Introduction

This second volume of essays seeks to continue the themes described in the first, but with a particular focus on aspects of commercial law. Those themes were: a recognition of the organic nature and development of the common law (and the virtues of such a system); the importance of reasons, and the importance of the subjection of them to scrutiny in particular in precedent and legal history; the role of the judge in the development of that law by those reasons; and the importance, we think, of a sense of legal history and therefore respect for what has come before. As with the first volume, these essays were prepared for and in support of the reintroduction of a course in legal history for senior undergraduates at University. The purposes of the essays are the same: essays to introduce aspects of legal history (not necessarily the usual ones) for discussion; in that way, to highlight the breadth and variety of the common law; to identify some of the issues and personalities in and about the law; to promote further critical investigation; and, it is hoped, to encourage the virtues pointed to in the themes above.

In its origins, the project and the teaching course were named *Topics in Legal History*, but with the encouragement of the publishers, and in particular the work of the authors to trace topics down to their relevance in and to the practice of law in Australia today, it both narrowed and broadened into *Historical Foundations of Australian Law*. It narrowed in the sense of a focus on topics which matter and continue to matter in Australia today (but which are not mutually exclusive of the broader common law world); it broadened in so far as it sought to identify matters of common law history that can properly be understood as foundational in that regard.

While the choice of essays to go together into Volume I (foundations of the common law generally), or this volume was and probably still is debatable, the intention here has been to gather together those essays that have made up, influenced, or affected more directly the origins and development of commercial aspects of the common law.

The legal history course the reason for the efforts of the authors and essays has now been run for the first time. The objectives, and structure, of the course were (i) to introduce, and for students to become familiar with, some of the resources, language, topics, themes, cases and personalities occupying legal history, legal historians and the courts today; (ii) to consider legal history as a tool of both academic analysis and application in practice today; (iii) to examine particular topics in legal history that still have an important bearing on the law as it is practised and being developed *now*; (iv) and for students to be able to use the resources and knowledge to research and write a short essay on a topic,

case or point of legal history. In this first year the course worked more or less chronologically (although it could as easily have commenced with an issue in Australian law today, and worked backwards), beginning with the foundations of the tenure system; possession; the early books (Domesday, Glanvill, Bracton); the periodic influence of Roman law; the writs and early courts; and the early meaning of, and submissions of law to, statute. A particular focus, or continuing theme, across the topics selected in the first year was the evolution of the writs out of trespass, the distinctiveness of those writs from (but recognising the very many) other common law ones, as well as equity, and their continuing relevance and development, as it happened, illustrated by a number of recent High Court decisions.[1] One of the advantages of using the essays as the exploratory reading material for a course was the range of topics that could be addressed in a course of lectures; some freedom for students to select their own topics of interest towards the end of the course; and the very many different ways the course could be structured. I should add that the first year was honoured to have (in the order in which the topics were dealt with) JT Gleeson SC, Justice Emmett, Fiona Roughley, James Emmett, Jackman SC, Leeming SC, Justice Geoff Lindsay, Justice Hayne, Justice Allsop, Louise Dargan, Robert Yezerski, and Dick SC, who each presented their essays to the first cohort. In particular, the anthropomorphised course, somewhat lonely and vulnerable in the outset, survived with the very generous encouragement and support of Justices Hayne, Allsop, Kenny and Lindsay. It has been included in the curriculum again for next year.

The essays commence with (***1***) "A Sketch II: Praecipe to Negligence & Contract", intended as a continuation of the Sketch from Volume I, but with a focus on three matters. First, the fact that writs were not of themselves mutually exclusive, and the consequences of a system that allowed one or other (but not more than one at a time) to be pleaded in respect of a given set of facts. Secondly, the effect this had on facilitating the explosion of trespass as a writ for all occasions. Thirdly, the resulting development out of trespass or assumpsit, and in particular a modern law of tort and then contract. The next essay (**2**), "A Note on the Curious Incidents of Debt", is intended to be read with the first, and to raise some interest in what is still a profoundly important action. By debt, a party or the state recovers payments required by lawful authority, such as that muse, the taxing statute; and by debt in pervasive ways, parties can recover between them the fixed sum of money *due* in law. Contract (at least if executed on one side) is *one way* in which a debt can be created in private dealings; but debt is conceptually, historically, and utterly distinct from the remedy of damages and indeed debt is the dominant remedy for actions derived from wrongs. The

