

Editors
Justin T Gleeson
Ruth CA Higgins

CONSTITUTING LAW

Legal Argument and Social Values

THE FEDERATION PRESS

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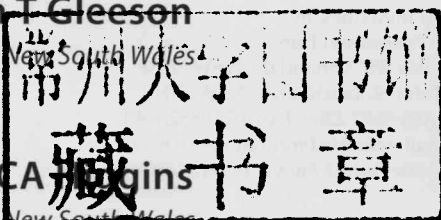
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CONSTITUTING LAW

The common law itself is nothing else but reason; which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and experience, and not of every man's naturall reason.

Sir Edward Coke,

The First Part of the Institutes of the Law of England (1628)

Cornu bos capitur, voce ligatur homo.

You must say something new and yet it must all be old.

In fact you must confine yourself to saying old things –
and *all the same* it must be something new!

Different interpretations must correspond to different applications. ...

Yes, you have got to assemble bits of old material. But into a *building*. –

Ludwig Wittgenstein, *Culture and Value* (1941)

Rem tene, verba sequentur.

Cato

Preface

Legal reasoning is not closed. It involves logical, empirical, evaluative and interpretative aspects. As a result of this mixed character, legal reasoning is not autonomous.¹ Its object is the law, but its subjects are various. Through law, legal systems reflect, form, modify and sanction various social practices, relations and activities. These social forms arise within a localised historical context, and have (amongst others) moral, economic, cultural, philosophical and psychological dimensions.² Moreover, the legal actions and decisions typically the subject of legal reasoning – legislation and judicial decisions – are acts and decisions taken within a politico-legal normative context far removed from individual, autonomous practical reasoning.

Within this context, legal argument involves a search for reasons which resonate. These reasons are drawn from various domains of social value, and are then articulated within the conventional categories of legal reasoning. Mark Van Hoeke observes:

Generally speaking, we can state that each legal argument contains three components: deductive reasoning, inductive reasoning and value thinking. With the *deductive* part of reasoning one reaches a legal solution by a logical deduction, starting from legal premises. With the *inductive* part of reasoning one starts from concrete facts and from desired results to reach general rulers, a hierarchy of principles, etc. Finally, *value thinking* is also inevitable in legal reasoning. Even the choice of premises (in deductive reasoning) and the choice of the facts and values considered to be relevant (in inductive reasoning) are themselves value-laden.³

- 1 This is a large claim which we can only touch upon in this preface. See J Raz, *Ethics in the Public Domain* (Clarendon Press, Oxford, Revised Edition, 1996) Chapter 14. Inquiries into the autonomy of legal reasoning and of the law are distinct; the latter concerning matters such as whether law's content can be identified absent reference to moral factors or reasoning: J Raz, *Between Authority and Interpretation* (Oxford University Press, Oxford and New York, 2009) at 376.
- 2 Compare law, in this regard, with a closed strategic system such as a game of chess. The permutations of possible chess games are vast, but there is a substantively and procedurally circumscribed universe within which chess is conducted. A player who plays a new move (as opposed to a new strategic gambit) not recognised by the rules of chess is no longer playing chess. By contrast, validly appointed legislatures are, subject only to certain constitutional limits, empowered to enact wholly new substantive and procedural laws which, when validly passed, constitute binding laws. Indeed, even constitutional amendment is typically possible, without necessarily effecting any fundamental change to the legal system.
- 3 Mark Van Hoeke, *Law as Communication* (Hart Publishing, Oxford and Portland, Oregon, 2002) at 125. See further J Raz, "Authority, Law, and Morality" (1985) 68 *The Monist* 295: "It is a major task of legal theory to advance our understanding of society by helping us

As a result, an advocate may be required to marshal scientific, mathematical, philosophical, psychological or moral propositions in order successfully to argue a case. Judges are often required to assimilate and adjudicate complex economic evidence. The historical origin and rationale of a legal doctrine may be relevant to, or determinative of, the outcome of an argument. As observed by Lord Greene MR, Wrottesley LJ and Evershed LJ in *Re Diplock; Diplock v Wintle*:⁴

[I]f the claim in equity exists it must be shown to have an ancestry founded in history and in the practice and precedents of the courts administering equity jurisdiction. It is not sufficient that because we may think that the 'justice' of the present case requires it, we should invent such a jurisdiction for the first time.

