lightweight or too heavy; add this one to your list.

Sarah Woodland

BOOK



Frank & Fearless

Nicholas Cowdery
(with Rachael Jane Chin)
(NewSouth, 2019)

Nicholas Cowdery AO QC was Director of Public Prosecutions in NSW from 1994 to 2011. The Office of the DPP was responsible for the prosecution of many high profile cases during this period, including the prosecutions of Gordon Wood for the murder of Caroline Byrne, and Keli Lane for the murder of her daughter, Tegan. Decisions not to prosecute are also important parts of the work of the Office. During his tenure as the DPP Cowdery presided over the decision to drop charges laid against The Chaser team over their 2007 prank during the APEC Conference, and not to prosecute Bill Henson for indecency following the raid upon the Roslyn Oxley gallery in Paddington in May 2008. In the following extracts from *Frank & Fearless*, Cowdery discusses the challenges presented by the absence of laws regulating voluntary assisted dying, and navigating the politics of the office.

'EXTRACTS FROM FRANK & FEARLESS'

Shirley Justins and the need for assisted dying laws

The criminal law is primarily intended to prevent harm to individuals and the community. Just like DPPs, judges are bound by the law and the facts of the cases in front of them, no matter how personally upsetting the outcome may be. But what happens when the law is dangerously inadequate?

One clear example of such a situation during my time as the DPP was the lack of voluntary assisted dying laws. Not long before my tenure ended, this dangerous state of affairs forced three Court of Criminal Appeal judges to resort to confusing and risky arguments in an attempt to bring about a reasonable and just result. However, the cleverest of legal reasoning is not enough to make up for parliament's failure, which puts the police, the prosecutors, the defence lawyers, the judges, the jury, everyone in the process, in a very difficult quandary even today.

In 2010 Shirley Justins decided to appeal her manslaughter conviction for providing the Nembutal that killed her partner Graeme Wylie after he drank it from a glass she left in front of him.

She hadn't helped Graeme die just to rid herself of the burden of caring for someone whose mind had deteriorated so much that he couldn't remember whether he had children. Even though Graeme had changed his will in favour of Shirley only a week before he died, it became clear during her trial that she hadn't helped him die for financial gain. She did it because she honestly believed that was what he wanted.

By 2011 Shirley had finished her prison time. For two years she had spent every weekend in jail. Nonetheless, in 2011 Shirley again found herself facing a trial over the death of the man she loved.

Six months earlier, having considered Shirley's appeal against her manslaughter conviction, the Court of Criminal Appeal had handed down the decision that sent her back into the dock. The three appeal judges appeared concerned about the state of the law that could lead to other loving carers taking desperate measures and then facing serious criminal consequences. Their task was to do justice in an area of somewhat uncertain law that appeared to operate unfairly, which led to this confusing turn of events that saw Shirley back in the dock for a crime for which she had already served her time.

Despite the purity of Shirley's motives in helping Graeme die, the law offered no clear way for her to get rid of her manslaughter conviction. Two of the appeal judges ordered a new trial. One of those expressed doubt that manslaughter should be prosecuted again. The third judge, who would have ordered an acquittal, held that another prosecution for manslaughter would be an abuse of process.

In the present criminal law regime, the offences of murder, manslaughter and (especially) aiding suicide arise for consideration whenever voluntary assisted dying may have occurred or have been contemplated.

There is probably a legitimate social purpose in seeking to discourage people generally from killing themselves and so the law against assisting suicide has a role to play in modern society. But the question is whether it should apply to all cases of suicide, including voluntary assisted dying carried out in carefully controlled circumstances with adequate protections in place.

'EXTRACTS FROM FRANK & FEARLESS'

Challenge – speaking out about the dangers of mandatory sentencing laws

I think there are at least three ways of doing the job of DPP. One is to go to work each day, roll the arm over and professionally attend to what is necessary and go home. Another is to do that job and also apply oneself diligently to improving the way we do things, but to carry out the processes of reform without public exposure, in the corridors of power. (I suspect that my predecessor operated that way, and very effectively.) A third is to do all that but also to agitate the reform process in public, in view of the community. I tried to do that – and I think succeeded, by and large (although not every reform was achieved). And I am not saying that there is anything wrong with doing the job in the other ways.

Why should I have chosen to make life difficult in that way? I think it began in reaction against the 'law and order auction' that accompanied the 1995 state election, soon after my appointment as DPP – each side preying on the community's fears by talking up law and order issues and pretending that the answers lay in ever more draconian law enforcement and punishment. Then later there were threats to introduce mandatory sentences or some form of grid sentencing, and it seemed to me that somebody should be publicly putting forward the opposing view. These wouldn't be the only times that I and other senior members of the legal profession had to battle over issues of principle, and the contest continues.

New South Wales politicians weren't the only ones to regularly promise and attempt to pass such laws. Politicians in two other states knew that shopkeepers were sick of shoplifters and the general public were sick of nuisances committed by the town drunks. In the late 1990s, those states had passed laws that forced judges and magistrates to impose more, and longer, jail sentences for petty theft and property damage.

The effects of these new sentencing laws in those two states were immediate. A 24-year old Aboriginal mother was sentenced to the mandatory 14 days in prison for receiving a stolen $2.50 can of beer. A 20-year-old man with no prior convictions was sentenced to 14 days in prison for the theft of $9.00 worth of petrol. Two 17-year-old girls with no previous criminal convictions were each sentenced to 14 days in prison for the theft of clothes from other girls who were staying in the same room. Two young apprentices were each imprisoned for 14 days for first offences. One of them broke a window and the other broke a light worth $9.60. Legal observers noted the mandatory sentencing laws were harshest on the young and vulnerable and Aboriginal persons, particularly those who stole food and clothes because they didn't have families who cared for them. What's more, the effect of the mandatory sentencing laws on the crime rate was zero.

BOOK

Hammerschlag's Commercial Court Handbook

David Hammerschlag (LexisNexis, 2019)

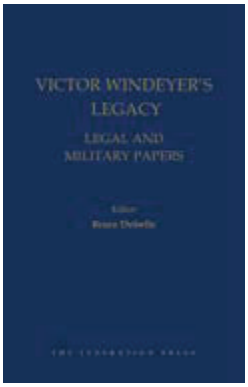
LexisNexis promotes this book as 'intended to be a practical tool for the benefit of those who practise in the commercial jurisdiction.' The brevity of the work (88 pages of commentary and 54 pages of reproduced Practice Notes, including two that have been re-issued since publication) is what provides its utility as a 'practical tool'. It provides a convenient summary of the relevant provisions of the UCPR and the Practice Notes, and is referenced to the leading cases on particular aspects without descending into detailed discussion of them. It also provides useful guidance as to the expectations the commercial Courts have of practitioners and parties that are not necessarily apparent on the face of the rules themselves.

This is a book that warrants personal inspection before purchase. Experienced practitioners in the area are likely to have a working knowledge of the practice of the commercial jurisdiction commensurate with the content of the book. On the other hand those who are new to the jurisdiction may find the commentary altogether too brief. For example, the author refers to the prohibition imposed by SC Eq 11 upon making an order for disclosure of documents before the parties have served their evidence unless there are 'exceptional circumstances'. This will be unsurprising for frequent flyers in the commercial jurisdiction, who will similarly be familiar with the cases that discuss what are 'exceptional circumstances'. For newcomers, while the author notes that this has 'been the subject of extensive judicial comment' there is no explication of what might amount to 'exceptional circumstances', and instead the practitioner is left to their own review of the caselaw, although the author has helpfully footnoted the leading cases.

This work achieves its goal of being a 'practical tool'. It provides a quick ready-reckoner for practitioners new to the commercial jurisdiction, and a useful refresher for those who only infrequently deal with particular parts of that jurisdiction.

Dominic Villa

BOOK



Victor Windeyer's Legacy – Legal and Military Papers

Edited by Bruce Debelle, 2019, Federation Press, 299pp.

He was, at least in many respects, a realist or a pragmatist, whereas his colleagues were for the most part apostles of legalism. This characteristic of his judgments serves partly to explain why it is that his reputation as a jurist stands higher today than it did in his own time and why, in the minds of many informed commentators, his reputation ranks second only to that of Sir Owen Dixon.

