Historical Foundations of Australian Law: Volume II, Commercial Common Law

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Reviewed by Dr Warren Swain*

Will no one tell me what she sings?
Perhaps the plaintive numbers flow,
For old, unhappy, far-off things,
And battles long ago:
The Solitary Reaper, William Wordsworth, (1807).¹

There is sometimes a tendency to think of legal history as the study of ‘old, unhappy, far-off things’. This is a serious mistake. In his forward to the first volume of these essays, the Honourable Paul Finn observes that legal history has ‘for the most part … been marginalised to the point of near extinction’. He adds that ‘This is more than a matter for regret. It impoverished our legal imagination’.² He is not alone in fearing for the future of the teaching of legal history in Australia.³ Professor Prest’s 2005 survey concludes that of the ten Australian Law Schools established before 1982,⁴ legal history was taught in six of them.⁵ There has been a slight improvement since then, with electives added at the University of Adelaide, The University of Queensland and the University of Sydney.⁶ Set against these gains is the loss of legal history at Macquarie and the University of Melbourne. Away from the leading law schools the position remains bleak. In 2005 only four of the

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¹ MA, BCL, D Phil (Oxon), Associate Professor, TC Beirne School of Law, University of Queensland, 2014 Academic in Residence, Supreme Court Library Queensland.
³ Vol 1, v.
⁵ This includes all of the Group of Eight plus Macquarie and the University of Tasmania.
⁷ Monash runs an elective, ‘Great Books of the Common Law’, which has significant historical content, although it is not a legal history course.
nineteen law schools established after 1982 ran distinct courses in legal history. In 2013 this figure is unchanged.7

The relative marginalisation of legal history is not unique to Australia. The subject remains in rude good health in the United States8 but the position in the United Kingdom is equally perilous. Of the twenty three law schools in the Russell Group, legal history is only taught in ten.9 It is no coincidence that the four English law schools of genuine world standing at the University of Oxford, University of Cambridge, LSE and UCL all run course in legal history.10 The reasons behind the decline are complex.11 When taught properly legal history is a very demanding subject. It requires a level of intellectual engagement, broad knowledge, and shear persistence that puts it beyond the reach of many students and university academic staff alike. When there are easier, trendier or apparently more ‘relevant’ alternatives the path of least resistance is usually a more attractive one.12 Once a subject is off the curriculum it can be a very difficult task to revive it.

It would be nice, but optimistic, to think that it is possible to teach legal history from original sources coupled with some selective reading from law journals. Thoughts therefore turn to a suitable textbook. The two standard works of Anglo-Australian legal history, JH Baker, An Introduction to English Legal History,13 and Alex Castles, An Australian Legal History14 are both excellent introductions but introductions none-the-less. Neither is suitable as a whole course book. The Historical Foundations of Australian Law, does not purport to fill the gap. Instead of attempting to be comprehensive, these volumes are intended to present aspects of legal history, highlight the breadth of the law, identify issues and key personalities, promote further critical investigation and to encourage appreciation of how the Common law develops over a long period of time.15 A wide range of subjects spanning many centuries are discussed. Volume one takes the reader from the time of the Norman Conquest in JA Watson’s, A Sketch;16 to postmodernist jurisprudence in, RCA Higgins, The Jurisprudences.17 Other subjects covered include the influence of Roman law on the Common law, early legal treatise, early statutes, land law, the separation of powers, and colonial law. Volume two ranges across private law from debt and trespass, through defamation, conversion, contract, the tort of negligence, legal professional privilege to the law relating to bills of exchange, assignment, agency, corporations and insolvency.

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7 According to University web pages current as of 2014, legal history is offered at Charles Darwin University, Flinders University, University of Newcastle and the University of Notre Dame. A course examining the legal history of copyright is also planned at UTS. I am grateful to Associate Professor Isabella Alexander for this information. Seven new law schools have come into existence since 2005. As far as I am aware legal history is not yet taught at any of them.


9 The Russell Group is the British equivalent of the Group of Eight.

10 These are joined by the University of Bristol, University of Exeter, University of Manchester, Newcastle University and Queen Mary University of London, Queen’s University Belfast.

