Legal history in Australia: The development of Australian legal/historical scholarship

Professor Horst Lücke[*]

Australian concern with legal history began in earnest in the 1920s. At first scholars focused almost exclusively upon English legal history, understandably so, for English common law was in force in the country and Australian courts followed the decisions of the House of Lords in preference to their own precedents. With few exceptions, early enthusiasts who focused on purely Australian developments failed to find book publishers. Worse still, law faculties occasionally certified that their efforts had not contributed meaningfully to the science of law.

In the 1960s Australian scholars began to see this concentration on English legal history as a regrettable neglect of the Australian story. The ensuing burst of creative activity was marked by attention being focused almost solely upon Australian developments. Although the importance of Australia's English legal heritage has since been recognised as inseparable from the local story, interest in local legal history has not waned and has, in fact, been greatly strengthened by the growing involvement of the judiciary and the legal profession, particularly in New South Wales and Queensland. This movement is likely to grow and spread and will, it is hoped, cause Australian law to become an important part of the national ethos.

Since the 1990s, historically oriented comparative research and teaching concerning links with Commonwealth countries and with the wider world have gained in importance, and the Law and History movement has promoted interdisciplinary studies. Law schools have played an important role in all these developments, but their involvement should be greatly strengthened.

I Introduction

In 1891 Edward Jenks, Dean of the Melbourne Law School, published a treatise on the government of the colony of Victoria with an account of the historical development.[1] Other books dealt with limited aspects of early legal developments,[2] but there was nothing which deserved to be called legal/historical literature until very much later. The academic character of a

* Professor emeritus (University of Adelaide), Hon Professor (University of Queensland). I am grateful to Professor emeritus Wilfrid Prest for numerous excellent suggestions which only someone so closely associated for many decades with the development of the discipline could have provided, to Professor emeritus Geoffrey Lindell and Professor Andrew Stewart for information concerning the history of Australia's constitutional law and industrial relations law respectively, and Dr Greg Taylor for having pointed out a number of mistakes. Any shortcomings are, of course, my responsibility. The editors of the *Zeitschrift für Neuere Rechtsgeschichte* have indicated that they have no objection to the republication of those parts of this article which have already appeared in volume 32 of that journal. The *Australian Bar Review* is grateful for that concession.

1 E Jenks, *The government of Victoria (Australia)*, MacMillan and Co, London, 1891. After his return to England, Jenks held appointments in Liverpool and Oxford and published well-known further works.

2 R Harrison, *Colonial sketches or five years in South Australia with hints to capitalists and*

subject, and the literary output devoted to it, depend to a large extent upon the attention the subject is given in academic institutions. University law schools were founded in Sydney (1855, but no teaching until 1890),[3] Melbourne (1857),[4] Adelaide (1883),[5] Hobart (1893),[6] Brisbane (1910, but no teaching until 1936),[7] and Perth (1927).[8] There were early courses in some of these schools with titles such as 'Constitutional History' or 'Constitutional and Legal History'.[9] In such courses, students would have been taught about constitutional history, including particularly Magna Carta, the struggles between the Stuart kings and Parliament, the Glorious Revolution, the Act of Settlement of 1701 and the nineteenth century reforms. However, even in the early twentieth century general legal history could hardly have been taught, for comprehensive accounts of it were only then coming into being in England.[10]

In 1924 the Australian law schools[11] agreed to establish Master of Laws degrees, the history of English law being one of the required subjects.[12] There was little demand for such courses, but in 1929 legal history received an effective boost in the Sydney Law School when W J V Windeyer, a young barrister, began to teach the subject there to undergraduates. He last taught in 1938, the year in which his textbook was published.[13]

Not a great deal could be expected from the university law schools before the 1950s, for their full-time academic establishments were minute; legal

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emigrants, Hall, Virtue and Co, London, 1862, pp 107–17; F Sinnett, *An account of the Colony of South Australia*, prepared for distribution at the International Exhibition of 1862, Adelaide, 1862, pp 13–19, 94–9.

3 Until 1890, the Sydney Law School was restricted to examining: T Bavin (Ed), *The jubilee book of the Law School of the University of Sydney 1890–1940*, Halstead Press, Sydney, 1940, p 5; J G and J Mackinolty, *A century down town: Sydney University Law School's first hundred years*, The University of Sydney, Sydney, 1991; see also A C Castles, A Ligertwood and P Kelly (Eds), *Law on North Terrace*, The University of Adelaide, Adelaide, 1983, p 5.

4 R Campbell, *A history of the Melbourne Law School 1857–1973*, The University of Melbourne, Parkville, 1977.

5 Castles, Ligertwood and Kelly, above n 3.

6 R Davies, *100 years: A centenary history of the Faculty of Law, University of Tasmania 1893–1993*, The University of Tasmania, Hobart, 1993.

7 See 'Heritage and History', <http://www.law.uq.edu.au/heritage-and-history> (accessed 21 December 2009).

8 See 'History of the University', <http://www.uwa.edu.au/university/history> (accessed 21 December 2009).

9 For further detail, see S Petrow, 'Overcoming 'intellectual colonialism': Aspects of the teaching of legal history in Australia from c 1890 to 2006' [2006] *ANZLH E-Journal*, paper 19, at 7–8.

10 Pollock and Maitland's great work appeared in 1898 (F Pollock and E W Maitland, *The history of English law*, Cambridge University Press, Cambridge, 1898), but it covered only the earliest period up to the reign of Edward I (1272–1307). It was the monumental History of English Law by Sir William Holdsworth (over 12 volumes, published between 1903 and 1938) which, even before its completion, gave some impetus to the inclusion of English legal history in law school curricula.

11 There was one in each of the state universities of New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania.

12 V A Edgeloe, 'The Adelaide Law School 1883–1983' (1983) 9 *AdelLR* 1 at 26.

13 W J V Windeyer, *Lectures on legal history*, Halstead Press, Sydney, 1938. A second edition was published in 1949 (and reprinted in 1957).

practitioners, employed on a part-time basis, gave most of the lectures.[14] In Adelaide John Jefferson Bray, a successful barrister and Chief Justice of South Australia from 1967–1978, taught legal history from 1957–1959.[15] He has left us a book on Roman history as well as books of poetry and of essays,[16] but little writing on Australian legal history.[17] The one full-time academic to teach the subject at that time was L J Downer, a distinguished scholar, who taught legal history first in Western Australia and then at the Melbourne Law School.[18]

The foundation of the Monash Law School in Melbourne in 1963 heralded the appearance of reasonably well-staffed law schools[19] with enough capacity to give legal history a secure place in curricula and for thus stimulating literary efforts. Surveys conducted in 1976,[20] 1982[21] 2005[22] and 2008[23] showed that this had not occurred. As recently as in 2005, Wilfrid Prest found that of the 10 pre-1982 law schools, four offered no legal history, two offered the subject as later-year electives,[24] two offered 'comparative legal history',[25] and the remaining two offered legal history as elective hybrids (ie, combined with other elements).[26] Of 19 law schools established after 1982, 12 offered no

14 In the Adelaide Law School there was only ever one full-time member of staff, the Professor of Law, from 1883 until a readership was added in 1950 and a lectureship in 1953 — Edgeloe, above n 12, at 33.

15 W R Prest (Ed), *A portrait of John Bray, law, letters, life*, Wakefield Press, Adelaide, 1997; Bray also taught Jurisprudence from 1941–1946 and from 1951–1952 and Roman law from 1959–1966: Edgeloe, above n 12, at 39–42; see also J J Bray, 'A plea for Roman law' (1983) 9 *AdelLR* 50.

16 J J Bray, *Gallienus: A study in reformist and sexual politics*, Wakefield Press, Adelaide, 1997; J J Bray, *Poems*, Cheshire, Melbourne, 1962; for a list of Bray's publications, see Prest, above n 15, pp 177–84.

17 Bray has published a brief biography of Sir Samuel Way, Chief Justice of South Australia 1876–1916, in the Australian Dictionary of Biography, and a review of H Reynolds, *The law of the land*, Penguin, Melbourne, 1987: J J Bray, 'Underestimating the fundamentals' (1988) 47 *AdelLR* 11.