Similarly, principles of international law, including articles of treaties which have been ratified or adopted into domestic law (focally, human rights norms), may guide or constrain how a court or an arbitrator will determine an application. Legal sources often explicitly direct legal reasoning towards exogenous, non-legal considerations.⁵

In his 1963 address to the Classical Association of Victoria at Melbourne, "The Teaching of Classics and the Law", the Honourable Sir Owen Dixon, approaching the end of his tenure as Chief Justice of Australia, observed that "there are so many things that a good barrister should know that I can feel the reluctance to exclude any form of knowledge in favour of any other form of knowledge".⁶

Admission as a lawyer requires detailed study of legal principles and reasoning. It does not typically involve any formal education in other forms of knowledge which "a good barrister should know". However, the practice of law in our globalised culture, which is rich with technical specialisations,

understand how people understand themselves. To do so it does engage in evaluative judgment, for such judgment is inescapable in trying to sort out what is central and significant in the common understanding of the concept of law".

4 [1948] Ch 465 at 481-482.

5 See, for example, s 4E of the *Competition and Consumer Act 2010* (Cth) (which invokes the economic concepts of "substitutable for or otherwise competitive with" in defining the legal concept of a market); s 10(b) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (which invokes the focally moral notions of "cruel, inhuman or degrading" punishment"). Legal consideration of causation often intrudes on to philosophical terrain; psychological matters are frequently directly invoked in sentencing submissions; and scientific issues frequently arise and require substantive consideration within intellectual property disputes. See Michael S Moore, "Moral Reality Revisited" 90 (1992) *Michigan Law Review* 2424 at 2496: "Constitutional interpretation ... includes moral reasoning by judges, in part because the US Constitution seems to invite such reasoning by its value-laden concepts".

6 Owen Dixon, *Jesting Pilate* (William S Hein & Co Inc, Buffalo, New York, 2nd ed, 1997) at 228. Dixon ventured in favour of classical study, however, that "it does implant what is a very useful thing in the law - a fear of error, a fear which leads a man to verify his references and his recollection".

requires an ecumenical mind, capable of assimilating and articulating principles and methodologies derived from multiple disciplines.

This need to marshal multiple disciplines presents an opportunity to any inquiring mind. Inevitably, however, this opportunity is often stifled by other – more immediate – demands. Dixon appears to have felt this keenly, observing to one correspondent, on his retirement: “A return to the interests which I possessed before law became not only an interest but a necessity [and] has led me to think that I have wasted a great deal of time”.⁷

The purpose of this edited collection is to provide a point of departure, to all involved primarily in the practice, but also in the study, of law as to the possibilities, application and limitations of principles that bear upon legal reasoning but do not derive from legal premises.

Various themes are explored: Why, to what extent, and in what ways is it appropriate for the domestic legal system to incorporate and assimilate extra-legal and international principles? To the extent that such incorporation is inevitable, is this a function of the demands of globalisation and the convergence it entails, of the maturity and pervasiveness in society of other disciplines, or of a more profound aspect of the character of legal reasoning? Is Amartya Sen correct to contend that a domestic legal system must look outwards through the eyes of Adam Smith’s “impartial spectator” to prosper from the wisdom of distant judgments and to avoid the evils of parochialism?⁸ Which, if any, parts of our legal system should be particularly open to such influences? What modes of reasoning best facilitate the conduct of such a dialogue?⁹

Continuing the approach adopted in our previous collection *Rediscovering Rhetoric*,¹⁰ the essays approach the various topics from the perspectives of both the advocate and the judge. The role of the advocate in presentation and persuasion must extend beyond the skilful assembly of facts and legal principles to the construction of arguments which address the fundamental purposes of law and laws. Those concerns inevitably include whether and when to look beyond the domestic and the intra-legal to draw sustenance from the wisdom and experience of other disciplines and peoples.