11 For some suggestions see Prest, above n 5, 274–6.

12 It would be invidious and indeed very consuming of time and space to single out all of the intellectually light-weight courses currently taught in Australian and indeed English law schools, but one cannot help but notice that a remarkable number now run courses on Law and Climate Change. The continued popularity of the pseudo-science of criminology remains a puzzle. GK Chesterton was surely on to something when, in Eugenics and Other Evils (Cassell & Co., 1922) 167, he wrote that, ‘crime is not a disease. It is criminology that is a disease’.

13 (Butterworths, 4th ed, 2002).

14 (Law Book Company, 1982).

15 Vol 1, 1v

16 Vol 1, 1–27.

17 Vol 1, 408–40.
It is sometimes apparent that this is not a work written by professional legal historians. There are very few citations of authorities from the Year Books. Primary printed sources are very under used, a fact that is all the more disappointing given that many are now easily accessible through databases such as the Making of Modern Law. The use of case law is variable. In consequence some chapters are heavily reliant on the secondary literature. Sir William Holdsworth, never an entirely reliable source, appears with depressing regularity in the footnotes of many contributors. Greater use of the series, The Oxford History of the Laws of England and Comparative Studies in Continental Anglo-American Legal History would have prevented more than one error.

It would be unfair to be too critical about omissions of content given the nature of the exercise but a few cannot pass without comment. The role of juries is barely mentioned. The fact that juries were absolutely central to civil as well as criminal litigation makes this a somewhat surprising omission. The modern law of contract and tort is partly a legacy of the way in which the civil jury was pushed aside in the 19th century. As in the majority of works on English legal history, the main focus here is on the central Common law courts. Despite problems of procedure and doctrine in these courts the legal system still worked. This can, in part, be explained by the success of those other courts which only receive walk on parts in these volumes and might have been explored further. In a work largely compiled by practitioners one might have expected, in addition to the sharp pen portraits of Lord Mansfield, Sir Owen Dixon and Justice Story, that a place might be found for at least one contribution on the history of the legal profession.

Inevitably in a work of this length there will be plenty of quibbles of substance. Space only permits mention of a few of them. In a discussion of debt it is said that the 'general English law position [at the time of Glanvill] did not recognise that agreements were enforceable merely by consent.' Yet consensual contracts were generally recognised at this time. The action of covenant enforced a true consensual contract. The mandatory deed in covenant did not come about until around 1292. Consensual agreements were also enforceable in the mercantile courts on payment of earnest money or God's penny. The implicit suggestion that before the Middle Ages the Church was the prominent forum for enforcing contracts and that this then faded with the rise of the Common law is slightly misleading. IM Jackman, in 'Why the History of Restitution Matters' criticises the 'restitution industry', from either ignoring or been indifferent to the lessons of history. This cannot be allowed to go unchallenged when

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18 There are some examples. Randall and Edgeworth make good use of material from the Year Books.
19 The only significant discussion appears in Ben Kramer’s excellent chapter on Lord Mansfield, see vol 2 269–70. The jury is mentioned briefly by a few other authors, for example vol 3, 113.
21 Vol 2, 50–1; 107–10, 120–2; 202–3; 307–12.
22 Vol 1, 93.
quite the reverse is true. What Mr Jackman presumably means is that he disagrees with the conclusions that the 'restitution industry' has drawn from history and this is a point of view with which I have a great deal of sympathy.

The *Historical Foundations of Australian Law* largely achieves its aims. If some chapters work better than others do, then this is partly a matter of personal preference. Every chapter contains something of some interest. A few can be singled out. J Randall and B Edgeworth, 'Detinue, Trover and Conversion', GC Lindsay, 'Building a Nation: The Doctrine of Precedent in Australian Legal History' and MJ Leeming, 'Five Judicature Fallacies' are especially stimulating. JI Gleeson, 'Glanvill to Bracton: The Two Great Early Legal Treatises', FT Roughley, 'The Development of the Conscience of Equity', and M Lunney, 'Trespass, The Action on the Case and Tor' are thoughtful introductions to complex topics. These volumes are very well produced. The chronology, selected glossary and sketch of writs are good ideas which are well executed. There is a long tradition of legal history teaching in Australian law schools. The subject is too important to be allowed to quietly fade away. It is to be hoped that this work makes a valuable contribution towards arresting the slide.

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