18 L J Downer 'Some thoughts on legal history' (1954) 3 *UWALR* 13; idem, 'Legal history — is it human?' (1963) 4 *MULR* 1; idem, (Ed), *Leges Henrici Prim*i, edited with translation and commentary, Oxford University Press, Oxford, 1972; S J Stoljar and L J Downer (Eds), *Year Books of Edward II*, Year Books Series vol XXVII, 14 Edward II, Michaelmas 1320, London, 1988 (Selden Society vol 104 for 1988). See also W R Prest, 'Legal history in Australian law schools 1982 and 2005' (2006) 27 *AdelLR* 267 at 269.

19 Since 1964 the Federal Government has been injecting substantial funds into the university system: *Report of the Committee on the Future of Tertiary Education in Australia to the Australian Universities Commission*, Government Press, Canberra, 1964. Some of the larger law schools now have establishments in excess of 50 full-time academic staff.

20 H K Lücke and R J Wallace, 'Law courses in Australia' in R Balmford (Ed), *Legal Education in Australia. Proceedings of National Conference 1976*, Australian Law Council Foundation, Melbourne, 1978, vol I, 107, pp 145–7.

21 W R Prest, 'Law and history: Present state and future prospects' in C L Tomlins and I W Duncanson (Eds), *Law and history in Australia*, La Trobe University Press, Melbourne, 1982, pp 29, 34–6.

22 Prest, above n 18, at 267, 272–3.

23 M Kirby 'Is legal history now ancient history?' (2009) 83 *ALJ* 31 at 35–6.

24 The law schools at the Universities of New South Wales and Western Australia.

25 The law schools at Macquarie University and at the Australian National University in Canberra offered these in the interesting form of joint enterprises with the Universities of British Columbia and Victoria (Canada).

26 The law schools at the Universities of Melbourne and Tasmania.

such teaching at all. Only two offered legal history courses (compulsory in both cases).[27] It is hardly surprising that of the various interest groups of the Australasian Law Teachers Association the one on legal history has been much less successful than many others.

II Phase 1: English legal history in the Antipodes: the Windeyer school of legal history

A Early literature

After it was first published in 1938, Windeyer's textbook became the standard text for a few decades. In the preface, the author expressed his indebtedness to his great English predecessors, Maitland,[28] Pollock[29] and Holdsworth[30] and to the Selden Society,[31] and echoed the belief of some of the great common law jurists of the early twentieth century in the power of historical analysis as a key to a true understanding of the living law.[32]

The book proceeded chronologically, commencing with the Anglo-Saxon period and the Norman conquest and covering the most significant constitutional developments (see above). Beyond that, it dealt with the essentials of general English legal history, covering the beginnings of the court system and of the common law under Henry II, the early writers Glanville[33] and Bracton,[34] the statutes passed by Edward I, the Yearbooks, the forms of action, the later evolution of the court system, including the Court of Chancery and the prerogative courts, with writers such as Fortescue,[35] Littleton,[36] Coke[37] and Blackstone,[38] and the contribution made by great judicial figures such as Holt and Mansfield and, above all, Sir Edward Coke.

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27 The law schools at Flinders and Notre Dame Universities: Prest, above n 18, at 267, 273.

28 F W Maitland (edited by A H Chaytor and W J Whittaker), *The forms of action at common law: A course of lectures*, Cambridge University Press, Cambridge, 1936. See also S F C Milsom, 'Maitland' (2001) 60 *Cambridge LJ* 265.

29 Of particular interest: F Pollock, *The genius of the common law*, Columbia University Press, New York, 1912; see also M De Wolfe Howe (Ed), *Holmes-Pollock letters: The correspondence of Mr Justice Holmes and Sir Frederick Pollock 1874–1932*, Harvard University Press, Cambridge, 1941.

30 Holdsworth, above n 10.

31 The Society's publications had by then reached the 57th annual volume: G O Sayles, Select cases in the *Court of King's Bench under Edward I*, vol II, the Selden Society, London, 1938.

32 'A page of history is worth a volume of logic.': O W Holmes as quoted in the preface to Windeyer's book. 'the application of methodical historical criticism . . . to commonly accepted statements has exploded one baseless legend after another . . .': F Pollock, 'A plea for historical interpretation' (1923) 39 *LQR* 163 at 168.

33 R de Glanville (G D G Hall, transl), *The treatise on the laws and customs of the realm of England*, Oxford University Press, London, 1965.

34 H de Bracton (S E Thorne, transl), *On the laws and customs of England*, Cambridge University Press, Cambridge, 1968.

35 Sir John Fortescue (Francis Gregor, transl), *De laudibus legum Angliae/a treatise in commendation of the laws of England*, Robert Clarke & Co, Cincinnati, 1874.

36 T Littleton (edited by E Wambaugh), *Littleton's tenures in English*, John Byrne, Washington DC, 1903.

37 Sir Edward Coke, *Institutes of the laws of England*, First part, R Pheney & S Brooks, London, 1809; second, third and fourth parts, London, 1797.

38 W Blackstone, *Commentaries on the Laws of England*, 1st ed, Oxford University Press, Oxford, pp 1765–9.

Windeyer's book marked what might be called the first phase of legal/historical studies during which English legal history was dominant. Of its 280 pages only the last chapter of no more than 12 pages dealt with the 'introduction of English law into Australia'.[39] When the second edition was published in 1949, these proportions had hardly changed.[40] The book reflected the manner in which the subject was taught in Australian law schools.[41]

Those few legal scholars who took up the cause of historical legal research in the 1950s focused on the history of English law. The late Samuel Stoljar, a research scholar in the Research School of Social Sciences at the Australian National University in Canberra, published historically oriented books on agency and quasi-contract[42] and a very substantial body of research work devoted to the clarification of current legal issues by means of historical analysis.[43] Others shared Stoljar's outlook. Ken Shatwell, Dean of Sydney Law School, greatly encouraged such studies.[44] Alice Erh-Soon Tay felt inspired to seek to elucidate the early English law of bailments.[45] It was no accident that Stoljar mixed his interest in English legal history with attention to American contract theoreticians,[46] for they also drew substantially on early English material. Some of the relevant common law material is written in Latin or in Law French,[47] but forty years ago that was not beyond the grasp of scholars, professionals or students in Australia, for Latin was a prerequisite to admission to legal studies.[48] Some French was needed as a basis for understanding Law French and one had to cope with its terminological peculiarities and the many abbreviations used in the Law French sources.

When your reporter, coming from a civil law background, entered this new world as a young lecturer in the Adelaide Law School in 1961, the approach

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39 Windeyer, above n 13, pp 249–61.

40 The book had grown to 335 pages and the last chapter on Australian developments took up 18 pages.

41 The situation in New Zealand was very similar; as Jeremy Finn has explained: 'At the University of Canterbury in the mid-1970s, the first year course included "legal history" from Henry II to the Judicature Acts 1873–75; with never a mention of New Zealand, or, indeed, any other former British colonial possession.' — J Finn 'A formidable subject: Some thoughts on the writing of Australasian legal history' (2003) 7 *Australian Jnl of Legal History* 53.

42 See reviews by H K Lücke in (1964) 2 *AdelLR* 263.

43 The full range of Stoljar's work may be found in the Index to Legal Periodicals. The following is a selection of his articles: S J Stoljar, 'Contractual concept of condition' (1953) 69 *LQR* 485; 'Early history of bailment' in (1957) 1 *American Jnl of Legal History* 5; 'Dependent and independent promises. A study in the history of contract' (1957) 2 *SydLRev* 217; 'Doctrine of failure of consideration' (1959) 75 *LQR* 53; 'Contract, gift and quasi-contract' (1959) 3 *SydLRev* 33; 'What is account stated?' (1964) 4 *SydLRev* 373; 'Transformations of account' (1964) 80 *LQR* 203; 'Consideration of forbearance' (1965) 5 *MULR* 34.

44 Petrow, above n 9, at 8. See also K O Shatwell, 'The study of legal history' (1951) 2 *UWALR* 94; idem, 'The doctrine of consideration in the modern law' (1954) 1 *SydLRev* 289 at 291–309 (survey of development from fourteenth to seventeenth century).

45 A Erh-Soon Tay, 'The essence of a bailment: Contract, agreement or possession?' (1965) 5 *SydLRev* 239.

46 See, eg, S J Stoljar, 'Ambiguity of promise' (1952) 47 *Northwestern University LRev* 1; idem, 'Prevention and co-operation in the law of contract' (1953) 31 *Canadian Bar Review* 231; idem, 'Some problems of anticipatory breach' (1974) 9 *MULR* 355.

