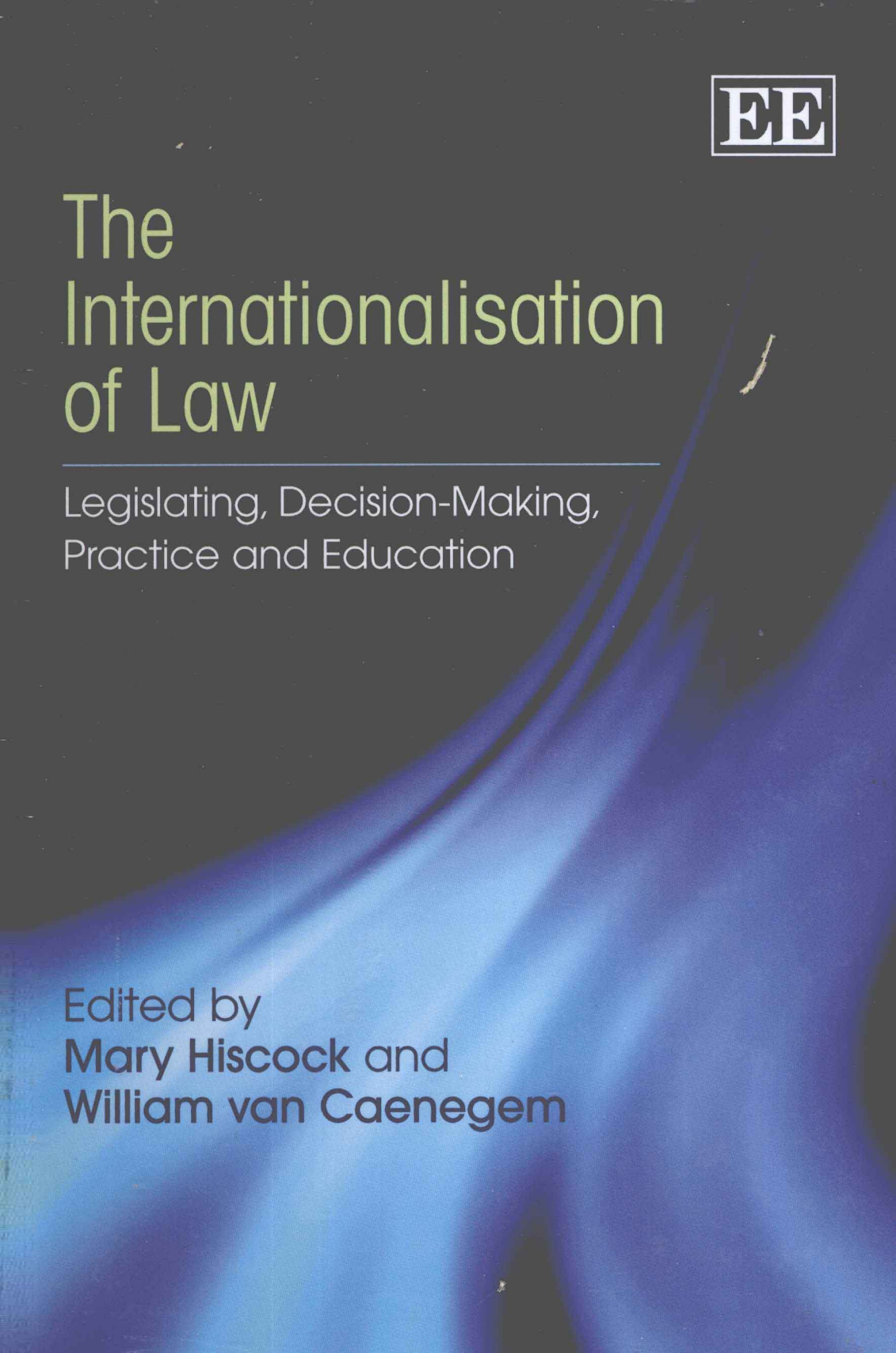
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The Internationalisation of Law
Legislating, Decision-Making, Practice and Education
Edited by
Mary Hiscock and
William van Caenegem

