

## Advocacy and Judging: Selected Papers of Murray Gleeson

Hugh Dillon (Ed) |  
The Federation Press | 2017



This work contains 33 papers authored by the Honourable Murray Gleeson AC during the period 1979 to 2015, covering a range of legal topics relevant to the practice of barristers and Australian law more generally.

As the title of the compilation suggests, many of the papers principally focus upon aspects of advocacy or the role and work of judges. These papers address topics such as the function and method of advocacy, cross-examination, judicial method, judicial selection and training, the nature of the judiciary, qualities necessary for judicial activity, the impact of the Constitution and legislation upon such activity and the importance of public confidence in the judiciary.

Aside from those papers that address those subjects as their principal focus, all of the selected papers address topics fundamental to the work of barristers and judges. The rule of law and the nature of the adversarial system are constant undercurrents in most of the papers. This selection includes papers on fundamental principles of the common law, such as legality, finality and legitimacy, and in relation to the criminal justice system, the presumption of innocence. Several papers address matters which are intrinsic to the work of lawyers and judges, such as legal interpretation and contractual interpretation. These papers provide a thorough foundation in an easily digestible format for those principles, the legal reception of which can often be assumed and therefore taken for granted. These works contain a valuable exposition of the basis of such principles.

Many of the papers consider aspects of constitutional law and several take the Constitution as their principal focus, including one on the constitutional decisions of the Founding Fathers, and another on section 74 of the Constitution, which prohibits appeals to the Privy Council from the High Court on constitutional matters. Other

areas of law have not been forgotten: most are of general application to multiple areas of law, and one addresses the significance of *Donoghue v Stevenson*<sup>1</sup>. There is a wealth of material to satisfy those interested in legal history, including a paper on ‘Magna Carta – History and Myth’, as well as papers considering the history of the High Court and the Privy Council, particularly as regards Australia.

Most, if not all, of the papers were delivered as oral addresses or speeches. The audiences of those addresses varied, ranging from solicitors at the Australian Government Solicitor’s Office, readers and junior barristers practising in New South Wales, Australian judges, legal practitioners, academics and law students in Australia, members of the public, and the members of the Singapore Academy of Law. The range of audiences means that the papers contain differing amounts of introductory material and assumed knowledge depending on their target audience. While some papers were delivered to experienced lawyers and judges on whose part a reasonable level of knowledge on the relevant topic could be assumed, others were not, and the resulting paper could easily be appreciated by non-lawyers, or lawyers unfamiliar with the Australian legal tradition. For example, ‘Australia’s Contribution to the Common Law’ was an address given to the Singapore Academy of Law on 20 September 2007. In it, Mr Gleeson highlighted particular High Court decisions in areas of importance in criminal law, equity, contract, tort and administrative law, where the Court could be seen to be ‘acting sometimes creatively and sometimes traditionally, sometimes boldly and sometimes cautiously, but in all cases consistently in the application of a judicial method ... in the mainstream of the common law tradition’.<sup>2</sup> That paper traverses years of the High Court’s body of work across many areas of law that would be of interest to those new to Australian law as well as Australian lawyers interested in a summary of significant matters in Australian jurisprudence.

Each paper addresses the issues with which it is concerned in depth, yet concisely, and in an entertaining style. In ‘The Centenary of the High Court: Lessons from History’, Mr Gleeson described a judgment of Sir Samuel Griffith, then chief justice, in *Baxter v Commissioner of Taxation* (NSW) (1907) 4 CLR 1087 as being ‘the most vitriolic judgment in the Commonwealth Law Reports’.<sup>3</sup> Elsewhere,<sup>4</sup> in addressing aspects

of judicial style, Mr Gleeson referred to a letter from Professor Harrison Moore to Andrew Inglis Clark written in 1906, in which Professor Moore complained that during three and a half days of addressing the High Court, counsel ‘never got a clear five minutes speaking’, due to judicial intervention. Mr Gleeson stated in his paper

(which was delivered in 2003, during his tenure as chief justice of the High Court) ‘No counsel would be given three and a half days now, and a clear five minutes speaking would only happen if all the Justices walked off the Bench’.<sup>5</sup>

In ‘A Changing Judiciary’, an address delivered to the Judicial Conference of Australia Colloquium, Uluru, on 7 April 2001, Mr Gleeson emphasised the importance of institutions having a ‘corporate memory’ to safeguard against error in declaring an existing state of affairs essential or fundamental without adequate knowledge of what has occurred in the past, or what occurs in other places. He stated:<sup>6</sup>

People may be surprised to learn that what they regard as an indispensable part of the natural order of things is, in truth, a recent development, or may be quite different from the way things are done, by respectable people, elsewhere. They may be alarmed by aspects of current practice which are not really new, but are simply a response to problems that have been around for a long time.

Given that the earliest of these papers was delivered 38 years ago, and many of the papers contain a careful recitation of the historical and legal development of the relevant topic, the book in and of itself will contribute to the safeguarding of a collective memory in respect of the issues with which it is concerned.

This book is an indispensable resource for Australian lawyers, particularly barristers, and will also be welcomed by those with an interest in Australian legal history or the judiciary.

Reviewed by Victoria Brigden

#### ENDNOTES

- [1932] AC 562.
- Advocacy and Judging: Selected Papers of Murray Gleeson* at 101.
- Id at 133.
- ‘The Centenary of the High Court: Lessons from History’, in *Advocacy and Judging: Selected Papers of Murray Gleeson* at 132.
- Id at 145.
- Id at 53.