The collection originated in a series of seven seminars given to the New South Wales Bar Association between March and June 2010. We are profoundly grateful to all who participated in that series: The Honourable Justice William

7 Quoted in Phillip Ayres *Owen Dixon* (The Miegunyah Press, Melbourne, 2003) at 285.
 8 A Sen, *The Idea of Justice* (Harvard University Press, Cambridge, Mass; Belknap, 2009), especially Chapter 18.
 9 For useful analyses of legal reasoning generally, see Larry Alexander and Emily Sherwin, *Demystifying Legal Reasoning* (Cambridge University Press, Cambridge and New York, 2008); Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press, Cambridge Mass and London, 2009).
 10 JT Gleeson and RCA Higgins (eds), *Rediscovering Rhetoric: Law, Language and the Practice of Persuasion* (Federation Press, Sydney, 2008).

Gummow AC, The Honourable Justice J Dyson Heydon AC, The Honourable Ian Callinan AC, The Honourable JJ Spigelman AC, The Honourable Justice John Basten, The Honourable Arthur R Emmett, The Honourable Malcolm Turnbull MP, The Honourable Bob Carr, Professor Denis Dutton, Professor Gillian Triggs, Professor Gary Edmond, Professor Emeritus Wilfrid Prest, Geoff Lindsay SC, Noel Hutley SC, Stephen Gageler SC, Dr Andrew Bell SC, Senior Lecturer Edward Santow, and Julian Leaser. We are grateful also to Craig Lenehan for contributing to this written volume.

We owe great thanks to the Honourable TF Bathurst, Chief Justice of New South Wales, who, as President of the New South Wales Bar Association, gave this project great personal support, and to the Bar Association for generous funding in support of the seminar series.

At The Federation Press, we are grateful to Chris Holt, for his continued commitment to edited collections which record and promote the practice of reasoning; and to Kathy Fitzhenry for her attentive review of the manuscript.

Justin expresses his gratitude to professional colleagues present and past, especially PG Hely, GFK Santow and J Watson.

Ruth thanks Anne, Clarissa, Hamish and James for their friendship; Justin Gleeson and Peter Brereton for the generous guidance and opportunities each has provided over the past five years; Joseph Raz – for a debt I will be glad always to owe, and Liliana Munoz, *otra vez, con todo*.

Professor Denis Dutton participated in the first seminar of the series on which this book is based, but was ultimately unable to contribute to this collection. We dedicate this book to him with gratitude for his example of intellectual wakefulness.

JTG
RCAH
Sydney, June 2011

Contribution

in memory of Denis Dutton

Contributors

The Honourable Justice John Basten was appointed a Judge of Appeal of the New South Wales Court of Appeal in 2005. He graduated with first class honours in law from the University of Adelaide, and subsequently attained a BCL from the University of Oxford. From 1996-99, Basten served as a part-time Commissioner of the NSW Law Reform Commission. He was a member of the NSW Pay Equity Taskforce (1996-97), Part-time Commissioner of the Australian Law Reform Commission (1986-87), a lecturer in law at the University of New South Wales (1974-80), and a Bigelow Teaching Fellow at the University of Chicago (1972-73). He has also served as part-time Hearing Commissioner of the Human Rights and Equal Opportunity Commission. In 1992, Basten was appointed Queen's Counsel.