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Abbreviations

ACICA	Australian Centre for International Commercial Arbitration
ACT	Australian Capital Territory
ADR	Alternative Dispute Resolution
AIG	American International Group
ALRC	Australian Law Reform Commission
APEC	Asia-Pacific Economic Co-operation
APRA	Australian Prudential Regulation Authority
ASEAN	Association of South-East Asian Nations
ASEAN ANZFTA	ASEAN Australia New Zealand Free Trade Agreement
AUSFTA	Australia US Free Trade Agreement
BCCI	Bank of Credit and Commerce International
BGB	Burgerliches Gesetzbuch
BIS	Bank for International Settlements
CALD	Council of Australian Law Deans
CCBE	Council of Bars and Law Societies of Europe
CCC	Common Core Curriculum
CER	Closer Economic Relations Treaty (NZ-Australia)
CFI	European Court of First Instance
CFSP	Common Foreign and Security Policy
CIDE	Centro de Investigación y Docencia Económicas
CISG	United Nations Convention on Contracts for the International Sale of Goods
CJ	Chief Justice
CMMI	Capability Maturity Model Integration
DCFR	Draft Common Frame of Reference
EACLE	European-American Consortium on Legal Education
EC	European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EEC	European Economic Community
ELSA	European Law Students Association
EMU	European Monetary Union

EPU	European Payments Union
ERASMUS	European Region Action Scheme for the Mobility of University Students
ERISA	Employee Retirement Income Security Act (US)
ESI	Electronic Stored Information
EU	European Union
FDIC	Federal Deposits Insurance Commission
FSA	Financial Services Authority (UK)
FSAP	Financial Sector Assessment Program
FSB	Financial Stability Board
FSF	Financial Stability Forum
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GJB	Gaikokuko Jimu Bengoshi (Japan)
IACA	International Association of Corporation Administrators
IAIS	International Association of Insurance Supervisors
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICN	International Competition Network
ICrimC	International Criminal Court
ICSID	International Centre for the Settlement of Investment Disputes
IEG	Independent Evaluation Group
ILSAC	International Legal Services Advisory Council (Australia)
IMF	International Monetary Fund
IMI	International Mediation Institute
IOSCO	International Organisation of Securities Commissions
ITESM	Instituto Technológico de Estudios Superiores de Monterrey
JLV	Joint Legal Venture
LACC	Law Admissions Consultative Committee (Australia)
MAR	Model Administration Rules
MoU	Memorandum of Understanding
NACLE	North American Consortium on Legal Education

NAFTA	North American Free Trade Agreement
NGO	Non-governmental Organisation
NMAS	National Mediator Accreditation System (Australia)
NPP	National Privacy Principle
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
ODR	Online Dispute Resolution
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
PECL	Principles of European Contract Law
PPS	Personal Property Security
S&L	Savings and Loan
SAR	Special Administrative Region
SEC	Securities and Exchange Commission
SOAS	School of Oriental and African Studies
SPQ	Statistical Process Control
SPV	Special Purpose Vehicle/Company
SSRN	Social Science Research Network
TEC	Treaty of the European Community
TEU	Treaty of the European Union
TQC	Total Quality Control
TQM	Total Quality Manager
TREC	Text Retrieval Conference
TRN	Trans-governmental Networks
UCC	Uniform Commercial Code
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

Foreword

John O. Haley

The internationalisation of law is especially appropriate for a symposium celebrating the founding of Bond University. Bond's founding coincided not only with the end of one millennium and the start of another but also with a technological transformation that continues to alter and reshape our lives. We already take for granted means of worldwide communication that for many of us were unimaginable when this great university enrolled its first students. Equally transformational have been the political events of the past two decades. Who among us could have predicted two decades ago the reunification of Germany, the collapse of the Soviet Union, the economic re-emergence of China, armed conflict, involving the most militarily advanced nations on earth, within one of the least advanced tribal communities? In the wake of these developments and events, we have also witnessed a global acceleration of evolutionary change or progress without necessarily its positive connotations.