47 S J Stoljar, 'Common lawyer's French' (1954) 47 *Law Library Jnl* 119.

48 That requirement was abolished in most if not all law schools in the 1960s.

of these scholars seemed to him natural and necessary. Who could hope to understand modern common law contract principles without first grasping the mysteries of the decision handed down by all the Justices of England and the Barons of the Exchequer in 1602 in *Slade's Case*?[49] Well-known English legal historians like A W B Simpson[50] and G D G Hall gave generous advice, but they also represented formidable competition, for they were far more knowledgeable and closer to the relevant sources.

B Law school curricula: the Maitland factor

To Samuel Stoljar, it was English not Australian judicial precedents which deserved attention.[51] Few other scholars went this far, but most would have agreed that, by clarifying the significance of early English cases, one was thereby rendering an important contribution to a full understanding of the current Australian law. The Australian colonies had inherited the common law of England 'so far as the same can be applied within the said colonies',[52] and even after the foundation of the Commonwealth of Australia in 1901 that body of law remained the governing system.[53] Australian courts, led by the High Court of Australia, had embraced the policy of following decisions of the House of Lords in preference to their own precedents.[54] In 1942 Sir Owen Dixon, then and now one of the most respected Australian jurists,[55] gave classical expression to this legal world view:

> We believe that no good can come of divergence between the common law in one jurisdiction of the British Commonwealth and as administered in another. We think that it can be best avoided by continuing to recognise the high persuasive authority of the decisions given in the Strand and at Westminster . . . [The common law] represents but one system of legal conceptions . . . the first duty of the peoples who share in the possession of the common law is to . . . hold fast to the conception of the essential unity of the culture which it gives them.[56]

The legal system which Australia had inherited, the English common law, was uncodified. At no point had a line been drawn to ensure that much of the common law as it had evolved since its beginnings in the thirteenth century

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49 4 Co Rep 92b; H K Lücke, '*Slade's case* and the origin of the common counts' (1965) 81 *LQR* 422 at 539 and (1966) 82 *LQR* 81; see also idem, 'Specific performance at common law' (1965) 2 *UTasLR* 125.

50 A W B Simpson, 'The place of *Slade's Case* in the history of contract' (1958) 74 *LQR* 381.

51 In personal conversation with me, he made it clear that he was not interested in the decisions of Australian judges.

52 An Act to provide for the administration of justice in New South Wales and Van Diemen's Land, 9 Geo IV, c 83 (Imperial Parliament, 1828) section 24; see A C Castles, 'The reception and status of English law in Australia' (1963) 2 *AdelLR* 1 at 3.

53 A C Castles, *An Australian legal history*, LawBook Co, Sydney, 1982, p 493.

54 *Piro v Foster* (1943) 68 CLR 313; [1943] ALR 405; BC4300006.

55 P Ayres, *Owen Dixon*, The Miegunyah Press, Melbourne, 2007. Sir Owen was appointed a justice of the High Court of Australia in 1929 and was its Chief Justice from 1952 until 1964. See also the review of Ayres' biography of Dixon by J H Farrar 'Owen Dixon by Philip Ayres' (2003) 15(2) *Bond LRev* 20, and D Ritter, 'The myth of Sir Owen Dixon' (2005) 9 *Australian Jnl of Legal History* 249.

56 O Dixon, 'Two constitutions compared' in O Dixon (collected by Judge Woinarski), *Jesting Pilate*, LawBook Co, Melbourne, 1965, pp 104–5; see also J M Williams, *One hundred years of the High Court of Australia*, King's College London, London, 2003.

was no longer in force. Ancient authorities, even those from the yearbook period, could still be invoked in the forensic process as part of the living law. This was no less true in Australia than in England. Australian examples are not difficult to find.

W J V Windeyer, appointed a Justice of the High Court of Australia in 1958,[57] employed ancient precedents to add persuasive force to his judgments. In *Norman v Federal Commissioner of Taxation*[58] the High Court was asked to clarify the common law meaning and operation of *choses in action* and Windeyer J invoked a quotation from a work by Sir Francis Bacon published in 1637[59] and early English cases cases such as *Lampet's Case*,[60] *Wood and Foster's Case*,[61] and *Grantham v Hawley*.[62]

No judge in Australia used historical sources more convincingly than Sir Owen Dixon. In *Yerkey v Jones*[63] the High Court had to clarify the extent to which married women are legally liable on guarantees signed for their husbands' debts. Sir Owen analysed the authorities from *Baskervil v Sinthome*[64] to *Pybus v Smith*,[65] concluded that the effect of these early decisions had been summed up correctly in *Story's Equity Jurisprudence* (1835) sec 1395,[66] and then proceeded to explain a number of nineteenth century authorities and the impact made by the Married Women's Property Act 1882.[67] Dixon's judgments:

> combin[ed] the results of deep historical research with luminous and accurate exposition of existing law — neither confounding the dogma nor perverting the history.[68]

Considering the state of the common law prior to the 1960s, one might have argued that legal/historical studies imparted much needed professional equipment, not just a lawyer's cultural adornment. Under Richard Blackburn, Dean of the Adelaide Law School from 1951–1957, planning proceeded on this basis:

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57 His high reputation was acknowledged by his appointment as Vice-President of the Selden Society (London) and as Honorary Fellow of the Royal Australian Historical Society. He was also made an honorary member of the Society of Public Teachers of Law (UK).

58 (1963) 109 CLR 9; [1964] ALR 131; BC6300030.

59 *A collection of some principal rules and maxims of the common law*, John Sheares, London, 1637.

60 (1612) 10 Rep 46b; 77 ER 994.

61 (1586) 1 Leon 42; 74 ER 39.

62 (1615) Hob 132; 80 ER 281.

63 (1939) 63 CLR 649; [1939] ALR 62; BC3900003.

64 (1614) Tothill 95; 21 ER 134.

65 (1790) 1 Ves Jun 189; 30 ER 294; (1791) 3 Bro CC 341; 29 ER 570.

66 'The doctrine is now firmly established in equity that [a married woman] may bestow her separate property, by appointment or otherwise, upon her husband as well as upon a stranger. But at the same time, courts of equity examine every such transaction between husband and wife with an anxious watchfulness and caution, and dread of undue influence.'

67 For yet another tour de force by Sir Owen, see *McQuarrie v Jaques* (1954) 92 CLR 262 at 269–89; [1955] ALR 49; BC5400730.

68 F W Maitland, 'Why the history of English law is not written' in H A L Fisher (Ed), *The collected papers of Frederic William Maitland*, Cambridge University Press, Cambridge, 1911. See <http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=871&chapter=70245&layout=html&Itemid=27> (accessed 12 January 2010). Maitland's words, if applied to Sir Owen Dixon's treatment of older precedents, would be an apt tribute.

> Law is not history, but cannot be understood in a context from which history is absent. To a person who denied this proposition I would have to propound it as dogma.[69]

The Australian judiciary and professional organisations insist that the so-called 'Priestley eleven subjects'[70] must be taught. They have never backed training in legal history as a necessary preparation for practice. That subject seems to be regarded as 'merely cultural' and, as a result, law schools find insufficient space for it in their curricula.

In his celebrated 1888 inaugural lecture at Cambridge F W Maitland insisted that legal history should be a purely academic discipline rather than the handmaid of legal dogma.[71] The search for legal principle is governed, so he argued, by 'the logic of authority', legal/historical studies must be governed by 'the logic of evidence':

> A mixture of legal dogma and legal history is in general an unsatisfactory compound . . . The lawyer must be orthodox otherwise he is no lawyer; and orthodox history seems to me a contradiction in terms . . . If we try to make history the handmaid of dogma she will soon cease to be history.[72]

Stoljar was never assailed by such doubts, and Enid Campbell, in a seminal article, allowed herself the following muted criticism of Maitland's separation theory:

> The contrast between the lawyer's 'logic of authority' and the historian's 'logic of evidence' should not, I think, be pressed too far, for the search for authority is in part a search for evidence.[73]

She showed that older English precedents can be useful to the legal practitioner if they are invoked correctly, even though they are never binding like more recent ones.[74] L J Downer, a medievalist, argued that legal history was often helpful in assessing the social utility of legal rules and should therefore be given a secure place within the social sciences.[75] With respect, that is a defensible position; the historical approach can still serve as a guide, particularly when it is combined with comparative studies.[76] However, the authority of the great Maitland might have helped persuade Australian

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69 R A Blackburn 'Law school curricula in retrospect' (1983) 9 *AdelLR* 43 at 46. Under a new curriculum, legal history had to be studied by many, if not quite by all, students. Not long ago, Sir Gerard Brennan, a former Chief Justice of the High Court, voiced similar views: 'Legal history . . . is important to any who seek an appreciation of the cultural and institutional phenomena of the present day. And it is, of course, essential to lawyers who need to define the scope and operation of legal rules.': Speech given on 25 February 2009 at the 2008–2009 awards ceremony of the Australian legal history essay competition arranged by the Francis Forbes Society for Australian Legal History, at <http://www.forbessociety.org.au/documents/brennan.pdf> (accessed 10 January 2010).