When a jurist is described in these terms, attention to his legacy is demanded. When the descriptor is Sir Anthony Mason, attention is commanded. Mason writes these words in his foreword to a miscellany of speeches, reviews, obituaries and other reflections by Victor Windeyer, soldier, historian and judge.

This "Legacy" has been compiled by Victor's former associate and soon-to-be biographer, Bruce Debelle. Debelle has also acted as judge in two States of the Commonwealth. (Victor preferred the pre-Cromwellian glory of "Commonwealth" over the place-name user-friendliness of "Australia".)

Charles Windeyer, a parliamentary journalist and contemporary of James Dowling, arrived in 1828. He and his wife duly produced an Australian born son. However, his eldest son Richard had remained in England with an eye to the bar there. Richard married Maria and produced William before himself arriving in 1835. All of which Victor recounted with colour and occasional diversion into feudal law before the historical societies of the Hunter River.

Richard was a prototype for the Sydney bar, successful but want to go too far. There was an incident involving sometime Solicitor General John Bayley Darvall, I think ancestor of the late bankruptcy silk Chum Darvall. The circumstances are addressed by Victor in a sober address to Australian judges on the topic "Contempt of Court". Elsewhere and away from judges, Victor permitted himself a family loyalty, complaining that Stephen CJ locked up Richard for 20 days while John Bayley received only 14. Richard "had apparently been the provoker, though perhaps not the aggressor."

Richard was not the first barrister and certainly not the last to confuse a cashflow founded on personal ability and a capital founded on the shoals of the Australian property market. Over-extended, he died at 42. This is a pivotal event in Victor's story - and, relevantly, for his writings - for three reasons.

First, the ability of widow Maria to navigate herself and her son around and past the eddies of genteel poverty. The strength of women in an age when legally superior men could well die young or become infirm was a common enough tale in many early families. The Macarthurs come to mind. The strength left a particular mark in the Windeyer line, where women tended to bluestocking and men tended to read JS Mill, still the world's most prominent male feminist.

Maria's success creates the next two reasons. First, there is nothing in Victor's writing which suggests a want of caution. That is not to say that Richard was reckless or anything other than unlucky, but it is clear enough that Victor was not going to risk unduly. He summed up his own attitude by recording the words of his boss at El Alamein. Soon after the turning point, General Montgomery wrote "Always operate from a firm base. The more uncertain and indefinite the situation, the more necessary it is to observe this rule."

Secondly, Maria was the parent who raised Victor's grandfather William. William was a central theme of Victor's life. Like his grandson, he was a judge with lifelong interests in Sydney Grammar School and the University of Sydney. More importantly there was a solid overlap of character, and I note Henry Parkes's remark about (his sometime employee) William, "He would have made as good a soldier as he has made a sound judge."

It is worth emphasising that Debelle has produced a legacy of "legal and military papers". The relationship between the military and the law is close. No few male and female members of the Sydney bar have served, and the Windeyer family is only one of many exemplars. As to the similarities between the disciplines, the binding nature of precedent and of orders and the role

and significance of symbolism in both professions are only two of many examples.

Victor himself also illustrated the neat paradox that the best of our leaders often comprise those who understand best the commonality in all of us. The author of this note's father served as a junior officer under Victor in North Africa and New Guinea, and the author can confirm via paternal hearsay what Professor Gummow made clear at the miscellany's launch: Victor related to his troops; he ate the food of his troops; he relied on his troops; his troops followed him.

Debelle has made good use of a number of Victor's commentaries on matters military, and it is a privilege for the reader to have the benefit of Debelle's success in tracking down Victor's address upon the victory of the second battle of El Alamein. Incidentally, bearing in mind that Victor's predecessor was Dudley Williams MC and without in any way diminishing the courage of the common law bar, does any member of the Association know why the High Court has a penchant for warriors from the whispering jurisdiction?

As to matters legal, Victor wrote as a common lawyer. I mean this in the widest sense: while he accepted and indeed welcomed the supremacy of parliament, his true faith lay in the culture of the common law, a set of rules moulded by countless generations to impose limits and to protect and develop freedoms.

As to the limit of legal knowledge, Debelle has recorded Victor's advice to 1952 graduates:

The Chancellor has admitted you lawyers as bachelors of laws, not of law - plural, not singular. This it seems is because it is assumed - quite erroneously of course - that you are learned in the canon as well as in the civil and common law.

As to the limit of the common law, Victor was a man of his time and his upbringing. For him, empire was an opportunity "to remember the peace, and welfare and progress that British rule, by example and authority, gave in so many parts of the world".

Rather than look to differences between his way of thinking and more modern ideas, Victor himself would have encouraged looking to similarities. A modern observation of Victor's words might be that he ignored or was indifferent to the many times British rule's example and authority badly misfired. Perhaps. But my own sense from reading through the miscellany as a whole rather than taking isolated words tailored to particular audiences is that he was patently aware of and supportive of the need for the common law to develop and not to fossilise and that any representative democracy had to have inclusion and not exclusion as a primary social goal. For Victor, empire came with the common law: "It is a common wealth [two words] of doctrine and custom in which we share."

Victor looked to Plato, to Bacon and to Edmund Burke as thinkers with solutions for current problems. He noted - surely correctly - that Bacon was "a man of wider interests and ampler mind" than Coke, and the only error I found in his work was his reference to Nathaniel Bacon as Francis's half-brother. Frances did have such a half-brother, but the Nathanial to which Victor was referring was a nephew prominent in the (other?) Commonwealth. The doctrine of the fertile octogenarian cannot save the day.

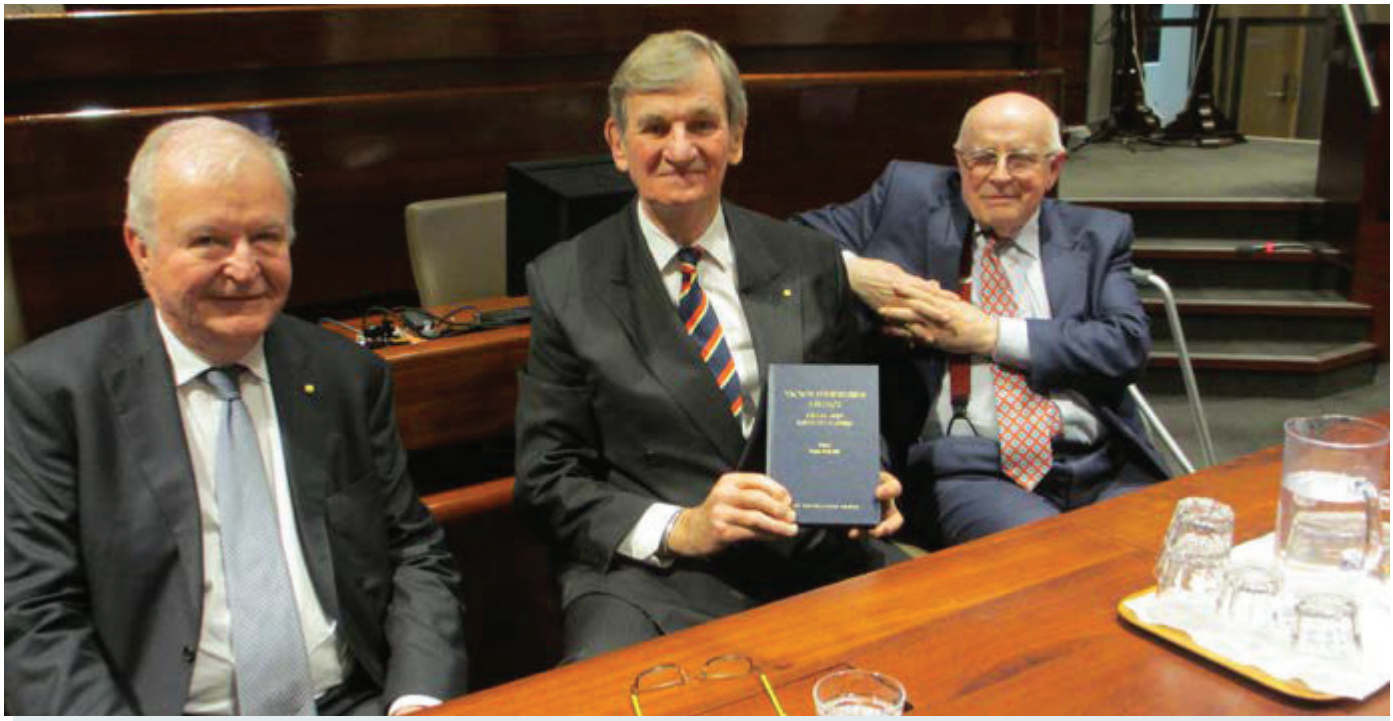
Sir Anthony Mason closed his foreword by comparing this miscellany to that of Lord Radcliffe, "Not in Feather Beds". The title may have been informed by the fact that Radcliffe had one of the more unpleasant gigs of modern times, the drawing of the boundaries for the new nations of India and Pakistan, and see Auden's "Partition" for a vicious dig. Actually, the title came from William Roper's biography of a fine equity judge, Thomas More:

We may not look at our pleasures to go to heaven in featherbeds; it is not the way, for our Lord Himself went thither with great pain, and by many tribulations, which was the path wherein He walked thither, and the servant may not look to be in better case than his Master.