1 *Magill v Magill* (2006) 226 CLR 551 (immunity from tort, deceit); *Marcolongo v Chen* (2011) 242 CLR 546; [2011] HCA 3 (statutes); *Australian Crime Commission v Stoddart* (2011) 244 CLR 554; *Equuscorp Pty Ltd v Haxton* [2012] HCA 7; 86 ALJR 296 (restitution); *PGA v The Queen* (2012) 245 CLR 355 (rape); *Andrews v ANZ Banking Group Ltd* [2012] HCA 30; 86 ALJR 1002 (penalties); *Barclay v Penberthy* [2012] HCA 40; 86 ALJR 1206 (action *per quod servitium amisit*).

distinction between debt and damages ought not be seen as confusing, or be confused, opaque or arcane. It is also interesting to consider debt as *the* action which, probably influenced by the shades of Aristotelian justice pervading its origins, was concerned to reverse what would sometimes be called an unjust enrichment.

In (**3**) "Trespass, The Action on the Case and Tort", Professor Lunney examines more closely the relationship of trespass, the action on the case, and the modern grouping of torts. It was decided early in the project not to worry too much about essays covering similar ground, where the topics were sufficiently important to warrant some repetition. The further reason for taking this approach was that, given the purposes of the project, it is useful to consider how different authors treat the same or similar material, and draw different inferences or place different emphases on historical facts, as we have them and understand them so far. Professor Lunney's essay examines in particular the role of *fault*; distinctions between direct and consequential injury; the still somewhat vague resort to an idea of *wilful* default; and the "considerable debate in Australia over whether there exists a tort of 'negligent trespass'." It may be that modern commercial law is thought of in terms of contracts, finance and statutes. But trespass, *case* and tort, and those considered in the subsequent essay, (**4**) "Detinue, Trover and Conversion" by Randall QC and Professor Edgeworth, are fundamental to a true understanding of commercial law. Together they describe the boundaries of commercial dealings at common law with physical, personal, property. Thus, to acquire any *thing* – for the modern participant, say, a car, an Apple™, or just food – there must be a good acquisition of the property by the vendor in the first place, ideally free from any claims by others to a better right to possession; there must be some protection afforded to the goods in the period before exchange, or while the exchange is being arranged; and there must be a moment of recognition as to when the dealing is ended. In the treatment of personalty by the common law, the plaintiff does not so much *own* the computer; rather the plaintiff is simply the person with the better right to possession, meaning in common law, to payment of its value.

The collection then takes a different turn, with (**5**) Associate Professor Rolph's "The Sources of Defamation Law". This essay, and the next two, might have been included in the first volume as more broadly concerned with foundational ideas of the common law. However, the point of their inclusion here, again given the purposes of the project as a whole, was to take the opportunity to introduce the subjects themselves, *and* invite a consideration of them in the context of commercial law. In the first place, defamation once reflected the very high regard of the law for personal reputation, in particular for the *professions*, somewhat eroded by the gross expansion of negligence, and pure economic loss. In that context, the potential for the jury to temper the expectations of judges sitting alone in respect of what satisfies *reasonable* professional conduct has been lost, defamation alone holding on to the last vestiges of that institution. Brereton SC's

essay (*6*) on "Legal Professional Privilege" outlines how privilege has gained currency as a fundamental right, but its origins are less certain and probably less influenced by high ideals. Again, in addition to the essay as an introduction to that topic, it is provoking to consider whether and the extent to which it is justified in the commercial context. That is, not because there is some action being taken by the state against an accused of some crime; but in the context of modern commercial dealings, to individuals and those standing behind the legal, but spectral, corporation. Chapter (*7*), by Professor McDonald, returns to and completes the first of the great descendants of trespass and *case*, namely, the action for breach of duty, or negligence. With the expansion of negligence to cases of purely economic loss, and the expansion of professional services into commercial ones, there is barely a participant in the market who does not either owe, or have the benefit of, a duty by someone to take care. Negligence has reached a pivotal point. There are very real historical issues over matters such as the extent to which *Donoghue v Stevenson*[2] was intended as a departure from the then established applications of negligence; the way in which that case has been treated as if divorced from prior precedent and the then established applications of the tort; and whether the *reasons* for judgment in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[3] paid sufficient regard to either. The doctrine has clearly faltered, to the point of "confusion approaching chaos";[4] and, although it might be clarified through the prism of other legal theories, one way through may be to reconsider the action against its historical origins and purposes.