70 Criminal Law, Torts, Contracts, Property (including the Torrens System), Equity (including Trusts), Administrative Law, Constitutional Law (State and Commonwealth), Civil Procedure, Evidence, Corporations or Company Law, Legal Ethics and Professional Conduct.

71 Maitland, above n 68.

72 Ibid.

73 E Campbell, 'Lawyers' uses of history' (1968) 6 *UQLJ* 1 at 2.

74 Ibid, at 1–23.

75 Downer, 'Some thoughts', above n 18, at 14.

76 The conceptual clarity of the modern law can still be improved by such historical analysis,

curriculum planners that legal history was not essential to legal practice.[77] Entrenching English legal history in Australian law schools during the 1960s and 1970s was a lost cause in any event, for the English common law was about to exit the Australian stage.

C The demise of the Windeyer school

1 A sense of Australian national identity

There was a time when Australians saw themselves as British, thought of England as 'home' and derived a sense of collective identity from being part of the world-wide British Empire. The fall of Singapore to Japanese forces in 1942 shattered one crucial part of the British legacy: the assurance of national security. In the 1960s Britain withdrew the reach of her military power from all areas east of Aden. The resulting void was filled in part by the American alliance, but also by a growing sense of self-sufficiency. There has long been a distinct Australian ethos, home-made rather than imported from the British Isles. It finds its expression in sport, literature, music, in the arts and in Australian political and military traditions. Its most important components are egalitarianism (a 'fair go' for everyone), a strong anti-authoritarian outlook, the ideal of mateship, solidarity with the victims of natural disasters like droughts, floods and fires, and, last but not least, pride in the exploits of the Australian armed forces. A sense of Australian nationalism made itself felt in general Australian historiography:

> In 1958, Russel Ward wrote *The Australian Legend*, seeking to identify the features of Australia's story that were unique or special. Recent and contemporary Australian historians such as Manning Clark, Geoffrey Blainey, Geoffrey Bolton, Stuart Macintyre, Henry Reynolds, Marilyn Lake, Judy Brett and many others wrote of Australian history as a new and exciting subject of study.[78]

The legal system could not claim immunity from the impact of these potent forces. Sooner or later, clinging to the English common law, yet another part of the Imperial legacy, was bound to be seen as an aspect of the despised 'cultural cringe', a sense of cultural inferiority, from which some Australians supposedly suffer.[79] One momentous consequence was the emergence and recognition of an Australian version of the common law. Another was the birth of the academic discipline of Australian legal history.

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see H K Lücke 'Simultaneity and successiveness in contracting' (2007) 15 *European Review of Private Law* 27. Whether ancient common law sources, sometimes expressed in an unfamiliar language, should be regarded as component parts of the major premises of the modern law is a very different question.

77 Lücke and Wallace, above n 20.

78 M Kirby, 'Alex Castles, Australian legal history and the courts' (2005) 9 *Australian Jnl of Legal History* 1 at 5. The literature concerned with general Australian history is, of course, enormous and one cannot even begin to compose a comprehensive list. One of the most comprehensive works is M Clark, *History of Australia*, six volumes, Collins, London, 1962–1987.

79 Kercher has attributed the uncritical acceptance of Imperial control through Privy Council appeals even after Federation to cultural cringe: B Kercher, 'Homer in the Australian Alps: Attitudes to law since 1788' (1995) 1 *Australian Jnl of Legal History* 1 at 8. The term 'cultural cringe' was coined by the Australian writer A A Phillips in a famous article in (1950) 9 *Meanjin* 300. It has been defined as 'a term denoting a characteristically colonial

2 An Australian common law

However impressive, Dixonian forays into English legal history exposed an unsatisfactory feature of the legal landscape. Major premises to be employed in the courts should not be so complex that dealing with them requires scholarly sophistication of a kind possessed by only very few judges. Michael Kirby has highlighted other limits to the 'Dixonian green light to the use of history in court decisions' and has commented favourably on Campbell's suggestion that courts might seek assistance from legal historians in dealing with complex historical material.[80] Maitland himself had been greatly impressed by continental efforts to simplify the working premises of the legal system by codification.[81]

In 1963 Sir Owen Dixon himself ushered in a new era when he declared in *Parker v R*:

> Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied Smith's Case (1961) AC 290 I think that we cannot adhere to that view or policy. There are propositions laid down in the judgment which I believe to be misconceived and wrong.[82]

Four years later the Privy Council, then still the ultimate appeal court for Australia, acknowledged that the unenacted law in Australia should be described as the Australian common law.[83] English precedents, whatever their persuasive authority, no longer were the law of the land. The burden imposed on Australian judges by the esoteric sources of the English common law had been lifted. Australian law reports were now the major source of judicial authority. Moreover, the unenacted law had lost much of its territory to statute law of unquestionable Australian origin. 'Unravished remnants' of the uncodified judge-made common law[84] are now to be found mainly in areas such as contract and tort and, perhaps more importantly, in statutory interpretation. The time for a more self-sufficient approach to the sources of Australian law had arrived!

In a way, this development was only the culmination of a process which can be traced to the earliest colonial days. Ever since the new colony of New South Wales was placed under the unfettered authority of governors appointed by the Imperial government, there were ever-louder voices which clamoured for self-government. Bruce Kercher has given a brief account of the complex developments and their culmination in the final step, the Australia Acts 1986,

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deference towards the cultural achievements of others': G Davison, J Hirst and S Macintyre (Eds), *The Oxford Companion to Australian History*, Oxford University Press, Melbourne, 1986, p 165.

80 Kirby, above n 78, at 10. See also Campbell, above n 73, at 23.

81 F W Maitland, 'The making of the German Civil Code' in Fisher, *Collected papers*, above n 68, vol 3, pp 475–6; Kirby, above n 78, at 5.

82 (1963) 111 CLR 610; [1963] ALR 524; BC6300630.

83 *Australian Consolidated Press v Uren* (1967) 117 CLR 221; [1969] 1 AC 590; [1968] ALR 3; [1967] 3 All ER 523. In *Viro v R* (1978) 141 CLR 88; 18 ALR 257; BC7800022 the High Court decided that it was no longer bound to follow decisions of the Privy Council. The gradual move towards complete legal independence is traced by B Kercher, *An unruly child. A history of law in Australia*, Allen & Unwin, Sydney, 1995, pp 177–205.

84 C J Radcliffe, *Law and its compass*, Northwestern University Press, Illinois, 1960, p 52.

enacted separately by the Australian Federal and the British Parliaments which removed the last legal restraints upon Australian independence.[85] However, there is a wide-spread view that the last vestiges of British domination will not be removed until Australia has become a republic.

III Phase 2: Australian legal history — recognition as an academic discipline

Legal history students, and particularly the restless students of the 1960s and 1970s, must have been expecting tales of seafarers, pioneer settlers, convicts, Aborigines and bushrangers. Instead they had to listen to the complexities of *assumpsit* and of the action on the case.[86] Doubts about the Windeyer version of legal history, which had failed to contribute meaningfully to a national ethos of which the law had the potential to be an important part, had become inevitable. The second phase began during the 1960s and 1970s, coincidentally with the development of an independent Australian common law.[87] The change was gradual rather than sudden. The difference between the two phases is not one of exclusive pursuit but rather of volume and academic recognition.

A Early enthusiasts

During the Windeyer phase, enthusiasts for Australian legal/historical studies encountered difficulties in having their work recognised as significant. Ralph Hague, an academically brilliant graduate of the Adelaide Law School, was denied the Bonython Prize for an important work of nearly 1000 pages on the early legal history of South Australia, completed in 1936, on the ground that it was not a 'significant contribution to the science of law' as required by the terms of the endowment for the prize.[88] In South Australia at least, Australian legal history was not considered to be a discipline worthy of serious attention. Hague's book had to wait nearly 70 years before it was published posthumously in 2005.[89] The sorry episode came as a tremendous shock to this self-effacing scholar and overshadowed the rest of his life.[90] Hague's interest in legal history did not wane and he published a number of studies of

85 Kercher, above n 83, pp 177–88.

86 A Athaide, 'Alex Castles on the recognition of Australian legal history 1955–1963' (2003) 7 *Australian Jnl of Legal History* 107 at 109.