Dr Andrew S Bell SC was a University Medallist in both Economic History and Law at the University of Sydney and was the Rhodes Scholar for New South Wales in 1990. At Oxford, he won the Vinerian Scholarship for first place in the BCL and was also awarded a DPhil which formed the basis for his subsequent book *Forum Shopping in Transnational Litigation* (Oxford University Press, 2003). He has recently completed a new edition of Nygh's *Conflict of Laws in Australia* with Professor Martin Davies and Justice Paul Brereton. In 1990-91 he was Associate to Sir Anthony Mason. Andrew Bell was made silk in 2006 whilst in his 11th year at the Bar. He has a national practice and has appeared in more than 20 High Court appeals including *Pfeiffer v Rogerson*, *Lange v Australian Broadcasting Corporation* and *Povey v Qantas Airways*. He specialises in all matters of private international law and transnational litigation and arbitration, in which areas he has taught and written extensively.

The Honourable Ian DF Callinan AC was admitted as a solicitor of the Supreme Court of Queensland in 1960 and a barrister in 1965. He was appointed as a Queen's Counsel (QC) in 1978. He was President of the Queensland Bar Association between 1984 and 1987 and President of the Australian Bar Association between 1984 and 1985. He was appointed as a Justice of the High Court in February 1998, where he remained until 1 September 2007. Callinan was made a Companion of the Order of Australia in 2003 for his services to the law, arts and the community, and received the Centenary Medal in 2001 for his service as a Justice of the High Court of Australia. On 23 July 2010, the University of Queensland awarded him a Doctorate of Laws (*honoris causa*) in recognition of his service to the law and the arts.

Professor Gary Edmond is the Director, Program on Expertise, Evidence and Law, and a member of the Network for the Interdisciplinary Study of Law at the University of New South Wales, Sydney. He obtained a BA (Hons), winning the University Medal from the University of Wollongong, an LLB (Hons) from the University of Sydney, and a PhD from Cambridge. Gary has published on law and science, expert evidence, and the public understanding of science in journals dedicated to law, sociology and science studies. He is a member of the Australian and New Zealand Forensic Science Society, the Australasian Association for the History, Philosophy and Social Studies of Science, the Society for the Social Study of Science (US) and sits on the Council of the Australian Academy of Forensic Sciences. He is currently engaged in an ARC-funded empirical study of expert evidence in Australia.

The Honourable Justice Arthur R Emmett was appointed to the Federal Court of Australia in December 1996 with effect from 3 February 1997. He graduated from the University of Sydney as Bachelor of Arts (1964), Bachelor of Laws (1967) and Master of Laws (1976). In 1967 Justice Emmett was admitted as a solicitor in New South Wales. He was admitted to the Bar of New South Wales in 1978 and was subsequently admitted in the Australian Capital Territory, Western Australia, Victoria and South Australia. Justice Emmett was appointed Queen's Counsel in New South Wales in 1985 and in other jurisdictions soon after. He appeared on many occasions in the High Court and also appeared in the last appeal from Australia to the Privy Council. Justice Emmett was a Deputy President of the Copyright Tribunal of Australia from April 2001 to October 2007, when he was appointed President of the Copyright Tribunal. He is a member of the corporations, patent, admiralty, taxation and competition panels of the Federal Court's NSW registry. He has taught Roman Law at the University of Sydney since 1978 and has been Challis Lecturer in Roman Law since 1990. His publications include, "Towards the Civil Law: The Loss of Orality in Civil Litigation in Australia" (2003) 26(2) *University of New South Wales Law Journal* 447.

Stephen Gageler SC commenced a five-year term as Commonwealth Solicitor-General in September 2008. Before this, Stephen was a leading member of the New South Wales Bar, where he maintained a practice in constitutional, administrative and revenue law. Before he was called to the Bar, Stephen worked in both private practice and government and was Associate to Sir Anthony Mason. He has published widely in the areas of public law and federal jurisdiction.

Justin T Gleeson SC was admitted to the New South Wales Bar in 1989, having previously worked as a solicitor for four years at Freehill, Hollingdale & Page. He graduated from Sydney University with a BA/LLB First Class Honours, winning the University Medal in 1983, and with a BCL from Oxford in 1985. He took silk in 2000. He was editor of *Bar News* between 2000 and 2004. While

in full-time practice at the bar, specialising in areas of appellate, constitutional and commercial law, he has retained an interest in Roman Law, the classics, history and philosophy. His publications include many articles and *Rediscovering Rhetoric: Law, Language and the Practice of Persuasion* (Federation Press, 2008) (editor, with RCA Higgins).