It is neat that the penultimate paper of this collection is Victor's obituary for the highly regarded David Roper, also well-measured to the chancellor's foot.

In the end, Debelle's biography will tell us more about Victor Windeyer the man. In the meantime, this collection can be read merely because it is interesting and well-written. The reader will learn something of Windeyer's times and as much again of their own. It is a fine memorial of a warrior and scholar.

David Ash, Frederick Jordan Chambers.

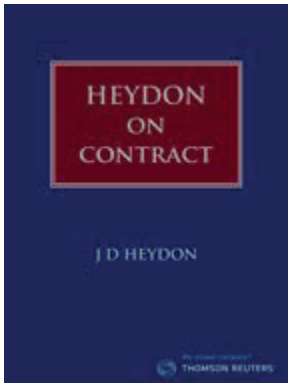


Victor Windeyer's Legacy: Legal and Military Papers

On 20 August 2019 Federation Press hosted the book launch of *Victor Windeyer's Legacy: Legal and Military Papers*, edited by the Honourable Bruce Debelle AO, QC. The event took place in the Banco Court in Queens Square and in attendance were the Windeyer family, the Lockhart and Lehane families, among many other distinguished judges and even some former Associates of Sir Victor.

The Guest of Honour was the Honourable W M C Gummow AO QC who launched this fascinating collection of disparate papers, speeches and notes which illuminate the contribution of a great Australian to not only the law but also to Australian society in the 20th Century. Most fascinating were the references to the late Sir Victor's military career. The event was well attended by members of the Bar and Australian history enthusiasts.

BOOK



Launch of Heydon on Contract: The General Part

The Hon Justice A S Bell
President, New South Wales
Court of Appeal
5 September 2019
Banco Court

The author spent all of his distinguished years at the Bar as a member of the Eighth Floor of Selborne Chambers. It was to Eight Selborne that he returned following his distinguished years of service first as a judge of the New South Wales Court of Appeal, then as a justice of the High Court of Australia, and then as Royal Commissioner. There often sits on the reception desk of Eight Selborne a vase of flowers. The vase never contains violets. Violets can shrink. There is no room for shrinking violets on Eight Selborne, and never has been. This is a theme to which I shall return.

Another characteristic of Eight Selborne is that, when that Floor comes to celebrate a member's achievement, it never meets in a restaurant which serves fusion cuisine. Fusion is not a popular word on Eight Selborne. Resistance to fusion, however, does not mean that an acclaimed master of equity cannot at the same time be a master of the common law, and in truth, one cannot be a good contract lawyer without also having a sound grasp of equitable principle – and there is far more reference to and discussion of equitable doctrine in *Heydon on Contrac*t than in most contract law texts. There is, for example, a whole chapter on 'Unconscientious Conduct', as well as a detailed treatment of equitable assignment of benefits under contracts.[1]

The author of the book launched tonight deprecates the use of sobriquets such as 'master of equity' or 'master of the common law' but, as TEF Hughes QC must have said on thousands of occasions, the facts in this case are "stubborn and impressive".

The facts reveal the author's first foray into the common law occurred almost 50 years ago, in 1971, with the publication of the first edition of *The Restraint of Trade Doctrine*. 1973 saw the monograph on *Economic Torts* published. It was republished in a second edition in 1978, shortly before the author came to the Bar. In between editions, in 1975, came a Casebook on Equity, now in its 8th edition. Coinciding with the second edition of *Economic Torts* in 1978 was the first edition, with Bruce Donald, of *Trade Practices Law*, of which there have been many subsequent editions or manifestations, published in the financially crippling loose leaf format! There then followed, in 1979, the commencement of an association with the Australian edition of *Cross on Evidence* which has lasted for 40 years, spanning 10 editions. Later works, of course, include two editions of Meagher Gummow and Lehane (the 4th, in 2002, with R P Meagher and Justice Leeming, and the 5th, in 2015, with Justice Leeming and Dr Turner) and two editions of *Jacobs' Law of Trusts* (the 7th and 8th editions in 2006 and 2016 respectively), both with Justice Leeming. *Restraint of Trade* is now in its fourth edition.*2* Not to be overlooked in this extraordinary record are the 20 years spent editing the Australian Law Reports[3] and 20 years as editor of the New South Wales Law Reports,[4] collectively resulting in the publication of exactly 200 volumes of law reports.

The work which it is my very great pleasure to assist in launching tonight is one of quite extraordinary scholarship and erudition. It displays many of the characteristics that Chief Justice Spigelman highlighted upon the author's elevation to the High Court from the New South Wales Court of Appeal in 2003: "prodigious energy", "inexhaustible relish for work", "vivid prose style", and "systematic arrangement and presentation" in which "[n]o corners were cut" and "[n]o issues were dodged".[5]

The work is ominously entitled *Heydon on Contract: the General Part*. It echoes, in this regard, Professor Glanville Williams' classic 1953 text *Criminal Law: The General Part*.[6]

That work aimed to "search out the general principles of the criminal law, that is to say those principles that apply to more than one crime."[7] Just as Williams distinguished between the general part of the criminal law and specific crimes,[8] so too does Heydon distinguish between the general part – that is, "the basic doctrines of contract formation, third party rights and dealings, contractual invalidity, termination and remedies for or affecting breach of contract" – and "*specific contracts*, like contracts relating to the sale of goods".[9]

Only time will tell whether the present work will have the same influence as Williams' 1953 text but I strongly suspect it will. It most certainly should. It has already been cited in numerous decisions of the New South Wales Court of Appeal.[10] One Federal Court judge has also been wise enough to cite it[11] and, as the author himself might say in one of his more mordant moments, many others are no doubt giving some thought to the prospect of doing so. Now that there has been a further print run, which almost inevitably will also be shortly exhausted, its reach will continue, and rightly so.

In this context it is, I think, apt to recall the words of an early reviewer of Glanville Williams' text who wrote that "the best tributes to this work will be not so much what reviewers say of it but what teachers and practitioners will do with it."[12] There is little doubt that *Heydon on Contract* – which outrageously exhausted its first print run within a matter of weeks, if not days – will soon be on the shelves and trolleys of teachers, students, judges, and practitioners throughout the country, and indeed beyond. It would be an act of gross professional negligence to be without a copy at work, as well as one at home, if for no other reason than that its weight alone will exceed your luggage allowance or your strength at the end of a wearying day in court.

This book is weighty in both senses of the word. It stands out for many reasons.

First, it is written with all the benefit of more than 50 years of full engagement with the law, from a variety of perspectives: as an academic lawyer, as an advocate, as an intermediate appellate judge and as a judge of an ultimate appellate court.