87 To Rosemary Hunter, its arrival was even more recent: 'Australian legal history has only emerged as a field of scholarship in its own right in the last twenty years. Prior to that, Australian legal history tended to be written and taught as a footnote to the great sweep of English legal history . . .': 'Australian legal histories in context' (2003) 21 *Law and History Review* 607.

88 The Faculty seems to have acted on a distinction between treating a subject 'merely historically' (as Hague had supposedly done) and treating it 'critically and philosophically'.

89 R M Hague, *Hague's History of the Law in South Australia 1837–1867*, University of Adelaide, Adelaide, 2005. By then, the outlook had changed; nearly 90 persons and institutions contributed financially to the publication project. Ralph Hague died on 10 March 1997. See also the review of Hague's book by H K Lücke in (2006) 10 *Legal History* 267.

90 The full story is told by Helen Whitington in *Hague*, above n 89, pp 839–44.

limited scope,[91] but he made no further attempt to gain any form of recognition for his *magnum opus*. He simply deposited typed copies with the State Library of South Australia and resisted attempts by prominent Adelaide lawyers to persuade him to have it published or to submit it for an academic degree.

The Ralph Hague saga has counterparts in other states. S H Z Woinarski's manuscript on the history of legal institutions in the state of Victoria,[92] a substantial work of nearly 800 pages completed in 1942, has been gathering dust in the Monash and Melbourne University Libraries. Enid Russell's manuscript concerning the development of the Western Australian legal system, completed in 1950,[93] was published 22 years after the death of its author![94]

New South Wales took Australian legal/historical studies seriously somewhat earlier than the other states. In 1929 C H Currey, an educator and inspector of schools, graduated LLD at Sydney University with a thesis about the legal history of New South Wales.[95] Encouraged by his success,[96] he published further such studies,[97] and left part of his estate to the State Library of New South Wales 'to promote the writing of Australian history from the original sources'. Currey's published work is perhaps the first significant milestone on the way to the new Australian approach.

Herbert Vere Evatt might have been inspired by Currey to publish, when he was already a Justice of the High Court of Australia, his much-noted article on the legal foundations of New South Wales.[98] He also wrote an historical work about the Rum Rebellion of 1808.[99]

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91 The following books by R M Hague were all published in Adelaide: *Sir John Jeffcott: Judge of the Supreme Court, 1936*; Court of Appeals, 1940; *Mr. Justice Crawford: Judge of the Supreme Court of South Australia 1850–1852*, 1957; T*he Judicial career of Benjamin Boothby*, 1992; *Henry Jickling: Judge of the Supreme Court of South Australia from November 1837 to March 1839*, 1993. There is also an undated book simply entitled *Mr Justice Boothby*.

92 S H Z Woinarski, *The history of legal institutions in Victoria*, unpublished thesis, Melbourne, 1942.

93 The Library of the University of Western Australia has published this as the completion date but has added a question mark.

94 E Russell, *A history of the law in Western Australia and its development from 1829 to 1979*, University of Western Australia, Perth, 1980.

95 C H Currey, *Chapters on the legal history of New South Wales 1788–1863*, unpublished thesis, Sydney, 1929.

96 Concerning the impact of his lectures and his publications upon his students, see Kirby, above n 23, at 31–2, and address by the Hon Murray Gleeson, formerly Chief Justice of the High Court, at the 175th Anniversary Dinner of the Supreme Court of New South Wales, at <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_175_g> (accessed 3 November 2009).

97 C H Currey, *The Irish at Eureka*, Angus & Robertson, Sydney, 1954; idem, *The transportation, escape and pardoning of Mary Bryant*, Angus & Robertson, Sydney, 1963; idem, *The brothers Bent: Judge-Advocate Ellis Bent and Judge Jeffery Hart Bent*, Sydney University Press, Sydney, 1968; idem, *Sir Francis Forbes: The first Chief Justice of the Supreme Court of New South Wales*, Angus & Robertson, Sydney, 1968. The last-named book, one of Currey's most important works, contains a review of the early social, political and legal history of New South Wales.

98 H V Evatt, 'The legal foundations of New South Wales' (1938) 11 *ALJ* 409.

99 H V Evatt, *Rum rebellion: A study of the overthrow of Governor Bligh by John Macarthur*

B Recognition at last

There were a few short-lived early legal journals in Australia.[100] Publication of university law school journals commenced with the foundation of the Annual Law Review in 1948 (renamed the University of Western Australia Law Review in 1960). Jeremy Finn has published a very useful survey of the legal/historical articles published in these reviews during the late 1950s and in the 1960s.[101] Before John Bennett commenced his great legal biography project, he published a number of articles in the Sydney Law Review on more general legal themes.[102] Enid Campbell published some of her much-quoted articles in these reviews[103] and the history of the Torrens system was given early attention.[104] Even Sir Victor Windeyer felt prompted to give more detailed attention to the subject which he had treated so cursorily in his book.[105] The real turning point came with the arrival on the scene of the great figures who turned the subject into what it is today.

1 Alex Cuthbert Castles

The pivotal figure in the story of the development of Australian legal/historical studies is the late Alex Cuthbert Castles.[106] As a student at the Melbourne Law School in the 1950s, Castles wondered why Windeyer's book gave such scant attention to Australian developments.[107] During a period of study in the United States he became acquainted with the work of American legal historians and returned persuaded that Australia's legal history deserved to be told.[108] In 1963, in a first literary foray into this field, Castles produced an inventory of the laws which the Australian colonies had inherited.[109] This was followed by his introduction to Australian legal history in 1971[110] and, in

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and the New South Wales Corps, Sydney, Angus & Robertson, 1943. This was the very same William Bligh who, as captain of the Bounty, had been set adrift by his mutinous crew in 1789.

100 For detail see Finn, above n 41, at 60–2.

101 Ibid, at 64–8.

102 For detail, see ibid, p 65 n 52.

103 E Campbell, 'Women and public functions' (1961) 1 *AdelLR* 190; idem, 'The royal prerogative to create colonial courts: A study of the constitutional foundations of the judicial system in New South Wales 1788–1823' (1964) 4 *SydLRev* 343; idem, 'Colonial legislation and the laws of England' (1966) 2 *UTasLR* 148. A book on the judiciary co-authored by Campbell is not primarily historical, but it draws on important historical sources: E Campbell and H P Lee, *The Australian judiciary*, Cambridge University Press, Melbourne, 2001.

104 D Pike, 'Introduction of the Real Property Act in South Australia' (1960) 1 *AdelLR* 169. Douglas Pike was one of Australia's most prominent historians at the time. The article is still recognised as one of the best on the subject. W N Harrison, 'The transformation of Torrens's system into the Torrens System' (1962) 4 *UQLJ* 125.

105 W J V Windeyer, 'A birthright and inheritance: The establishment of the rule of law in Australia' (1962) 1 *UTasLR* 635.

106 For a bibliography of Castles' works, see (2003) 24 *AdelLR* 154.

107 Athaide, above n 86, at 109.

108 Ibid, at 120–2.

109 Castles, *The reception*, above n 52, pp 1–31.

110 A C Castles, *An introduction to Australian legal history*, LawBook Co, Sydney, 1971.

1979, by a source book[111] intended to provide ready access to important documents. The source book opens with documents about transportation and the convict system and the penultimate chapter deals with the treatment of Aborigines. The final chapter covers the reception of English law. Teachers of the subject were thus given much colourful material upon which to construct interesting courses.

The decisive turning point came in 1982 with Castles' first comprehensive account of the development of the legal systems in the Australian colonies during the first one hundred or so years after British settlement.[112] There is a brief account of bushrangers, who were often escaped convicts, living by 'plunder and robbery'.[113] Castles explains the role played by the earliest practising lawyers in the colony, George Crossley ('father of the legal profession'),[114] Edward Eager and George Chartres who were all convicts.[115] There are accounts of the harsh methods used to enforce discipline among the convict population,[116] and of the sometimes brutal places of secondary punishment to which convicts were sent if they committed further offences in the colony.[117] We are introduced to the earliest judges in New South Wales, including Richard Atkins,[118] an alcoholic, and Jeffrey Hart Bent, a man of 'self-righteous pomposity'[119] who refused to disembark until Governor Macquarie had greeted his arrival in Port Jackson with a salute of thirteen guns and then paralysed the Supreme Court for years by refusing to sit with the two lay assessors and to agree to the admission of convict lawyers to practice.[120]

However colourful, such anecdotes are by no means the essence of Castles' Legal History. The book is a systematic analysis of:

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111 J M Bennett and A C Castles, *A source book of Australian legal history. Source materials from the eighteenth to the twentieth centuries*, LawBook Co, Sydney, 1979.