Yet little of what we tend today to label as 'globalisation' or 'internationalisation' is new. Centuries before the emergence of the earliest kingdoms of Western Europe, goods and ideas flowed east and west across Eurasia. While Alfred the Great was uniting England as a Wessex-based kingdom, the Muslim rulers of Iberia were manufacturing silk and cultivating rice introduced from Asia. Long before the Christian faith had reached Lithuania, much of central and Southeast Asia had been successfully proselytised by Muslim traders and evangelists. Only after Magellan's circumnavigation of the world and the establishment of the first territorial colony in East Asia by a West European kingdom at the end of the sixteenth century, were the major continents fully integrated into a global system of trade and governance. Our planet ever since has been subject to ever more expansive processes, what might best be called economic and intellectual 'West Europeanisation'.

We need to speak with similar modesty about the contemporary 'internationalisation' of law. By the end of the nineteenth century only a handful of territories and peoples outside of the Ottoman and Russian empires were not, or had not at some time been, subject to rule by one or

more West European states. In Africa, only Ethiopia, and in East Asia only China, Japan, Thailand, and, for only another decade, Korea were independent polities in 1900. Of these only China had resisted Westernised reforms to its imperial political and legal system. Japan and Thailand had reformed their political and legal systems in conformity with prevailing West European models. A century ago West European law – grounded either in the English Common Law tradition or in the continental European Civil Law tradition – had become universal outside of the Ottoman domains.

The spread of Western law was not simply the product of technological, economic, and military ascendency. Normative claims of universality are deeply embedded within the Western legal traditions. The mantra of conforming to the legal values and institutions of 'civilised nations' justified the imposition of Western forms of government and private law codes. Today, the same mantra is invoked with respect to human rights. Twelfth- and thirteenth-century natural law theory is only one source of this proselytising cast to Western law. Captured in the post-Enlightenment rhetoric of the French Revolution – Liberty, Equality, and Fraternity – are equally evangelical but often conflicting values that permeate our political and legal cultures. International reform efforts designed to improve libertarian, market-based economic performance or to ensure egalitarian distributions of wealth, and similar endeavours to ensure basic human rights or the 'rule-of-law' reflect basic legal values that evolved within the Western legal tradition and spread by Western legal missionaries. Not surprising from this perspective is the prevalence of contemporary ideological and armed conflict within the historically most institutionally advanced regions of the world with the least prolonged and extensive interaction with the West.

The internationalisation of Western law does not mean its stagnation. The institutions and structures received in the Americas, Africa, Asia, and Australia over a century ago were not static. Rather they provided common frameworks within which the legal systems of states emerging from colonial rule developed along often very different trajectories. Despite common origins, the political and legal systems even of culturally closely related, neighbouring states – Chile and Argentina, Malawi and Zimbabwe, Canada and the United States, Australia and New Zealand – are remarkably different. Indeed, it is today's diversity of over 200 national regimes within a world of instantaneous communication coupled with an age-old impetus for universally accepted and enforced norms that pose the greatest challenges.

Many of the transformational changes we have personally witnessed during the decades since the establishment of Bond University have been the product of such diversity and the related tensions produced by the