Pausing there, the difference between these last two positions is one that assumes no little importance in the author's opinion but not, in his opinion, in the minds of at least some intermediate appellate judges.[13] This topic is one upon which the author dilates in forthright style in various parts of the text.[14] The New South Wales Court of Appeal's decisions in *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603; [2009] NSWCA 407 (**Franklins v Metcash**) and *Mainteck Services Pty Ltd v Stein Heurtey* SA (2014) 89 NSWLR 633; 310 ALR 113; [2014] NSWCA 184 come in for criticism.[15] That is not to say, however, that generous acknowledgement is not made elsewhere of decisions of intermediate appellate courts. The scholarly decision of Justice Joe Campbell, for example, in *Ryledar Pty Limited v Euphoric Pty Ltd* (2007) 69 NSWLR 603; [2007] NSWCA 65 (**Ryledar v Euphoric**) concerning whether it is a requirement for rectification to be granted that the parties' common intention

be evident by "some outward expression of accord", and the same judge's decision in *Franklins v Metcash* in relation to the form of a decree for rectification (although not that aspect of the decision dealing with *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337; [1982] HCA 24), are singled out for praise.[16]

As to *Ryledar v Euphoric*, Heydon describes it as a "most fundamental analysis" which "merits quotation" as "a summary does not do it justice".[17]

The author's own decision, when a member of the New South Wales Court of Appeal, in *Brambles Holdings Limited v Bathurst City Council* (2001) 53 NSWLR 153; [2001] NSWCA 61 also highlights the significant role that decisions of intermediate appellate courts can play in the faithful and clear distillation of the principles of contract law. The decision of Murray Gleeson, when Chief Justice of the Supreme Court of New South Wales in the *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540, that of Michael McHugh in *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 97,326, and the joint judgment of Meagher, Handley and Cripps JJA in *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337 provide other examples.

But to return to the text and my first observation, the key point is that it is rare indeed for a textbook on such an important topic as the law of contract to be written by an author with such a wealth of practical experience, and the wisdom and insight born of that experience and the various perspectives that experience has afforded him. One distinguished exception, of course, is the trilogy of texts written or revived by the author's erstwhile colleague on the New South Wales Court of Appeal, the Hon KR Handley QC, whose works on res judicata,[18] actionable misrepresentation,[19] and estoppel by conduct and election[20] have been generously acknowledged and praised by the author, both in *Heydon on Contract*[21] and elsewhere.[22] Those works, as with *Heydon on Contract*, demonstrate not only the enormous importance for practitioner and judge alike of excellent legal textbooks per se, but the value in having principle distilled by authors whose lengthy and distinguished professional careers have demanded and nurtured not only forensic insight, but the highest degree of rigour in the identification, formulation and application of legal principle.[23]

Such authors also appreciate that the law cannot in practice be pigeon-holed. Thus where, for example, principles from the law of trusts and assignment must be understood fully to understand a contractual topic such as privity, those principles are discussed. As Heydon says, "purism" – which may otherwise have led to the exclusion of non-contractual topics in a textbook on contract – is not to be exalted over practicality and convenience.[24]

By way of contrast to the present work, most legal textbooks start their lives as the work of a young academic. Sir Guenter Treitel, for example, was 34 when the first edition of his classic *The Law of Contract* (**Treitel**) was published in 1962, some two years before Dyson Heydon went up to Oxford. But not all academic texts are of such quality as Treitel. As Heydon JA said, in response to an argument I made as a junior in *Union Shipping New Zealand Ltd v Morgan*,[25] in which (I suspect) I had not spared reference to the academy:

> "[A]cademic literature is, like Anglo-Saxon literature, largely a literature of lamentation and complaint. The laments and complaints can be heard even when academic wishes are acceded to."[26]

Whether or not that observation was wholly fair (and I recall having some thoughts about that at the time), it is a memorable example of the author's literary style and felicity of language.

The second general point I would make is that much of the law of contract is well settled. That is a good thing and what sophisticated economies require for the efficient functioning of trade and commerce. In those areas where the law is relatively settled, *Heydon on Contract* sets out with great

clarity the relevant principles, provides ample citation in support of them and frequently descends from the general to the particular to highlight, in typically epigrammatic style, the way in which the established principle has been held to operate in particular factual circumstances. The discussion by the author of what acts may amount to an affirmation of a contract following an act or conduct by the counterparty that would have entitled the first party to rescind is a case in point.[27]

But there are areas of the law of contract where either the law is not fully settled or it is vague in its ambit,[28] where difficult cases have made bad law,[29] or where some major or subtle or insidious doctrinal divergences have emerged in common law jurisdictions. In these areas, the text adopts a very different style. It is a style which gives great insight into the author's mind and forensic personality. The learning underpinning that style has been described by Associate Professor Lee Aitken, a boon luncheon companion of the author, as "dodecohedral in the Daubian sense".[30] Whilst I must confess to lacking Professor Aitken's commitment to plain English language, the observation is apposite.

The third broad point to be made in relation to *Heydon on Contract* is that this is a book on the *Australian* law of contract first and foremost. This is not because the author is a republican, and there is no threat that he will join Mr Peter FitzSimons on the hustings in a red bandana (although it is an intriguing image). Rather, it is because the law of contract in Australia is undoubtedly distinct from the law of contract in England in a number of important and indeed fundamental respects.

Just because the text is avowedly one concerned with the Australian law of contract, however, it would be wholly erroneous to think that it does not deal with the English law of contract. It does – and at great and illuminating length – but this is not done as an act of slavish adherence; quite the opposite. It is to expose and explain the key differences which have emerged. These differences exist, for the most part at least, not because Australian law has diverged from English law as traditionally stated but because English law itself has moved in conspicuous ways. *Heydon on Contract* is essential reading for the "many [who] think that Australian law conforms with the modern English approach" and "others [who] think that Australian law should be made to conform with the English approach".[31]

The differences that have emerged are most fundamentally (but by no means only) associated with the law in relation to contractual interpretation and the law in relation to the rectification of contracts and other instruments.[32] The exposition and exploration of these differences in *Heydon on Contrac*t is informed at a human level by a dialectical engagement that began more than 50 years ago. Let me explain.

In 1966, Lord Franks, the legendary British civil servant, post-war Ambassador to the United States and philosopher, chaired a commission of inquiry into the University of Oxford. The Commission said that the famous Oxford tutorial system:[33]

> "[a]t its heart is a theory of teaching young men and women to think for themselves. The undergraduate is sent off to forage for himself… and to produce a coherent exposition of his ideas on the subject set… In [the tutorial] discussion the undergraduate should benefit by struggling to defend the positions he has taken up…"

Two years before the Commission's Report was published, a young but tall Rhodes Scholar from New South Wales had made his way down the Oxford High Street, turned right into the entrance to University College, then in its 715th year, and presented himself for tutorials in the undergraduate law course in a dank room near Magpie Lane. His tutor was a slightly older but equally tall South African Rhodes Scholar who had won the Vinerian Scholarship in 1957. This was the future Lord Hoffmann. Thus two towering – I was going to say "titanic" but that is not all that portentous – two towering intellects were thrust together in the unique and robust environment of

the Oxford tutorial. Heydon himself would become the Vinerian Scholar in 1967.

In moving the vote of thanks to Lord Hoffmann following the Fifth John Lehane Memorial Lecture in 2010, the then Justice Heydon recalled their first meeting:[34]

"It was a dark October night in 1964. We sat in his rooms in a part of the College called "Kybald", distinguished for gloomy Victorian architecture. There, solemnly and seriously, calmly and quietly, he explained how the system worked."

The lively debates between the two as to legal principle and philosophy and judicial method and technique that began that dark but auspicious October night in 1964 continue, more than 50 years later, in the pages of this book, for it is largely if not exclusively to Lord Hoffmann and the influence of his decisions in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, *The Starsin* [2004] 1 AC 715,[35] and *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 (**Chartbrook**) that Heydon attributes the divergence of English contract law from orthodoxy. This is done with force but, at the same time, much admiration. Thus he writes:[36]

> "Lord Hoffmann's exposition of the modern English approach is striking, brilliant and seductive. W B Yeats said that Bishop Berkeley's prose dripped with suave glittering sentences. Lord Hoffman's certainly does. In part those sentences highlight with extraordinary freshness some profound aspects of the traditional law. In part they go well beyond them."

The reader of *Heydon on Contract* is left in no doubt, however, where the line between insight and heresy lies. Take the discussion of Chartbrook.

