

Palgrave Modern Legal History

Series Editors

Catharine MacMillan

The Dickson Poon School of Law

King's College London

London, UK

Rebecca Probert

School of Law

University of Exeter

Exeter, UK

This series provides a forum for the publication of high-quality monographs that take innovative, contextual, and inter- or multi-disciplinary approaches to legal history. It brings legal history to a wider audience by exploring the history of law as part of a broader social, intellectual, cultural, literary, or economic context. Its focus is on modern British and Imperial legal history (post 1750), but within that time frame engages with the widest possible range of subject areas.

More information about this series at
<https://link.springer.com/bookseries/14681>

Sarah McKibbin • Jeremy Patrick
Marcus K. Harmes
Editors

The Impact of Law's History

What's Past is Prologue

palgrave
macmillan

Editors

Sarah McKibbin
University of Southern Queensland
Toowoomba, QLD, Australia

Jeremy Patrick
School of Law and Justice
University of Southern Queensland
Toowoomba, QLD, Australia

Marcus K. Harmes
University of Southern Queensland
Toowoomba, QLD, Australia

Palgrave Modern Legal History

ISBN 978-3-030-90067-0

ISBN 978-3-030-90068-7 (eBook)

<https://doi.org/10.1007/978-3-030-90068-7>

© The Editor(s) (if applicable) and The Author(s), under exclusive licence to Springer Nature Switzerland AG 2022

This work is subject to copyright. All rights are solely and exclusively licensed by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use. The publisher, the authors and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, expressed or implied, with respect to the material contained herein or for any errors or omissions that may have been made. The publisher remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

Cover image: © DigitalVision Vectors / Getty Images

This Palgrave Macmillan imprint is published by the registered company Springer Nature Switzerland AG.

The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

FOREWORD

This volume shows the variety of approaches currently adopted by scholars working on the law and legal institutions of England and Australia and it is one which convincingly demonstrates the continuing importance of legal history for the understanding of the legal institutions and legal doctrine of these two common law jurisdictions. Of the thirteen papers included in the volume two focus on specific individuals (the English eighteenth-century Attorney General Sir Dudley Ryder and the Australian twentieth-century High Court judge Albert Bathurst Piddington) but place them in their wider contemporary context by looking at the development of the office of Attorney General and Ryder's relationship with his governmental colleagues and by sketching in Piddington's prior and subsequent career and explaining the circumstances which led to Piddington being appointed but never sitting in the High Court. Four papers focus on English and Australian constitutional law and development. One looks at Lord Atkin's famous dissent in the 1942 case of *Liversidge v Anderson*, a case which challenged the arbitrary exercise of executive discretion to imprison indefinitely. It locates that dissent in its contemporary social and legal context and then traces the stages by which Atkin's dissenting opinion came to be accepted as the constitutional orthodoxy. A second provides an ambitious overview of UK constitutional history over the four decades down to 2019. It looks at some of the major changes of that period (increasing centralisation of governmental power under Margaret Thatcher, devolution in Scotland and Wales under Tony Blair, the decline of Cabinet government and the impact of the Brexit referendum) and

their short and longer-term impact on the UK's unwritten constitution. A third paper suggests that the concept of path dependency may be a useful tool for understanding why some doctrines of Australian constitutional law have been able to change quite dramatically over time while others have remained pretty much the same and uses two specific areas of constitutional law to show how that works in practice. A fourth argues that modern lawyers need to understand the deeper normative values which underlay the 1867 Constitution Act of Queensland if they are to be given a modern meaning in allowing the allocation of property as wealth on just and principled lines. Two papers focus on aspects of the modern history of the legal profession in England and Australia. One looks at the representation of members of the English legal profession of an earlier era (and particularly of English barristers defending the accused) in British television series of the second half of the twentieth century as one of the ways in which a non-academic public acquires its knowledge of the workings of the legal profession in the past. The other looks at the restrictions on the promotion of the services of members of the legal profession in Australia and New Zealand prior to the 1970s and shows how that was an inheritance from prior history of the legal profession in England from the Middle Ages onwards. It then traces how and why they were removed but also shows that the removal of the restrictions has had relatively little impact on the way lawyers sell their services to their clients. Two papers are mainly concerned with the history of private law. One traces the very long-term change in the law of tort from strict liability to the allocation of liability on the basis of the defendant's fault and why it occurred. This starts in the Ancient World with the Code of Hammurabi and the Twelve Tables of ancient Rome but brings us down to the present day (and beyond). A second paper demonstrates the way in which the High Court of Australia from the 1980s onwards has shifted Australian private law in new directions by creatively invoking common law arguments derived from English legal history, showing just how important knowledge of that legal history can be for Australian lawyers. Two papers take the legal treatment and status of Australia's indigenous people (its First Nations) in the past and in the future as their topic. One looks at the first half century after the arrival of the first group of British colonists in 1788 and the arrival of English law in Australia and what evidence there is of the settlers coming to treat indigenous people during this period as being entitled to the protection of English law. A second makes a brave effort to utilise the example