112 Castles, above n 53, pp i–xx, 1–553.

113 Ibid, pp 79–80.

114 Ibid, p 107.

115 Ibid, Other famous convicts were the architect Francis Greenway (St James Church in Sydney) and the portrait painter Joseph Blackler. George Hughes, George Howe and Robert Walsh were printers who operated the first government printing presses — A C Castles, *Annotated bibliography of printed materials on Australian law 1788–1900*, Lawbook Co, Sydney, 1994, p xiii.

116 Castles, above n 53, at 43, 64–5, 106, 160–3, 219–20, 257. As an early eyewitness relates: '. . . there issued out of the prisoners' barracks a party consisting of four men, who bore on their shoulders . . . a miserable convict, writhing in an agony of pain — his voice piercing the air with terrific screams. Astonished at the sight, I inquired what this meant, and was told it was only a prisoner who had been flogged, and who was on his way to the hospital!' — quoted from the reminiscences of Sir Roger Therry, in Bennett and Castles, *Source book*, above n 111, p 9; see also R Hughes, *The fatal shore*, Alfred A Knopf Inc, New York, 1987. For a detailed account of the punishments used to enforce convict discipline, see D Neal, *The rule of law in a penal colony. Law and power in early New South Wales*, Cambridge University Press, Sydney, 1991. See also idem, 'Free society, penal colony, slave society, prison?' (1987) *Historical Studies* 497.

117 The worst of these were Norfolk Island and Macquarie Harbour in Van Diemen's Land; for others, see index entries under 'punishments': Castles, above n 53, at 552.

118 See also the analysis of Atkins' literary productions by M Meehan, 'The fallen world of Judge Advocate Atkins' in S Corcoran (Ed), *Law and history in Australia*, vol 5, Adelaide University Press, Adelaide, 1991, p 35.

119 Castles, above n 53, at 106.

120 For further detail, see Currey, *The brothers Bent*, above n 97.

- the creation of New South Wales,[121] and then of the other colonies;[122]
- the struggle for the introduction of jury trial and of wider forms of self-government;
- the 'laws and practices of Imperial Britain'[123] as applied to the Australian Continent, including the inherited British laws both enacted and unenacted (judge-made, common law);
- the creation of the superior and lower courts, the 'most important sources of authority in the colony';[124]
- the making of colonial laws, including the very significant reforming legislation which was later adopted by many jurisdictions around the world;[125]
- the Hearn Code of Victoria, an unsuccessful attempt to embody the whole of the law of that colony in a comprehensive code (Australia's contribution to nineteenth century codification);[126]
- the legal status of the Aboriginal population and the reality of Aboriginal disadvantage.[127]

Castles' apparent acceptance of some unpalatable principles as the historical foundation of the Australian legal system[128] has prompted Duncanson and Tomlins to comment that the book 'is written from a perspective which accepts uncritically a positivist jurisprudential specification of law'.[129] Like most lawyers, Castles knew that, short of the acknowledged processes of change or, indeed, revolution, the burden of allegiance to the existing law must be accepted and that neither sociological insight nor ideological stance nor religious creed bestows a dispensing power.

No apology is offered for having dealt with Castles' *magnum opus* in some

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121 From a virtual penitentiary at first, the colony gradually developed into an ordinary community. In 1820 there were 27,000 convicts and about 50,000 free settlers, including 17,000 former convicts: Castles, above n 53, at 32; for further population figures, including figures for Van Diemen's Land, see index entries under 'populations': Castles, above n 53, at 551. For an excellent account of the transformation of New South Wales from a penal colony to a free society during the first 50 years, see Neal, above n 116.

122 New South Wales (covering the Continent to the 135th degree of longitude), Western Australia (1829 — created by the settlement of the remaining part of the Continent), South Australia (1836 — the only convict-free colony), Victoria (1851), Tasmania (1856), and Queensland (1859) (the last four carved out of the territory of New South Wales). See also L A Whitfeld, *Founders of the law in Australia*, LexisNexis Butterworths, Sydney, 1971.

123 See also B H McPherson, *The reception of English law abroad*, Supreme Court of Queensland Library, Brisbane 2007.

124 Castles, above n 53, at 67. Courts of Criminal Jurisdiction in New South Wales and on Norfolk Island had been provided for by an Act of the Imperial Parliament; other courts were set up by orders of the Executive Government of Britain ('Letters Patent'). The various documents may be found in Bennett and Castles, *Source book*, above n 111, pp 18–22, 26–7, 31–38, 42–58.

125 The two most successful Australian legal exports are the Queensland Criminal Code of 1899 and the South Australian Real Property Act 1858 (Torrens System). For an account of the creation of the Torrens System, see Hague, above n 89, at 253–318, 779–96.

126 See also Bernard Schwartz, *The Code Napoleon and the common law world*, New York University Press, New York, 1956, p 274.

127 Castles, above n 53, at 515–42.

128 'Opinions like those of *Vattel*, interacting with the Laws of Empire, provided the foundations for the exercise of British colonial power in Australia.' — ibid, at 17.

129 I W Duncanson and C L Tomlins, 'Law, history, Australia: Three actors in search of a play' in Tomlins and Duncanson, above n 21, at 1, 11.

detail, for it marks a true turning point in the rehabilitation of Australian legal history as an academic discipline.[130]

Politics might have been a professional sideline for Castles, but his interest in the political numbers game was passionate.[131] In the mid-eighties he combined with his Adelaide colleague, Michael Harris, and published a thoroughly entertaining historical account of the law and politics of South Australia.[132]

One of Castles' concerns was to ensure that Australian source material was made accessible to researchers. He knew that the Source Book was only a beginning and he rendered an invaluable service to researchers by publishing his magnificent bibliography of printed legal materials.[133] This publication guides the reader to early newspapers, government gazettes, books, journals, pamphlets and other printed matter in which legally important documents such as statutes, regulations, government announcements, parliamentary materials and reports of court cases can be found. There is an explanatory introduction of some 18 pages and helpful annotations explaining the significance and value of the publications listed.

A project for the production of a similar guide to the vast amount of legally significant unpublished documentation, titled 'Australian Legal Records Inventory', was undertaken in cooperation with others. Not surprisingly, this huge project remained incomplete.[134]

In 2003, the year Castles died, his book on Sarawak was published.[135] His untiring energy and enormous productivity are evident in the publications which appeared posthumously. Australia's most famous bushranger, Ned Kelly, is mentioned only briefly in his Australian legal history,[136] but in 2005 Castles' daughter, Jennifer, arranged for the posthumous publication of her father's detailed analysis of the questionable legality of Kelly's conviction and execution.[137] Castles was fascinated by the legal history of Tasmania and a detailed account of the history of the law of that state was discovered by chance in the basement of the Tasmanian Law Society and published in 2007.[138] *Alex Castles' index to Van Diemen's Land case law, 1840–1857* was

130 Athaide, above n 86, at 107–26.

131 He is well-remembered in Adelaide as an astute election commentator.

132 A C Castles and M C Harris, *Lawmakers and wayward Whigs. Government and law in South Australia 1836–1986*, Wakefield Press, Adelaide, 1987.

133 Castles, *Annotated bibliography*, above n 115.

134 Four published parts of the project are listed in Castles' bibliography as follows: R Foster, with assistance of A C Castles and W R Prest, South Australian legal records, Adelaide, 1996; South Australian Police Historical Society, Adelaide, 1989; Supreme Court of South Australia, Adelaide, 1989; Legal records in public collections, 1989. For further detail concerning this project, see W R Prest 'Alex Castles: An Adelaide perspective' (2003) 7 *Australian Jnl of Legal History* 29 at 34.

135 A C Castles, 'The constitutional and legal history of Sarawak: Documents and commentaries', Vol I, *People's law-making and Brooke rule*, Kuching, Sarawak, 2003.