The difference between the approach in Chartbrook and that under Australian law is that, for the purposes of rectification, Australian law concentrates on the actual mental states of the parties as opposed to what a reasonable person might have conceived to be the common intention of the parties. This is a major doctrinal distinction. Under the heading "Australian and English Positions Contrasted"[37] the author "warms up" by describing academic discussions of *Chartbrook* as being "in their remoteness from forensic realities, … reminiscent of the constitutional schemes of the Abbé Sieyès". He was, of course, and as you would all recall, one of the chief political theorists of the French Revolution, famous for saying of France to Mirabeau that it was "a nation of monkeys with the throat of parrots". It could have been worse: as George W Bush reportedly said more than 200 years later, "[t]he problem with the French is that they don't have a word for entrepreneur."

But to return to *Heydon on Contract* and the assault on the law of rectification, the author writes that:[38]

> "English authorities since 2009 reveal the English position, even if clear in principle, to be very obscure in practical application. And even if one considers that it can be rendered clear in application, one may not like it. The persons in that frame of mind may console themselves. Like the weather in Melbourne, it will soon change."

Such change in England has, in fact, begun to happen. In delivering the 2017 Harris Society Annual Lecture at Keble College Oxford where, of course, Dyson Heydon had been a tutorial fellow, Lord Sumption said that:[39]

> "rather more than thirty years ago, the House of Lords embarked upon an ambitious attempt to free the construction of contracts from the shackles of language and replace them with some broader notion of intention. These attempts have for the most part been associated with the towering figure of Lord Hoffmann. More recently, however, the Supreme Court has begun to withdraw from the more advanced positions seized during the Hoffmann offensive, to what I see as a more defensible position."

His Lordship also said on that occasion, in words with which Dyson Heydon would, I expect, fully concur, that:[40]

> "Judges are fond of speculating about the motives and practices of businessmen in drafting contracts. It is a luxurious occupation. The rules of admissibility protect them from the uncomfortable experience of being confronted by actual facts."

Returning to Mr Heydon and Lord Hoffmann, after his meteorological allusion to the weather of Melbourne, there then follows an extended and what may fairly be described as "Heydonesque" demolition of the *Chartbrook* decision and its forebears. It is a matter of note that in this discussion there is an interesting defence of Lord Denning and his decision in *Frederick E Rose (London) Ltd v William H Pim Junior & Co Ltd* [1953] 2 QB 450 which was heavily relied upon in *Chartbrook*. In short, the author considers it unfair to place the blame for the *Chartbrook* heresy on this decision. Thus he says:[41]

> "In point of principle, it is not enough to stigmatise what Denning LJ said because of the mere fact that it was he who said it. It is true that glory has departed from his reputation. The 'cloud-capp'd towers and gorgeous palaces' of the energetic judicial legislation he perpetrated over four decades have slid into ruins. But he had, with respect, exceptional legal learning and acuity. In this instance, and for his time, it is not his words in themselves that are wrong but what has later been made of them by numerous modern lawyers."

"Modern" is not a term of approbation in the Heydon lexicon.

The discussion and critique of *Chartbrook in Heydon on Contract* is illuminating on a number of levels. It draws out a fundamental difference between Australian law and English law on a centrally important topic. It tracks through what the author considers, rightfully in my opinion, a fundamental departure from orthodoxy. It does this by a close analysis of the cases which preceded *Chartbrook* and it highlights how a lack of rigour is apt to create doctrinal chaos. In all of this we see, as in other parts of the work, the stringent attention to detail, the closeness of the analysis and reading of the relevant cases and the depth of the author's scholarship and historical grasp. It was these characteristics which marked him out as a fine advocate and as a fine judge.

One other area in which there has been doctrinal controversy and indeed movement at the level of ultimate appellate courts relates to the doctrine of penalties. If I may say so, the discussion of the penalties doctrine in this text is the clearest I have ever read. That discussion includes but is by no means confined to the decisions in *Andrews v Australia and New Zealand Banking Group Ltd* (2016) 247 CLR 205; [2012] HCA 30, *Cavendish Square Holdings BV v Talal El Makdessi* [2016] AC 1172 and *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525; [2016] HCA 28.

In relation to that trilogy of decisions, the author notes (at [26.970]) that "the law has, at least superficially, travelled into a time of turbulence and disputation" and that these three decisions have attracted a vast amount of critical commentary "varying greatly in angle, tone and detail". The author calls out exaggeration of the extent to which the law in its practical operation has been unsettled by those decisions as well as "the allegedly unedifying character of what the Supreme Court and the High Court said about each other". Pouring cold water on what has excited many academics, he advises that "those who go to the cases in the hope of a titillating experience are doomed to bitter disappointment".

There is an interesting and diverting reflection on judicial technique manifested in the three decisions.[42] The discussion which follows then takes the reader clearly through *Andrews*, then *Cavendish*, then *Paciocco*, teasing out the differences both between the individual judgments in *Cavendish* and *Paciocco* as well as the differences between the three cases. There is then an invaluable analysis of the status in Australia of the four key propositions associated with Lord Dunedin's speech in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79 in light of *Paciocco*.

The final point I would make is that *Heydon on Contract* is written with such inimitable style and flourish that consulting it is far more than a routine matter of professional engagement as a starting or end point for research. It is a pleasure to read. Throughout, there are insights and reflections on themes not necessarily confined to contract law but about which the author has often spoken. These include the merits or otherwise of joint judgments in ultimate appellate courts,[43] the importance of isolating the ratio decidendi in any case,[44] and the importance of expedition in commercial cases, both in respect of their hearing and disposition. He links the excessive use of extrinsic evidence to the clogging of the arteries of litigation. He writes:[45]

> "This is bad not only for litigation generally. It is bad for commercial litigation in particular. A commercial court is supposed to be a piepowder court. The merchants come in. They stamp the dust off their boots. They want a speedy answer. Commercial health – the health of individual traders and the health of the economy as a whole – depends not only on the direction of the circulation of money, but also on its velocity. Those who owe money should pay it speedily. Those who do not owe it are entitled to a judgment removing doubt about that point. Slowness in adjudication can result in the bankruptcy of traders despite the justness of their claims or defences. Many transactions and businesses are interconnected. Much legal process is instituted or defended unmeritoriously, in the knowledge that the court's delays can be exploited to deny justice. These abuses of legal process are massive in scale.
>
> The trouble is that the English position is so liberal that even though it forbids recourse to negotiations, it tends to invite parties to prepare and tender negotiation material in the hope that all or part of it will be admitted as background material.

> The cost pressures affecting large firms of solicitors operating under their expensive business models are notorious. In those circumstances a cynic might say that greater love hath no managing partner than this – the eruption of large-scale commercial litigation against a loyal and valued client. Even if most managing partners do not experience that emotion, commercial litigation involving analysis of contractual background does generate excessive discovery, huge tenders of ill-digested documents, the preparation of diffuse witness statements and prolix cross-examination."

I would take this opportunity to place on the record my strong endorsement of these sentiments and the explicit and implicit criticisms they contain.

As with especially the earlier editions of *Meagher, Gummow and Lehane*, there are also deployed throughout *Heydon on Contract* bon mots, literary allusions, and acerbic reflections which bring a smile to the reader who is otherwise occupied in a search for crystalline principle. Take, for example, the discussion of privity and the author's citation of the 30th edition of *Anson's Law of Contract*, edited by the former Lord Justice Beatson, the soon to be Lord Burrows, and Professor Cartwright. The author quotes from Anson the 'assertion' that:

> "In principle the promisee should also be able to recover substantial damages if, by reason of a breach of contract, the promisee (a) comes under a moral obligation to compensate the third party, though under no legal obligation to do so, or (b) voluntarily incurs expense in making good the default."

He then writes: "Apart from a noticeable odour of restitutionary sanctity, this passage has several problems."[46] These are then delineated with some vigour and zeal. You will recall my earlier observation as to the absence of shrinking violets on Eight Selborne.