of Magna Carta as a precedent for the acceptance of a version of legal pluralism which might provide a conceptualisation for the constitutional recognition of indigenous rights in Australia alongside the existing framework of Australian law and common law rights. One final chapter gives an overview of the history of biosecurity regulation in Australia and its successes (including the exclusion of phylloxera) and failures (the ill-advised introduction of the cane toad) and the lessons which can be learned from them.

This is a valuable collection of essays on English and Australian legal history which illustrates the strengths of a variety of approaches to the doing of legal history and their complementarity. It also helps to demonstrate the continuing value of legal history to a broader understanding of current law. It can be commended to not just students but also teachers of both law and history and practitioners.

All Soul's College, Oxford

Paul Brand

CONTENTS

1	Introduction	1
	Marcus K. Harmes, Sarah McKibbin, and Jeremy Patrick	
2	Politics and Profession: Sir Dudley Ryder and the Office of Attorney General in England, 1689–1760	5
	Wilfrid Prest	
3	Lord Atkin’s Dissent in <i>Liversidge v Anderson</i>: Indecorously Orthodox?	25
	Karen Schultz	
4	The Challenges to the UK Constitution Since 1979 and Brexit	49
	Michael Mulligan	
5	The Age of Rumpole Is Past? Legal History on British Television	65
	Marcus K. Harmes, Meredith A. Harmes, and Barbara Harmes	
6	The History of Legal Marketing in Australia and New Zealand	83
	A. Keith Thompson	

7	The Historical Development of the Fault Basis of Liability in the Law of Torts	105
	Anthony Gray	
8	What Albert Did and What Albert Did Next: Albert Bathurst Piddington—The High Court Judge Who Never Sat	131
	A. S. Bell and James Monaghan	
9	Path Dependency, the High Court, and the Constitution	155
	Jeremy Patrick	
10	The Use and Misuse of Legal History in the High Court of Australia	179
	Warren Swain	
11	Did the Early British Colonists Regard the Indigenous Peoples of New South Wales as Subjects of the Crown Entitled to the Protection of English Law?	201
	Gavin Loughton	
12	Land, the Social Imaginary, and the <i>Constitution Act 1867</i> (Qld)	239
	Julie Copley	
13	The Good, the Bad and the Ugly: A Short History of Biosecurity Regulation in Australia	257
	Noeleen McNamara	
14	Legal Pluralism Past and Present: Magna Carta and a First Nations' Voice in the Australian Constitution	277
	Jason Taliadoros	
	Index	301

NOTES ON CONTRIBUTORS

A. S. Bell was appointed President of the New South Wales Court of Appeal in February 2019. His Honour was a dual University medallist at the University of Sydney and Vinerian Scholar at Oxford University, where he took a BCL and DPhil. He was a silk at the NSW Bar prior to his elevation to the Bench.

Julie Copley is Lecturer (Property and Construction Law) at the University of Southern Queensland and a PhD in Law candidate at the University of Adelaide. Admitted to legal practice, Julie has worked for Queensland's Parliament and Court of Appeal and in public and private sectors in legal research, legislative and legal policy roles.

Anthony Gray is Professor of Law and Associate Head (Research) at the University of Southern Queensland, Australia. His approximately 140 peer-reviewed articles have been published, many in leading law journals both in Australia and internationally, and he has completed numerous monographs within the past five years.