dynamics of technological advances. No change has been more pervasive than the expansion of law itself. At every level of society we are daily making and remaking legal rules that regulate with ever-expanding scope nearly all aspects of human life. The borders between private and public spheres have blurred beyond recognition. From birth to death, we are enveloped by regulatory controls that order and channel our behaviour. Bargaining in the shadow of the law has largely replaced autonomous private ordering. How to understand and respond to this new world of law is the primary challenge that we as legal scholars and educators face. How do we cope with the volume of law even within one system? What aspects of the legislative and administrative processes deserve our attention and focus? How can the legal profession deal with the need for legal knowledge, not to mention multiple linguistic and cultural skills? What should be learned and taught? What research needs to be done? How do we evaluate the diversity of judicial systems and adjudicatory processes? What alternatives for resolving both private and public grievances make the most sense? This symposium and the papers presented here are a fitting response. For each of the topics covered – legislating, legal practice, teaching, research, decision-making, and arbitration – the diversity and increasing volume of law, coupled with both the explosive expansion of communication in volume and speed, have profound consequences. Underlying each of the papers are concerns and tensions that these changes continue to produce within Australia and the rest of the world. They are indeed fitting for a celebration of the twentieth anniversary of Bond University.

Preface

Mary Hiscock and William van Caenegem

This book is the edited proceedings of a Symposium on the Internationalisation of Law held at the Faculty of Law, Bond University from 26 to 27 June 2009. The Symposium was the principal academic celebration of the twentieth anniversary of the first classes of the Law Faculty, which were in May 1989.

The subject of the Symposium was settled after wide consultation amongst the faculty. Internationalisation of law reflects the philosophy and experience of the faculty over the last two decades: it is also an exploration of what lies ahead in making law, resolving disputes, researching the law, and teaching and studying it.

The participants all have a link with the Law Faculty and with its academic staff. The two days of discussion were an experience which drew together those who contributed papers, those who chaired panels, and those who attended and participated in the discussions. As editors, we must thank those participants who gave the gift of their time and work, whether they be authors, panellists, or discussants. As editors, we have tried to draw this discussion into our final chapter, our Epilogue.

Coinciding with the Symposium was the annual Sir Gerard Brennan Lecture, given in 2009 by the Chief Justice of the High Court of Australia, the Honourable Robert French, CJ who was invited to address a topic within its scope. The Chief Justice directed his paper to the use of international case law in the High Court, and has kindly agreed that the paper should be published in this book of proceedings of the Symposium.

The international law firm of Baker & Mackenzie sponsored the Symposium and funded Professor Lawrence Baxter as the Baker & Mackenzie Visiting Fellow.

The Vice Chancellor of Bond University, Professor Robert Stable, sponsored the attendance of Professor John Haley as the Bond University Vice-Chancellor's 20th Anniversary Visiting Scholar. The generous support of the Law Faculty facilitated attendance at the Symposium by other participants, and other expenses, as did a contribution made by the Bond University Research Committee.

Without the support of the sponsors, the Law Faculty and of Bond University, the Symposium would not have taken place. We would like to thank in particular, Professors Laurence Boulle, the Acting Dean of Law in 2008, and Geraldine Mackenzie, the Dean of Law in 2009. We were very ably backed up by the Law School external events team, particularly Cherie Daye and Rachel Black.

Preparing for the Symposium and editing the proceedings has been a joint responsibility. The Planning Committee consisted of Professors William van Caenegem, Mary Hiscock, Gerard Carney, and Vai Io Lo, with William as Chair. Amanda Thompson was our hardworking executive assistant. Mary and William have jointly edited the Proceedings with the indispensable assistance of Kate Allan, our student editor.

The law and practice are stated as at June 2009. There have since been major developments in bank regulation, and the Lisbon Treaty has come into force in December 2009. In both cases, these were foreshadowed in the analysis of the chapters by Lawrence Baxter and Inge Govaere respectively.

Since the Symposium, Les McCrimmon has become Professor of Law at Charles Darwin University, Darwin; Ian Govey has become the Chief Executive Officer of the Australian Government Solicitor; and Clyde Croft has become a Justice of the Supreme Court of Victoria.

The internationalisation of law: introductory and personal thoughts for the Symposium

Mary Hiscock*

My thesis is that internationalisation of law, at least in this country, is not a novel phenomenon. What is to me uncertain, and calling for debate, is how it will develop in the twenty-first century.