Priceless, too, is the description of Sir Owen Dixon's concurrence with Sir Victor Windeyer's discussion of voluntary equitable assignments in *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 16. Of this, Heydon says:

> "[Windeyer's] judgment received a significant encomium from Dixon CJ, in the dying months of his much-admired career. The encomium was cool, perhaps. But it was real. And it was notable. For it was enunciated by a stern critic. From his lips or pen what seemed to be praise was rarely sincere. And what seemed to be sincere was rarely praise. He said: "I have had the advantage of reading the discussion contained in the decision of Windeyer J of the whole subject of voluntary equitable assignments and I do not know that there is anything contained in it with which I am disposed to disagree."[47]

It will not be said of this book, as Mr Heydon's great friend, the late R P Meagher AO QC, also of Eight Selborne, once memorably wrote of an English text on the law of trusts, that "[n]obody should yield to the temptation to buy this book, and the author, the publisher and the editors ought all be ashamed of themselves and each other".[48] Happily, entirely the opposite is true of *Heydon on Contract* (with the possible exception of the pessimist who signed off on the original print run). What was said, however, of the late Professor Treitel, who died only a matter of weeks prior to the publication of this work, by the current Dean of the Oxford Law Faculty could well also be said of Dyson Heydon and this work:[49]

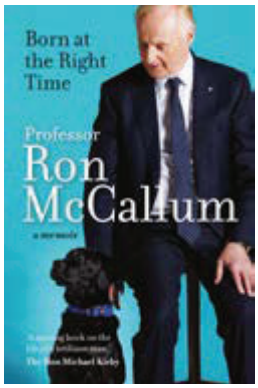
> "it was clear that Treitel and contract were well-suited. The law of contract provided ideal material for his rigorous doctrinal analysis and precise attention to detail, and his desire to impose some order on the case-law in particular."

This is a most significant publication, brilliantly written and splendidly produced, including an enormously useful table of contents and index. It is a great honour to have been asked to participate in its launch.

ENDNOTES

1 See JD Heydon, *Heydon on Contract* (Lawbook Co, 2019), ch 18 and [13.280]ff respectively.
2 JD Heydon, *The Restraint of Trade Doctrine* (LexisNexis, 4th ed, 2018).
3 From (1979-80) 29 ALR to (1999-2000) 169 ALR.
4 From [1980] 1 NSWLR to (1999-2000) 48 NSWLR.
5 The Hon JJ Spigelman, *Transitions in the Court: Ceremonial Speeches by Chief Justice Spigelman 1998-2011* (NSW Bar Association, 2012) 26-27.
6 Glanville L Williams, *Criminal Law: The General Part* (Stevens & Sons, 1953). An expanded second edition followed eight years later: *Criminal Law: The General Part* (Stevens & Sons, 2nd ed, 1961).
7 Williams, *Criminal Law* (1953), v.
8 Ibid.
9 Heydon, above n 1, vi (emphasis in original).
10 *Searle v Commonwealth of Australia* [2019] NSWCA 127; *Wollongong Coal Ltd v Gujarat NRE India Pty Ltd* [2019] NSWCA 135; *Coplin v Al Maha Pty Ltd* [2019] NSWCA 159; *Donau Pty Ltd v ASC AWD Shipbuilder Pty Ltd* [2019] NSWCA 185; *Strike Australia Pty Ltd v Data Base Corporate Pty Ltd* [2019] NSWCA 205; *Darzi Group Pty Ltd v Nolde Pty Ltd* [2019] NSWCA 210.
11 *ACME Properties Pty Ltd v Perpetual Corporate Trust Ltd as trustee for Braeside Trust* [2019] FCA 1189.
12 A L Armitage, 'Book Reviews: Criminal Law: The General Part' (1954) 12(2) *Cambridge Law Journal* 243, 247.
13 Heydon, above n 1, vii. On this theme, see JD Heydon, 'How Far Can Trial Courts and Intermediate Appellate Courts Develop the Law?' (2009) 9 *Oxford University Commonwealth Law Journal* 1.
14 See, eg, Heydon, above n 1, [9.790], [9.920], [9.980], [9.1050], [9.1070], [13.170].
15 Ibid, [9.980]-[9.990].
16 Ibid, [30.140].
17 Ibid.
18 Spencer Bowen and Handley, *The Doctrine of Res Judicata* (LexisNexis, 4th ed, 2009).
19 Spencer Bowen and Handley, *Actionable Misrepresentation* (LexisNexis, 5th ed, 2014).
20 KR Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell, 2016).
21 See, eg, Heydon, above n 1, viii, [14.270], [14.760], [14.780], [14.800], [25.70], [31.20].
22 See the then Justice Heydon's remarks on the launch of the Hon KR Handley AO's 2006 work *Estoppel by Conduct and Election:* 'Estoppel by Conduct and Election' (2006/2007 Summer) *Bar News* 110.
23 Chapter 23, for example, includes a section headed "Forensic aspects of frustration": Heydon, above n 1, [23.150]ff.
24 Ibid, [12.250]. In other areas, the reader is directed to specialist texts dealing with topics that may arise in contractual disputes but are only flagged in passing in the text. See, for example: in relation to statutory unconscionability, [18.80] and [18.90]; in relation to merger, ch 25.
25 (2002) 54 NSWLR 690; [2002] NSWCA 124 at [98].
26 Notwithstanding this sentiment, in his capacity as author of *Heydon on Contract*, the author generously acknowledges academic work he admires. Three examples are: DW Greig and JLR Davis, *The Law of Contract* (Law Book Co Ltd, 1987), referred to in the Preface at v; G Tolhurst, *The Assignment of Contractual Rights* (Hart Publishing, 2nd ed, 2016), referred to at [13.10]; and JW Carter, *Carter's Breach of Contract* (LexisNexis Butterworths, 2nd ed, 2018), referred to at [24.20].
27 Heydon, above n 1, [31.640]-[31.930].
28 The author includes in this respect modern High Court authority on contractual illegality: ibid, [20.900].
29 See, for example, the author's discussion of *Jackson v Horizon Holidays Ltd* [175] 1 WLR 1468 and *Albazero (Owners) v Albacruz (Cargo Owners) (The "Albazero")* [1977] AC 774: Heydon, above n 1, [12.160] and [12.170] respectively.
30 L W J Aitken, 'Book Review: Selected Speeches and Papers' (2018) 37 *University of Queensland Law Journal* 329, 333.
31 Heydon, above n 1, [8.250] (emphasis added).
32 Many other differences are highlighted in the text. These include, for example: differences as to the operation of the doctrine of frustration on executed leases (ibid, [23.90]); differences as to the availability of damages for the disgorgement of benefits obtained by a wrongdoer (at [26.190]); and differences as to Lord Hoffmann's approach to remoteness of damage (at [26.590]).
33 Franks Commission, *Commission of Inquiry: Report* (Clarendon Press, 1966) 101-2, quoted in David Palfreyman, 'Higher Education, Liberal Education, Critical-thinking, Academic Discourse, and the Oxford Tutorial as Sacred Cow or Pedagogical Gem' in Palfreyman (ed), *The Oxford Tutorial: 'Thanks, you taught me how to think'* (Oxford Centre for Higher Education Policy Studies, 2nd ed, 2008) 16.
34 JD Heydon, 'Speech in Honour of Lord Hoffman', in John Sackar and Thomas Prince (eds), Heydon: Selected Speeches and Papers (Federation Press, 2018) 59, 61.
35 *Homburg Houtimport BV v Agrosin Private Ltd (The "Starsin")* [2004] 1 AC 715.
36 Heydon, above n 1, [8.250]. In his footnote to this passage, the author is at pains to point out that "the application of Yeats's remark to Lord Hoffman is intended to be complementary." Whether or not the spelling of "complementary" is a rare typographical oversight or intentional is intriguing.
37 Ibid, [30.180].
38 Ibid.
39 Lord Sumption, 'A question of taste: the Supreme Court and the interpretation of contracts' (2017) 17(2) *Oxford University Commonwealth Law Journal* 301, 303.
40 Ibid, 301.
41 Heydon, above n 1, [30.220].
42 Ibid, [26.970].
43 See, for example, ibid, [26.970].
44 See, for example, the extensive discussion of Sir Anthony Mason's judgment in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337; [1982] HCA 24 in Heydon, above n 1, chapter 9, especially the remarks at [9.1200].
45 Heydon, above n 1, [9.1520].
46 Ibid, [12.140].
47 Ibid, [13.10].
48 R P Meagher, 'Book Review: An Introduction to the Law of Trusts' (1991) 8 *Australian Bar Review* 183, 184.
49 Anne Davies, 'Guenter Treitel 1928-2019' (19 June 2019) University of Oxford, Faculty of Law <https://www.law.ox.ac.uk/news/2019-06-14-guenter-treitel-1928-2019>.