The Honourable Justice WMC Gummow AC was appointed a Justice of the High Court of Australia in April 1995. At the time of his appointment, he was a judge of the Federal Court of Australia. He had held that office since 1986. He graduated from the University of Sydney as a Bachelor of Arts and Master of Laws. After 10 years in practice as a solicitor, he was admitted to the New South Wales Bar in 1976. He was appointed a Queen's Counsel in 1986. For 30 years he lectured part-time at the University of Sydney. He is the author and editor of several texts on equity and trusts. Justice Gummow AC was appointed a Companion in the General Division of the Order of Australia in 1997.

The Honourable Justice JD Heydon AC was appointed a Justice of the High Court of Australia in February 2003. At the time of his appointment, he was a judge of the Court of Appeal, Supreme Court of New South Wales, having been appointed to that office in 2000. He was educated at SCEGS, University of Sydney (BA) and Oxford University (MA, BCL) as a Rhodes Scholar. He was admitted to the New South Wales Bar in 1973 and was appointed a Queen's Counsel in 1987. At the age of 34 he was elected Dean of the University of Sydney Law School for the years 1978-79. He practised at the Bar from 1979 until his appointment to the Court of Appeal. He has published a number of legal texts including his first book, *The Restraint of Trade Doctrine*, in 1971.

Ruth CA Higgins has been practising as a barrister since 2006, principally in commercial, competition, and public law. She graduated with first class honours in law from Glasgow University in 1995, as joint winner of the Dr John MacCormick Prize for the Most Distinguished Graduate in Law, and winner of the Bennet Miller Prize for Private Law. Between 1996 and 2000, she undertook her DPhil at Balliol College, Oxford, on a Snell Scholarship. During this period, she held a lectureship at Corpus Christi College and was a visiting scholar at Columbia University, New York. Her publications include *The Moral Limits of Law: Obedience, Respect, and Legitimacy* (Oxford University Press, 2004) and (with JT Gleeson) *Rediscovering Rhetoric: Law, Language and the Practice of Persuasion* (Federation Press, 2008).

Noel Hutley SC is a leading member of the New South Wales Bar, specialising in appellate, public law and commercial practice.

Julian Leeser is Executive Director of the Menzies Research Centre. He has previously been Associate to the Hon Justice IDF Callinan AC, a solicitor at Mallesons Stephen Jaques, Special Advisor to the Commonwealth Attorney-General

(2004-06) and Visiting Fellow at Harvard University's John F Kennedy School of Government (2006-07). He was an elected delegate to the Constitutional Convention and a member of the Prime Minister's No Case Committee for the Republic Referendum. Since 2009 he has been conference convenor of the Samuel Griffith Society and member of the judging panel for the John Button Prize for Public Policy. He is the Editor of *State Policy Perspectives* (Menzies Research Centre, 2006) and *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (Menzies Research Centre, 2009).

Craig Lenehan is a barrister at the New South Wales Bar, with a public law practice.

Geoff Lindsay SC, of 8th Floor Wentworth Chambers in Sydney, has been a member of the New South Wales Bar since 1979. He took silk in 1994. He has been editor of the *Australian Bar Review* since 1996, and Secretary of the Francis Forbes Society for Australian Legal History since its foundation in 2002.