136 Castles, above n 53, at 338–9.

137 A C Castles, *Ned Kelly's last days: Setting the record straight on the death of an outlaw*, Allen & Unwin, Sydney, 2005.

138 A C Castles, *Lawless harvests or God save the judges: Van Diemen's Land 1803–55, a legal history*, Australian Scholarly Publishing, Melbourne, 2007.

published posthumously online with an explanatory note by the Macquarie team.[139]

Castles' influence in Adelaide was that of the great motivator. Younger colleagues and his legal history students began to work in the area. During the 1960s, 1970s and 1980s he supervised, or at least inspired, more than 50 legal history theses there.[140] In addition, many legal history theses were written in the Department of History[141] over a longer period (1963–1991). Castles had some input into many of these, too, for he cooperated closely with members of that department.[142] Lendrum's thesis[143] deserves special mention, for Castles arranged for its publication in the form of an article[144] and made use of its findings in his book.[145]

Together with his colleague Suzanne Corcoran and others he established the *Australian Journal of Legal History*, published under the auspices of the Adelaide Law Review Association.[146]

In 2003 Castles' position as the doyen of Australian legal history was celebrated in a special edition of the *Australian Journal of Legal History*.[147] Some of the contributions have already been mentioned. In 1999 the Law School at Flinders University, where Castles had become a professorial fellow after his retirement from the University of Adelaide, established a lecture series in his honour. Castles himself delivered the first of these lectures.[148] Sadly, in 2004 Castles' friend, Michael Kirby, a former Justice of the High Court, had to deliver the first of the Alex Castles Memorial Legal History Lectures, held in alternate years.[149] In 2008 Australia celebrated the sesquicentenary of the introduction of the Torrens Title system in South

139 See <http://www.law.mq.edu.au/scnsw/html/Castles'%20Van%20Diemen's%20Land%20Index.htm> (accessed 18 January 2010). The note reads as follows: 'Professor Alex Castles was fascinated by the law of Van Diemen's Land (later Tasmania). He prepared a very long index to the colony's case law which had been published in contemporary newspapers. The index was part of the preparation for his book *Lawless Harvests or God Save the Judges: Van Diemen's land 1803–55, a Legal History* (published posthumously in 2003 with the aid of Stefan Petrow). The index is published here by the permission of Alex's daughter, Margaret Castles.'

140 Legal history theses held by the University of Adelaide in (1995) 1 *Australian Jnl of Legal History* 137. Only T P Fry, *Freehold and leasehold tenancies of Queensland land*, University of Queensland Press, Brisbane, 1946, precedes Castles' arrival in Adelaide.

141 Ibid, at 140–4.

142 A J Short, *The legal foundations of South Australia*, unpublished thesis, 1967, written in the History Department, acknowledges 'the invaluable advice of Dr Castles'.

143 S D Lendrum, *Special legal problems relating to the Aborigines in South Australia in the first fifteen years after settlement*, S D Lendrum, Adelaide, 1976.

144 S D Lendrum, 'The Coorong massacre: Martial law and the Aborigines at first settlement' (1977) 6 *AdelLR* 26.

145 Castles, above n 53, at 525.

146 Corcoran's interest in legal history related mostly to corporation law: see S Corcoran 'Corporate law and the Australian constitution: A history of section 51(xx) of the Australian constitution' (1994) 15 *Jnl of Legal History* 131.

147 (2003) 7 (1) *Australian Jnl of Legal History*.

148 A C Castles, 'Working with our legal history: A revolution just beginning' (2003) 7 *Australian Jnl of Legal History* 5 (Speech originally delivered as the first 'Alex Castles Lecture on Legal History', Flinders University, School of Law, Adelaide, 12 August 1999).

149 Kirby, above n 78, at 1; see also H K Lücke, 'Obituary Alex Castles' (2003) 24 *AdelLR* 147.

Australia and Rosalind Croucher gave the latest of these lectures on that important subject.[150]

Much of Castles' work was focused on Australian legal history. If a sense of Australian nationalism was part of his motivation, it was nationalism in the best sense of the word. Those who knew him well, myself included, have acquitted him of any sense of chauvinism.[151] Given the opportunity, he extended his historical interests beyond Australia's borders.[152] Indeed, he also held strong cosmopolitan convictions, as shown by his active involvement in the affairs of the United Nations.[153] After all, Herbert Vere Evatt, a great Australian and fellow legal historian, had been one of the early Presidents of the General Assembly of the United Nations. Castles' single-minded preoccupation with Australian legal history was amply justified by the neglect from which the subject had suffered in the past.

2 John Bennett

Castles' co-author of the Source Book of 1979, John Bennett, is the pre-eminent and very productive author of Australian judicial biographies. Australia shares its enthusiasm for such works with England and the United States. Bennett, a solicitor and part-time lecturer, has published short biographies of a number of Australian Chief Justices, including the first, second and fourth Chief Justices of New South Wales,[154] the first three Chief Justices of Victoria,[155] the first two Chief Justices of Western Australia,[156] and the first Chief Justices of Queensland, South Australia and Tasmania respectively.[157] In his review of the books on Chief Justices Forbes, Dowling and Beckett,[158] Kercher explained that Bennett's plan was to publish 40 such biographies.[159] He vigorously defended the genre and Bennett's work in particular:

> In the Forbes biography, Bennett left out much of the case law because it had been examined by Currey, but not so with the other volumes. This is where these books shine. When all 40 volumes are published, we will have a new general history of nineteenth century case law in Australia. There are still thousands of cases to draw

150 R Croucher, 'Carthago delenda est! Sir Robert Richard Torrens and his attack on the evils of conveyancing and dependent land titles. — A reflection on the sesquicentenary of the introduction of his great law-reforming initiative', Alex Castles Memorial Legal History Lecture for Flinders University Law School, Adelaide, 2 August 2008. Also presented on 6 November 2008 as 'The Forbes Society Lecture 2008' in Sydney, at <http://www.alrc.gov.au/events/speeches/RC/2008/20082608.pdf> (accessed 20 November 2009).

151 Prest, *Alex Castles*, above n 134, p 33.

152 Castles, above n 135.

153 See A C Castles, *Australia and the United Nations*, Hawthorn, Vic, 1974. Concerning his other activities with United Nations affairs, see Prest, *Alex Castles*, above n 134, at 33.

154 Sir Francis Forbes, Sir James Dowling, Sir James Martin.

155 Sir William Beckett, Sir William Stawell, Sir George Higginbotham.

156 Sir Archibald Burt, Sir Henry Wrenfordsley. See also J M Bennett, *Portraits of the Chief Justices of New South Wales, 1824–1977*, John Ferguson, Sydney, 1977;

157 Sir James Cockle (Qld), Sir Charles Cooper (SA) and Sir John Pedder (Tas).

158 (2003) 7 *Australian Jnl of Legal History* 287.

159 For lists of earlier works in this genre, including T Blackshield, M Coper and G Williams (Eds), *The Oxford Companion to the High Court of Australia*, Oxford University Press, South Melbourne, 2001, see above n 5, at 288, and Finn, above n 41, at 57–9.

> out of the obscurity of nineteenth century newspapers and judges' notebooks, and these volumes will play a significant role in that important work.[160]

Bennett has also given a good deal of attention to institutional histories[161] and there are law review articles with broader themes.[162]

3 Bruce Kercher

In Castles' view, uniquely Australian circumstances such as convict transportation, long distances between population centres, a small population, the semi-arid nature of much of the country and the gold rushes made application of much of the inherited English law impossible. The reception principle excluded those parts of English law which, to paraphrase the Act of 1824, 'could not be applied'.[163] Although this rule of exclusion did not in terms allow for the making of new law, innovation was nevertheless called for. Castles' examples were special laws for landholding, for the use of water and for industrial relations.[164]

Bruce Kercher's account of the development of Australian law from its earliest beginnings to the present[165] commences with a determined search for further examples, including particularly those introduced not by colonial legislation but through the growth of custom or by means of judicial lawmaking. As he said in his 1995 article, published in the first issue of the *Australian Journal of Legal History*:

> There appears to be something wrong with the official story of Australian law . . . . A new generation of legal historians have rejected the old certainties of legal positivism . . . Australian law oscillated between strict adherence to English practices and the recognition of local variations. In place of the certainty derived from common law theory, historians have recognised a rich pluralism within the British empire.[166]

Kercher is no less an Australian nationalist than Castles was and he is just as critical of 'strict adherence to English practices'.[167] He ridicules as grotesque the Eurocentric attitudes of the great Sir Owen Dixon, who, it appears, used

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160 (2003) 7 *Australian Jnl of Legal History* 287 at 289.