In March 1957, on my first day as a law student at the University of Melbourne Law School, Professor Zelman Cowen, Professor of Public Law and Dean, welcomed me to the legal profession. We students were conscious of the limitations of the law. We were well aware of the evil that had been done in World War II by a nation renowned for its legal sophistication and its observant attitude to law. We also lived in the shadow of nuclear war, where naked power seemed to rule the world without regard for law. But, together with the traditional warning about the mortality rates of law students, the Dean told us that we had now entered an honourable and a learned profession and that we were part of a community of legal scholars which had no territorial limits.

We knew that, in a practical and limited sense, what he was saying was not true, for we were then destined to be Victorian lawyers, with a right to practise in the High Court, our then penultimate court of appeal. But over the next four years, we learned from those who were international scholars, either in origin or reputation or both. The ideas and principles and values that made up the law that we studied included those drawn from a global pool,[1] as did those we studied outside the law in other disciplines.[2]

That initial address has always stayed in my mind, and I have never wavered in my acceptance of it. For me, law has always been played out on an international stage. It led me to a career as a comparative and international commercial lawyer. Once I would have said that I am a lawyer who works in the field of private law, but the boundaries between public and private law have blurred. Within ten years of that first day at University, I had studied in the United States,[3] taught in Hong Kong,[4] and embarked on my first major research into Asian law.[5]

The experience of that first decade also exposed to me the division that exists between those lawyers who are comfortable with this larger concept of law, and those who are not. When Asian Contract Law,[6] the first book of our research team on the topic of Asian contract law, was published in 1969, an eminent judicial member of my faculty publicly lamented that I had wasted my time with such fantastical work, instead of doing my proper job of teaching the contract law of the State of Victoria to Victorian students. But research is always driven by passion, and by the single-mindedness of those who are engaged in it. It is not a course to follow if you seek plaudits from your peers or seek to be loved within your profession. And so as the years rolled on, it was a little unnerving to find that one seemed to have been caught up in the mainstream of legal thought.

But how does that mainstream characterise what is international? As an international commercial lawyer, I work on transactions characterised by a series of definitions found in domestic statutes, but derived from multilateral treaties.[7] So I know the scope of an international sale of goods,[8] of an international arbitral award,[9] and that kind of international public policy that entitles a court to set aside an otherwise valid arbitral award.[10] Despite the fact that these concepts are contained in domestic statutes, their essential meaning is that these are non-domestic transactions with certain specific characteristics that touch on other jurisdictions, and that they have been the subject of multilateral treaties. Consequently, they are derived from an ultimate source of law that originates outside the domestic sphere. They have legitimacy at two levels: within a strict constitutional sphere as valid domestic statutes; and because they are drawn from a consensus of sovereign States as agreed limitations on what would otherwise be their absolute sovereignty. This kind of internationalism is not controversial – indeed many would not even regard it as such.

Because the transactions that usually concern me are rarely between nations, but rather between juridical persons whether natural or otherwise, I have come to use the terms 'cross-border transactions' or 'transnational transactions', saving the term 'international' for its strict treaty application. I think the former term – cross-border transactions – is better because it picks up the essential characteristic of choice, which is critical to me as an international private lawyer. It, however, also covers federal intranational transactions, and so can be ambiguous; 'Transnational' – the term coined by Philip Jessup[11] – is equally at home in the world of public international law as in international private law, and that is perhaps why it appeals broadly to lawyers. It has been perhaps eclipsed by the more popular term, 'global', but that has much wider connotations than the strictly legal. Lawyers are familiar with the supranational, mostly found

in the institutional context. These supranational institutions, such as the European Court of Human Rights, have greatly enriched our knowledge and understanding of law, and their working methods give us interesting examples of the legal laboratory.

If we move from the technical legal world of jurisdictions to the more subtle world of ideas, the essential characteristic of 'internationalisation' in legal scholarship is that it originates, and is accepted, and operates more widely than in one closed system, whether that be national or regional or state or culture based or traditional. It is rarely compelling or binding in terms of authority. It is 'other'.