Professor Peden's essay (*8*), "Contract Development Through the Looking-Glass of Implied Terms", considers the changing role of the concept of intention in the development of modern contract law through the rubric of implied terms. Early regulation of contracting parties was based on the sort of behaviour society or the relevant trade considered acceptable for various relationships that commonly occured in commerce and more generally. The shift in emphasis to "contracting parties' intentions" to some extent changed the focus from model behaviour in relationships, and led to tests for terms implied in fact. However, terms implied in law, a relatively recent development, can be seen to re-establish default rules of behaviour expected or presumed of parties contracting in recognised relationships. Like negligence, the history of *restitution* is being made in Courts today. Essay (*9*), "Why the History of Restitution Matters", by Jackman SC, occupies a central place in this collection with a clear and orthodox analysis. In a kind of Hegelian dialectic, there was a 19th century thesis (hegemony) of contract subsuming all; an antithetical academic response named "restitution"; and probably in the long run a synthesis waiting to happen. The Australian courts have set down very clearly the way that that resolution should proceed in this jurisdiction.

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2 [1932] AC 562.

3 [1964] AC 465.

4 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, [45] (McHugh J).

After that, given that one of the ideas of the project was to recognise the influence and attributes of those judges whose work (in particular, *reasons*) seems from time to time to have risen above, the next essay really had to be (***10***) "Lord Mansfield", and by Dr Kremer at that.[5]

The next essays are very important contributions, both to the collection on their own, and for the purposes of a teaching course. The matters of (***11***) "Money and Bills of Exchange", and then (***12***) "The History of Cheques and Banking" by Anne McNaughton do not seem to be much emphasised in modern law courses. Given that these matters are obviously fundamental both to commercial dealings and also to the dealings of every participant in the economy, every day, it is striking that students may graduate not having examined what is money, or how banking works in law. Once again, in respect of money, cheques and banking, the law is in the middle of another great moment, as transactions rapidly shift from paper to PINs. A bank which does not adequately investigate the signatory of a fraudulent cheque (and perhaps, they rarely do) is liable in conversion; but that obligation, or allocation of risk, may not be sufficiently analogous when it comes to the entry of payee details and recipient account numbers for the purposes of electronic transfers of funds. In (***13***) Professor Tolhurst completes the sub-section, examining an everyday and vital means of transferring property, namely, the doctrines associated with assignments. To return to an earlier theme, *debts* (but not damages) have always been assignable at law.

The next two essays, on agency and corporations, go to two of the most important means of engaging in commerce. In (***14***) "Agency", Dick SC sets out to identify some of the key historical issues, and the major judicial influences, in the search for coherence in the concept. Agency continues to be a much abused term. On one view, it might be better regarded as a conclusion in respect of a relationship, not a premise. In (***15***) "Corporations", Michelle Wibisono presents a reminder that the company is a relatively modern statutory invention, albeit thoroughly informed by the law's treatment, in particular, of partnership, as the means for doing business.

This brings the collection to the end and, in that, the final essay (***16***), "The History of Bankruptcy and Insolvency Law in England and Australia", by Justice Allsop and Louise Dargan, is one which really exemplifies what the project was all about. That is, hastening to add, *not* the bit about what happens in the event of an unsuccessful venture; rather the whole essay reflects the intent of this project: to introduce a topic, of importance in its origins, and of significance to the law and the practice of law in Australia today.

JAW

5 Cf Birks, *Unjust Enrichment* (2nd ed, OUP, Oxford), 6 (fn 10), 18 (fn 23), amongst others.