BOOK



Born at the Right Time

Professor Ron McCallum
(Allen & Unwin, 2019)

Ron McCallum is not someone for whom you have to search far to find a distinguished descriptor. As a leading voice in the field of labour law, the former Dean of the University of Sydney Law School, Chair of the United Nations Committee on the Rights of Persons with Disabilities, and 2011 Senior Australian of the Year, a comprehensive list of his achievements alone could fill the pages of a lengthy tome. However, McCallum's memoir is remarkable not only for the extraordinary life it describes, but the compelling insights it offers into the man himself.

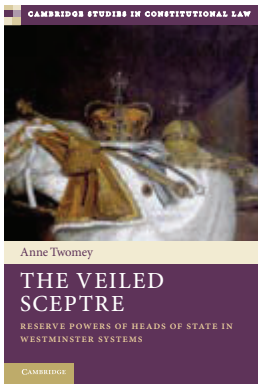
The fortunate timing of McCallum's birth is a theme that permeates the book. Blinded shortly after his premature birth in 1948, McCallum details the sweeping technological advancements in his lifetime that opened doors to opportunities previously unfathomable for blind people. From an early education that relied on the use of braillette boards, the advent of cassette players, speech synthesisers and other assistive technologies were all indispensable in allowing McCallum to overcome seemingly insurmountable barriers to education and ultimately to the legal profession. As McCallum discusses his often-challenging path through school, university and professional academia, the overwhelming sentiment is one of love for the many who assisted him along the way. He speaks with great affection for his mother, who was determined that her son should not be stymied by his disability and encouraged him to envisage a life for himself beyond the workshop labour jobs that awaited most blind people of his era. He has similarly high praise for the countless friends, students and volunteers who devoted hours to recording cases and textbooks onto cassettes for him to listen to. The book is most moving when McCallum speaks of his gratitude for his wife, Professor Mary Crock, and three children, who fulfilled the promise of a close-knit and loving family life he had long thought to be out of reach.

The title 'Born at the Right Time' is characteristically self-effacing, for it was not merely fortunate timing that contributed to McCallum's success, but also his own strength of character. He writes with nuance about his complex and evolving attitudes towards his disability. He is open in recognising that his tireless efforts early in his career to not only operate on the same level as his peers but to thrive in their midst were symptoms of a desire to 'put my blindness behind a curtain and to seek success despite it'. Later in his career, having established himself in the legal profession, he describes a shift whereby he became more involved with disability advocacy, taking on various positions within blindness organisations and notably working at a high level within the United Nations. This later period in his career also saw McCallum return to university lecturing, which he describes as his 'first academic love'. At one point, while reflecting on his own teachers, McCallum remarks that 'I don't think that you can be a truly good teacher unless you love your students'. I have had the great privilege of witnessing this sentiment first-hand, having been lectured by Ron in Administrative Law earlier this year. The joy that he so clearly derives from teaching is impossible not to emulate. His good humour and genuine fondness for his students elicit a universal respect and engagement, no mean feat in a time where university lectures are typically treated as extended social media scrolling opportunities.

Born at the Right Time is not an arduous book to read, nor does it delve too comprehensively into McCallum's extensive legal, academic and governmental experience. What it does do is leave a strong impression of a man with a profound belief in fairness, whose empathy for workers, minorities, refugees and the incarcerated may be traced directly back to his own feelings of isolation at various points in his life. It is a sensitive and endearing story of a man of great intelligence, kindness, introspection and gentle good humour, whose contribution to the Australian legal community and society more broadly cannot be overstated.

Olivia Fehon

BOOK



The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems

Professor Anne Twomey
(Federation Press, 2019)

Professor Anne Twomey is an internationally-recognised expert on constitutional law. Such is the learning contained in her recent book *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* that it featured in the written submissions of the Prime Minister and the Advocate General for Scotland in the UK Supreme Court's recent consideration of the prerogative power to prorogue the UK Parliament,[1] and was described by Gleeson CJ as a 'major contribution to the study of constitutional arrangements'[2].

Reserve powers are the powers exercisable by a head of state according to his or her discretion without, or contrary to, the advice of responsible ministers. Rather than focussing on labels of what are the reserve powers, Professor Twomey argues the preferable approach is to understand the constitutional principles from which constitutional conventions that govern the exercise of the reserve powers are derived.

These principles include: the rule of law;[3] responsible government;[4] representative government;[5] separation of powers;[6] and necessity.[7] As the events of 1932 (involving NSW Premier, Jack Lang) and 1975 (involving Australian Prime Minister, Gough Whitlam) will attest, the most controversial reserve power is the dismissal of a chief minister and thereby, their government. This power was described by MacKinnon as one that "hovers like a ghost": the very prospect of its exercise has led to resignations of governments without the necessity of formal dismissal (such as in Manitoba in 1915 and in Pakistan in 1957).

Bagehot famously described the British monarch's rights as '… the right to be

consulted, the right to encourage, the right to warn …', and Professor Twomey observes that '[i]nfluence exercised by a monarch before final decisions are made and final advice is given, is an essential aspect of the reserve powers, as it tends to avert any need to exercise them. That influence is rendered more effective by the existence of the reserve powers and by the ambiguity about their scope. The existence of the reserve powers … is enough to cause a Prime Minister to pause and think twice.'

Professor Twomey's text is an invaluable resource. It draws on a vast range of previously unpublished material, including from the Royal Archives at Windsor Castle, to provide numerous real world examples of constitutional crises, including those resulting in the dismissal of governments, which reveal how conflicting constitutional principles have been resolved in countries with a Westminster-style system of responsible government.

Bharan Narula

ENDNOTES

1 At [83] (p 26). The submissions are available at https://www.supremeCourt.uk/docs/written-case-for-the-prime-minister-and-advocate-general-for-scotland.pdf.
2 Chief Justice Gleeson, *Book Review: The Veiled Sceptre – Reserve Powers of Heads of State in Westminster Systems* (2018) 45 ABR 319 at 323.
3 The head of state must act in a legally and constitutionally valid manner.
4 The head of state is obliged to act upon the advice of ministers responsible to Parliament.
5 The lower House is formed of representatives directly elected by the people.
6 Determining what is legal is an exercise of judicial power and is for the Courts.
7 On rare occasions, when government has fallen outside the bounds of constitutionality, the head of state may exercise an otherwise unconstitutional power to lead government back to constitutional validity.

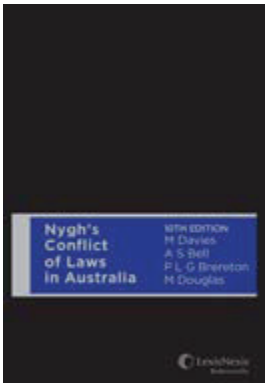
BOOK NEW EDITION

The Mortgagee's Power of Sale (4th edition)

Clyde Croft and Robert Hay (LexisNexis, 2019)

This text is an exposition of the law relating to the exercise of the power of sale by mortgagees of land, both under the general law and also under the Torrens system. It is structured transactionally, following the chronological steps taken by a mortgagee seeling mortgaged property under a power of sale. Although written by Victorians, the text includes reference to the relevant statutory provisions in NSW as well as Victoria. This edition is a minor update to the previous work (2013) to include reference to more recent cases, and remains a useful addition to the library of practitioners in the area.

BOOK NEW EDITION



Nygh's Conflicts of Laws in Australia (10th edition)

M Davies, A S Bell, P L G Brereton and M Douglas (LexisNexis, 2020)

This is the third edition of this seminal work published since the untimely death of Peter Nygh in 2002. The co-authors of the previous editions (Martin Davies from the Tulane University Law School, Andrew Bell - now President of the NSW Court of Appeal, and Paul Brereton - now of the NSW Court of Appeal) are joined by Michael Douglas from the University of Western Australia who has taken over responsibility for chapters previously authored by Martin Davies (dealing with Negotiable Instruments and International Monetary Obligations, the difference between Movables and Immovables, and Transactions Between Living Persons) and by Andrew Bell (dealing with State Immunity, the Exclusion of Foreign Laws and Institutions, Contracts, Corporations and Insolvency, and the Administration of Deceased Estates).