Its practical application as a broadening of vision is often seen in transitional States moving from Marxist or socialist rule to democratic principles, and in need of a new legal system to support that transition. This was brought sharply home to me when visiting the University of Peking in 1981. Professor Rui Mu, the Chinese private international law scholar whose work began in the 1930s, was lamenting the almost complete vacuum of Chinese law. When asked by us what was audibly and visibly being taught all around us – he simply said 'general principles of law'. Philip Jessup would have applauded that definition.[12] A more recent example of this was given last year in a fascinating account by Justice Julia Laffranque on her work in the Supreme Court of Estonia, and especially as Chair of the Consultative Council of European Judges.[13]

Can we settle a time when there began to be a consciousness of what is 'other' and what is 'not other'? We tend to think that the twentieth century was the century of great change in law and the legal profession. But on reflection, perhaps in Australia, the nineteenth century was a century of greater structural change in our law and legal system. Not only did penal settlements become colonies, and then States leading to federation and the creation of the Commonwealth of Australia in 1901, but there was also the absorption, and in some cases the anticipation, of the major English changes in court structure and civil procedure, which revealed the principles of law underneath.[14] What has played on from the nineteenth-century developments have been changes in and because of process, and the consequences of nineteenth-century ideas. Technology obviously is a great catalyst, together with the mobility and interconnectedness that it brings about.

But the legal pioneers of Australia came from and remained connected with intellectual forces around the world. The shape and content of our legal system comes from England, Ireland, Scotland and the United States, and from France and Germany too. It comes not only from common law, but also from canon and civil law, as my first law degree, the LLB degree, the Bachelor of laws, testifies – laws being the canon law and civil law in

the origin of that degree. The concepts of our commercial law go back thousands of years, and many can be directly traced over millennia and from civilisation to civilisation.

One of the tangible examples of this diversity within Australia is found in our treatment of legislation. Many of our nineteenth-century lawyers were disciples of Jeremy Bentham, and were determined to develop efficient legislation in the new colonies. Victoria was on the point of enacting a comprehensive Civil Code during the 1880s.[15] It was hardly introduced into the Parliament when it was forestalled by the death of Professor Hearn and the almost immediate effect of a major financial depression. Some problems continue! But it led to a pattern of regular consolidation of legislation, and a remarkable work of scholarship in my State of Victoria, in turning the whole of our inheritance of English law into statute, reforming it in the process.[16] We still have a criminal code in Queensland and in Western Australia, an adaptation of the Italian Penal Code. We did not take up the legacy of Stephen's codes as did other British colonies and dependencies such as India and Malaysia, even with the exigencies of running legal systems with limited resources in a large jurisdictional area. So, we never had the Contracts Code, which is still so important in India and Malaysia. So we still have a doctrine of consideration, although we imported some French law into our contract law in areas of mistake and remoteness of damage.

There has been great social change in this country, but our law was fashioned by a community of immigrants who brought their law with them along with their few belongings. A criminal conviction is no longer a prerequisite for admission to Australia, rather now a substantial obstacle. But the anti-authoritarian attitudes of the many Irish convicts and free settlers, the revolutionary ideas of the Peterloo Rioters, and those fleeing from religious persecution or failed revolutions in Europe gave us a broader idea of rights and wrongs than those imported by colonial governance. Immigrants and free settlers brought mining law from Cornwall and California, and water law from Spain via Mexico and California. Even today 45 per cent of our population was either born outside Australia or has a parent or parents who were.[17] So law in this country is no cultural monolith, and it has never been so. There were even women law students here at the end of the nineteenth century.

The one great flaw in our story is the overlooking of our indigenous population, and the long-time failure to recognise and accept an older and different idea of law.[18] It is therefore very fitting that we – my colleagues in this faculty and our students and alumni – have made our twentieth-anniversary birthday present to the Law School and the University, the Artist in Residence program for this year. This is a visit by the last Law