Professor Emeritus Wilfrid Prest, BA (Melb), DPhil (Oxon), FRHistS, FAHA, FASSA, joined Adelaide's History Department as a lecturer in 1966. Apart from two years as Assistant Professor at The Johns Hopkins University, Prest taught history in Adelaide until 2002, when he took up an ARC Australian Professorial Fellowship, for a research project on the life and works of the 18th century English legal author William Blackstone. A Fellow of Queen's College, University of Melbourne, Prest has held visiting positions at All Souls College, Oxford, Clare Hall, Cambridge, St Andrew's University, the Australian National University, Princeton University, the National Humanities Center, North Carolina and the University of Otago, Dunedin. His publications include *William Blackstone: Law and Letters in the Eighteenth Century* (Oxford University Press, 2008).

Edward Santow is a Senior Visiting Fellow at UNSW Law School, and CEO of the Public Interest Advocacy Centre (PIAC). He has taught Administrative Law, Federal Constitutional Law and Public Law. Ed is a Legal Adviser to the Legislation Review Committee of the NSW Parliament. This Committee is responsible for assessing whether Bills of Parliament infringe unduly on human rights. Ed serves on the board of a number of NGOs, including the Refugee Advice and Casework Service, the Australian Human Rights Group and represents Australasia on the Steering Committee of the Global Alliance for Justice Education. In 2009, he was presented with an Australian Leadership Award. Ed was previously a legal officer at the Australian Law Reform Commission, a solicitor at the Sydney law firm, Mallesons Stephen Jaques, and served as Associate to Justice Heydon of the High Court of Australia.

The Honourable James Spigelman AC was appointed as Chief Justice of New South Wales and Lieutenant Governor in 1998. He holds Arts and Law degrees from the University of Sydney. From 1972 he was Senior Advisor and

Principal Private Secretary to Prime Minister Whitlam, before being appointed as Permanent Secretary of the Department of Media in 1975. He served as a member of the Australian Law Reform Commission then commenced practice at the New South Wales Bar in 1980. He was appointed as Queen's Counsel in 1986 and Acting Solicitor General of New South Wales in 1997. He has served on the boards and as chair of a number of cultural and educational institutions. He is presently chair of the Council of the National Library of Australia. He is the author of *Secrecy* (1972), *Becket and Henry* (2004), *Statutory Interpretation and Human Rights* (2008) and co-author of *The Nuclear Barons* (1981). A collection of his addresses is published in *Speeches of a Chief Justice: James Spigelman 1998-2008* (2008) and *Opening Law Term 1999-2010* (2010).

Professor Gillian Triggs is the Dean of the Faculty of Law, University of Sydney. She holds the Challis Chair in International Law and is a former Director of the British Institute of International and Comparative Law and General Editor of the *International and Comparative Law Quarterly*. Gillian has published on Territorial and Maritime Sovereignty, Jurisdiction, Energy and Resources Law, WTO and International Criminal Law. Her most recent books are *International Law: Contemporary Principles and Practices* (2nd ed, 2011) and *International Frontiers and Boundaries* (2008, with Prescott). Gillian was admitted to practice in 1969, has maintained an international commercial legal practice and is a member of Seven Wentworth Chambers, Sydney as a Barrister.

The Honourable Malcolm Turnbull MP graduated from Sydney University BA and LLB. As the NSW Rhodes Scholar in 1978 he completed the BCL at Oxford. He worked as a journalist in Sydney and London and then, in 1980, was admitted to the NSW Bar, and some years later practised as a solicitor, although for the most part as an advocate. He successfully defended the former MI5 agent Peter Wright against the British Government, in the 'Spycatcher' trial. He established his own investment banking firm in 1987 and during that time co-founded a number of Australian companies including OzEmail Ltd. In 1997 Malcolm was elected to attend the Australian Constitutional Convention; he led the republican case in that convention and in the subsequent referendum. Elected to the House of Representatives in the Federal Parliament as the Member for Wentworth in 2004, Malcolm was appointed Parliamentary Secretary to the Prime Minister with responsibility for national water policy, and in 2007 appointed to Cabinet as the Minister for Environment and Water Resources. He is currently Shadow Minister for Communications and Broadband. He was Leader of the Opposition from 16 September 2008 to 1 December 2009 and before that Shadow Treasurer.

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