There have been significant developments since the previous edition, including High Court decisions considering the definition of marriage,[1] arbitration and jurisdiction agreements,[2] and the commercial exceptions to state immunity.[3] Discussion of the UK Supreme Court's decision considering state immunity and the act of state doctrine[4] has also been included, along with many decisions of intermediate Courts of appeal, including consideration of the choice of law in unjust enrichment and the presumption as to the content of foreign law,[5] pleading foreign law,[6] the public policy defence to enforcement of foreign judgments relating to gambling activities,[7] and the interaction between choice-of-law clauses and forum statutes, including in relation to the Australian Consumer Law.

As with previous editions of this work, this remains an essential part of any practitioner's law library.

BOOK NEW EDITION

Statutory Interpretation in Australia (9th edition)

D Pearce (LexisNexis, 2019)

This is the first edition of this work to be published since the retirement of Professor Geddes who co-authored the 3rd to 8th editions. There are two significant changes from previous editions. The first is that as a result of the author's publication of *Interpretation Acts in Australia* in 2018, the treatment of the content and operation of Interpretation Acts has been greatly reduced (the reader instead being referred to that other work for more detailed analysis and discussion). The second is that the increasingly burdensome listing of cases in the body of the text (the author eschews the use of footnotes) has been alleviated to aid readability by the inclusion of what is described as an "Annexure" at the end of the book. Here, the author has set out the citations of cases and relevant secondary materials where there are (generally) more than three citations relating to a particular topic. The reader is helpfully directed to the Annexure where this is relevant.

Dominic Villa

MOVIE

Diego Maradona (2019)

Released in July this year, *Diego Maradona* is the third film from acclaimed British director Asif Kapadia. As anyone who has seen either of Kapadia's two previous films knows, Kapadia is no ordinary documentary-maker – his first film, *Senna* (2010) won a BAFTA and his second, *Amy* (2015) won an Academy award for Best Documentary Feature. He relies almost exclusively on archival footage and home video clips rather than retrospective video interviews, and none of his documentaries have formal commentaries or a narrator. This gives Kapadia's films an immersive quality; rather than constantly being told by a third party what happened in the past, you are witnessing the past through uninterrupted original footage which has the immediacy and intimacy of the present. As a result, you cannot help but be absorbed by his films - whether you have an interest in Formula One, Amy Winehouse or football or not.

Constructed from over 500 hours of never-before-seen footage – some of which is from Maradona's personal archive – this film centres on the seven year period beginning in 1984 during which Maradona was contracted to SSC. Napoli for what was at the time a world-record fee. Maradona's well-known genius on the pitch catapulted the much-maligned team and its marginalised city of supporters into the 1988–89 European championships (which they won), resulting in a level of hysteria and idolisation never seen before in any sport. For a period Maradona's star burned so brightly that he was literally worshipped by some fans alongside the Virgin Mary.

I have no particular interest in football. Before seeing this film I couldn't have told you Maradona's nationality or which teams he played for. And I certainly hadn't heard the phrase 'the hand of God'. Yet I was every bit as engrossed by this film as my football-fanatic friends. It is like watching an opera – a rags to riches tale, a charismatic central character who is his own worst enemy – a victim of his own success. It has greed – so much greed (not least of all from those who refused to release Maradona from his contract no matter how much he begged), power (particularly within the string-pulling Camorra), addiction, adultery and, ultimately, destruction. It is the story of someone who was simultaneously magnificent and deeply flawed and who was hounded to his demise. It displays the full spectrum of human frailties writ large against a backdrop of super-human talent. Whether you are a football fan or not, whether you were a fan of Maradona or not, you should see this film. I will be surprised if it doesn't receive a nomination for Best Documentary at the 92nd Academy Awards. It certainly has my vote.

Sarah Woodland

The film is available on DVD and via Apple iTunes.

ENDNOTES

1. Commonwealth v Australian Capital Territory (2013)
2. Rinehart v Hancock Prospecting Pty Ltd (2019) 366 ALR 635
3. Firebird Global Master Fund II Ltd v Republic of Nauru (2015) 258 CLR 31
4. Belhaj v Straw [2017] AC 964
5. Benson v Rational Entertainment Enterprises Ltd (2018) 97 NSWLR 798
6. Palmer v Turnbull [2018] QCA 112
7. Kok v Resorts World at Sentosa Pte Ltd (2017) 323 FLR 95
8. Valve Corporation v Australian Competition and Consumer Commission (2017) 351 ALR 584

PODCAST

Secret History of the Future

'Journey into the past and you'll discover the secret history of the future.' Spanning two seasons, this energetic and intriguing podcast presented by Tom Standage (*The Economist*, London) and Seth Stevenson (*Slate*, New York) examines historical tech to discover and apply learning to our understanding of evolved modern technology. 'Patterns from history, to help us face the changes to come', where it is 'unreasonable to expect anyone to have seen the whole picture'.

The subjects are diverse. Can a data breach of the 19th century French telegraph system teach us about modern cyber security? Could investigating the death of the first pedestrian ever killed by an automobile in 1899 help us avoid a pileup of mistakes as driverless cars take over our roads? An 18th century robot that played winning chess executed a trick pulled by tech companies today. Composers' worries upon invention of the 19th century phonograph inform how to handle 21st century proliferation of digital music sampling.

The episode 'Unreliable Evidence' on 17 July 2019 may be of particular interest to barristers, especially those practising in crime. This episode visits fingerprinting in the early 20th century – then a new forensic technique, hailed as infallible – to draw lessons about the risks inherent in the modern reception of DNA profiling evidence, and how those risks should be managed. Standage and Stevenson tap into cultural and institutional tendencies to assume infallibility in such new forensic techniques, and identify dangers when the law is slow to arrest these assumptions in the criminal trial process.

As the presenters describe, fingerprinting originally wasn't for crime scenes; it was used to curb repeat offenders of pension fraud. But a fingerprint in a cash box in connection with a 1905 murder inside a shop was seized upon by an investigating officer who was also on a metro police fingerprinting committee, and who realised its forensic potential. At trial, the novel evidence was explained using a juror's fingerprint to demonstrate. The presentation was plainly persuasive; the suspects were found guilty and hanged.

At the time, fingerprinting was in the throes of replacing the 'Bertillon system' of identification. The Bertillon system was named after its inventor, Alphonse Bertillon, a French policeman who considered that each person's body proportions are different. His anthropometric system of identification gained wide acceptance as reliable and scientific in criminal investigation in the 19th century, utilising measurements of eleven human body parts – head width, finger length and so on. The system had a measure of success in France, but less so in parts of the British Empire governing racial populations tending to more homogenous measurements.

The episode fast forwards to a 2012 break and enter resulting in a death. Investigators found DNA at the crime scene including under the victim's fingernails. The DNA matched that of a person known to police, Lucas Anderson. The difficulty was that Anderson was in hospital at the time of the murder.

Anderson was mystified but, suffering drug, alcohol and mental health issues, mused 'maybe I did it and don't remember it'. Defence lawyers dug – his alibi was impenetrable. They did find, however, that Anderson had been conveyed to the hospital by the same ambulance used hours later to convey the deceased. With this physical link, the possibility of DNA transfer, albeit via unknown equipment, could explain the DNA evidence.

DNA evidence has at times been viewed as infallible. Standage and Stevenson discuss the human impulse to cut down the old while building up the new. Fingerprinting was not really questioned for a century, but studies found false positives in 1/1000 and false negatives in 1/20. Culturally, institutions may favour a tendency to rush technology into forensic use before it is thoroughly tested. It took nearly a century to test fingerprint evidence rigorously. The episode advances towards the question 'have we made the same mistake with DNA?' and answers 'Yes, I think we have'.

The episode also asks how DNA will be analysed in future. The presenters acknowledge that DNA is different from fingerprints; it has more solid and better scientific foundations. However, in some respects the technology is too precise, 'complicated science that we're expecting people to be able to interpret on a level with really dire consequences'. It falls primarily to the Courts – 'the gatekeepers' – and prosecutors to be aware of problems and protect the integrity of the evidence and process. Lucas Anderson 'is happening all the time' because DNA moves, all the time. It is not an infallible fingerprint.