Barbara Harmes lectures in communication at the University of Southern Queensland, with a particular focus on international students. Her doctoral research focused on the discursive controls built around sexuality in late-nineteenth century England. Her research interests include cultural studies, postgraduate education and religion.

Marcus K. Harmes is Associate Director (Research) at the University of Southern Queensland College and teaches legal history in the law degree.

His articles have been published extensively in the fields of religious and political history, with a particular emphasis on British religious history and constitutional history.

Meredith A. Harmes teaches communication in the enabling programmes at the University of Southern Queensland in Australia. Her research interests include modern British and Australian politics and popular culture in Britain and America. Her most recent publication in the *Australasian Journal of Popular Culture* was on race and cultural studies on American television.

Gavin Loughton has practised as a solicitor in Canberra since 1994. Since 2009 he has been a senior executive lawyer in the Constitutional Litigation Unit of the Australian Government Solicitor. He is one of the co-authors of the second edition of Perry & Lloyd's *Australian Native Title Law* (2018).

Sarah McKibbin is Lecturer (Law) in the School of Law and Justice, University of Southern Queensland, and co-author of *A Legal History for Australia* (2021) with Marcus K. Harmes and Libby Connors.

Noeleen McNamara is an associate professor in the School of Law and Justice at the University of Southern Queensland, where she teaches environmental law, contract law and torts law. McNamara's research focus is on environmental law, natural resources law and mining.

James Monaghan practises as solicitor in the NSW Crown Solicitor's Office. He was previously a researcher at the High Court of Australia and the NSW Court of Appeal. He studied at the University of Sydney and obtained the degrees of Bachelor of Arts (Hons I and the University Medal) and Bachelor of Laws (Hons I).

Michael Mulligan is a teaching fellow in the Centre for International Studies & Diplomacy at the School of Oriental & African Studies, University of London. He has previously taught at the British University in Egypt and Lancaster University. His research interests include international law and legal and constitutional history, and his recent publications include work on piracy, extraterritoriality and the East India Company.

Jeremy Patrick is a lecturer in the School of Law and Justice, University of Southern Queensland, Australia. His multiple journal articles have been published on historical aspects in the area of law and religion, including

constitutional religion clauses, blasphemous libel, and the legal regulation of fortune-telling and individual spirituality. He is the author of *Faith or Fraud: Fortune-Telling, Spirituality, and the Law* (2020).

Wilfrid Prest trained as a historian at Melbourne and Oxford, then taught history in Adelaide from 1966 to 2001, before moving to the Adelaide Law School. A second edition of his first book, *The Inns of Court Under Elizabeth I and the Early Stuarts*, is forthcoming from Cambridge University Press.

Karen Schultz is a lecturer at the Griffith Law School, Griffith University, and a solicitor of the Supreme Court of Queensland. Her background is in private practice, public sector research, and reform. Schultz's teaching and academic research is focused on legal theory, constitutional law, equity, and legal history.

Warren Swain is Deputy Dean at the Faculty of Law, the University of Auckland, New Zealand. He writes on contract and tort law and the history of private law and legal doctrine more generally. His books include *The Law of Contract 1670–1870*, and *Contract Law: Principles and Context*, with Andrew Stewart and Karen Fairweather, both published by the Cambridge University Press.

Jason Taliadoros works in the Deakin Law School, Deakin University, where he researches and teaches in the areas of torts, statutory compensation schemes, and legal history. His published works in these areas seek to identify patterns of thought in the law and the history behind them.

A. Keith Thompson is Professor of Law in the Sydney School of Law and Business at the University of Notre Dame Australia. He formerly practised as a partner (and as the marketing director) of a large law firm in Auckland and then as General Counsel for the Church of Jesus Christ of Latter-day Saints first through the Pacific and then the African Continent.

LIST OF TABLES

Table 10.1	Total citations of English legal classics by the High Court from 1903 to 2019	198
Table 10.2	Total citations of secondary legal historical literature by the High Court from 1903 to 2019	199
Table 10.3	Citation of English legal classics by High Court judges of ten or more	200
Table 10.4	Citations of historical secondary literature by High Court judges of ten or more	200