161 J M Bennett (Ed), *A history of the New South Wales bar*, LawBook Co, Sydney, 1969; idem, *A history of the Supreme Court of NSW*, LawBook Co, Sydney, 1974; idem, *Keystone of the Federal Arch: A historical memoir of the High Court of Australia to 1980*, Australian Government Publishing Service, Canberra, 1980; idem, *A history of solicitors in NSW*, LawBook Co, Sydney, 1984; idem, *Colonial law lords: The judiciary and the beginning of responsible government in New South Wales*, Federation Press, Leichhardt, NSW, 2006.

162 J M Bennett, 'The establishment of jury trial in New South Wales' (1961) 3 *SydLRev* 463; idem, 'Historical trends in Australian law reform' (1970) 9 *UWALR* 211. See also J M Bennett and J R Forbes, 'Tradition and experiment: Some Australian legal attitudes of the 19th century' (1971) 7 *UQLJ* 172, an article which Jeremy Finn has called 'one of the most significant pieces of legal historical writing of the 1970s': Finn, above n 41, p 66 n 57.

163 See above n 52. In the oft-quoted words of William Blackstone, 'only so much of English law, as is applicable to their own situation and condition of any infant colony' — quoted in Castles, above n 53, at 11.

164 Ibid, at 18.

165 Kercher, above n 83.

166 Kercher, above n 79, at 1, 2.

167 Castles mentions the expensive use of laborious parchment documents in the civil courts of the colony during the period 1817–1823: Castles, above n 53, at 111.

to ride through the Australian Alps reciting Homer in ancient Greek.[168] In his major work, Kercher noted with apparent approval the move away from the emphasis on biographies and institutional histories, and towards studies with greater emphasis upon the relationship between Australian society and law.[169] The basic criterion Kercher applies in evaluating early Australian law is: how well suited were our legal arrangements to Australian society at any stage of our history? One of his consistent answers is: whenever we followed English law slavishly, our arrangements became dysfunctional. His account of much legal detail is arranged under three main headings: 'Frontier law' with subheadings such as 'Law in the bush' and 'Amateur law on the penal islands'; 'Imperial orthodoxy, 1820–1900' with subheadings such as 'Innovation smothered' 'and 'repugnant legislation';[170] and 'Federation: deference and independence' with only two subheadings: 'Creeping towards legal independence' and 'The rebirth of Australian legal doctrine'. The gist of Kercher's book may be summed up in the words of Michael Kirby:

> . . . Australia began creatively enough, became an abject copier of the English and is now becoming more creative again.[171]

Kercher has produced a rich array of writing with the emphasis upon Australian studies.[172] However, Kercher's impact went far beyond his published books and articles. Like Castles, he had a deep concern for the state of the historical documentation in Australia and especially for the great paucity of law reporting in colonial Australia. In a common law country, reported judgments are the lifeblood of the legal system. In an article published in 2000,[173] Kercher explained that early case reports were to be found mainly in contemporary newspapers, that these often extensive reports were not always accurate and that they had to be checked against notebooks left by judges. Inspired by the Selden Society publications, and no doubt by the example set by Castles, a Macquarie team led by Kercher established the

168 Kercher, above n 79, at 8. At dinners Sir Owen used to write notes in Greek to law professors and amused himself when they were unable to answer (related by Norval Morris, Dean of the Adelaide Law School 1958–1962). The article distinguishes five phases of the evolution of Australian law: Frontier law, repugnancy, responsible government, federation and autonomy.

169 Kercher, above n 83, p x.

170 According to this doctrine, colonial legislation was considered invalid if it was repugnant to the law of England. This rubbery phrase caused enormous problems in the nineteenth century for its application oscillated between strict and liberal — see Castles and Harris, above n 132, pp 126–7.

171 Quoted in the review of the Kercher's book by B Livermore in (1998) 4 *Australian Jnl of Legal History* 113 at 114.

172 B Kercher, *Australian debt recovery law*, Federation Press, Annandale, NSW, 1990; idem, *Debt, seduction and other disasters: The birth of civil law in convict New South Wales*, Federation Press, Leichhardt, NSW, 1996; M Tilbury, M Noone and B Kercher, *Remedies: Commentary and materials*, LawBook Co, Sydney, 2004; B Kercher, *Outsiders: Tales from the Supreme Court of NSW, 1824–1836*, Australian Scholarly Publishing, North Melbourne, 2006. See also idem, 'Perish or prosper: The law and convict transportation in the British Empire, 1700–1850' (2003) 21 *Law and History Review* 527, and the other articles by Kercher referred to in this report.

173 B Kercher, 'Recovering and reporting Australia's early colonial case law: The Macquarie project'(2000) 18 *Law and History Review* 659 at 660–2.

Macquarie Project.[174] Their work has resulted in critical editions of early case reports of the colonial period in printed form or online. Together with T D Castle, Kercher has produced an edited version of the notebooks of Justice Dowling.[175] There is a full-text publication titled 'Decisions of the Superior Courts of New South Wales, 1788–1899'.[176] Acting in co-operation with Stefan Petrow of the Tasmania University School of History and Classics, the Macquarie team has also produced a set of records entitled 'Decisions of the nineteenth century Tasmanian Superior Courts'.[177] Case notes of numerous decisions of the Supreme Court of New South Wales from 1824–1842 have appeared under Kercher's editorship.[178]

C Institutions

1 The Francis Forbes Society for Australian Legal History

The foundation of this Society was announced at a dinner held in Sydney on 31 May 2002 to celebrate the centenary of the New South Wales Bar Association. The Society's name celebrates the first Chief Justice of New South Wales, Sir Francis Forbes (1823–1837). According to the constitution of the new Society, its aims are to:

> encourage the study and advance the knowledge of the history of Australian law; publish and promote, for the benefit of the public, books, journals, periodicals and other literary publications; arrange and promote, for the benefit of the public, continuing education; and promote the compilation of authentic records relating to Australian and Indigenous law.

Bruce Kercher became its first President. Other inaugural members of the Council were Keith Mason, then a Justice of the NSW Court of Appeal,[179] as Senior Vice-President, three barristers, two senior government lawyers, one solicitor and the CEO of the Law Society of New South Wales. Any misgivings Kercher might have felt about the closeness of the Society to the legal profession were overcome by the 'common passion for the study of legal history' uniting all the Society's members.[180] The commitment of the legal profession of New South Wales to the cause was demonstrated by the setting up of the 'Francis Forbes Fund' (donations tax exempt) and by attracting large grants from the NSW Public Purpose Fund,[181] but even more emphatically by

174 Ibid, at 659–65.

175 T D Castle and B Kercher (Eds), *Dowling's select cases 1828 to 1844: Decisions of the Supreme Court of New South Wales*, Federation Press, Sydney, 2005.

176 <http://www.worldlii.org/catalog/56056.html> (accessed 24 November 2009).

177 <http://www.law.mq.edu.au/sctas/> (accessed 24 November 2009).

178 <http://www.sl.nsw.gov.au/research_guides/convicts/instructions/superior_court_name.html> (accessed 24 November 2009).

179 See K Mason, *Constancy and change. Moral and religious values in the Australian legal system*, Federation Press, Sydney, 1990.

180 Comments at awards ceremony, above n 69.

181 This public fund receives the interest payments from solicitors' trust funds and may make discretionary grants to promote 'legal education, law reform and access to legal information'.

the energy and success in the promotion of its aims. A website[182] and a newsletter titled the 'Forbes Flyer' contain a great deal of information about the Society's activities.[183]

a The Forbes lectures

In 2002 the inaugural lecture was given by I M Barker QC on the history of jury trial in NSW, a subject of great historical importance, for in a sense it represented a first step on the road to self-government.[184] The lectures are held annually and later publication of the work presented, usually in book form, is the rule.[185] The substantial participation in this programme of lectures and publications by members of the NSW bar is an impressive demonstration of the energy and intellectual firepower of that organisation.

b Research projects

In late 2008 the Society decided to support the following four research projects: Lisa Ford and Brent Salter: *Select cases 1828–1863* (also supported by three universities); Tim Castle: *Australian capital punishment data base*; Paula Jane Byrne: *Ellis Bent (Judge-Advocate from 1809 until 1815*);[186] Tony Cunneen, *The NSW legal profession and World War I*. Grants totalling nearly $90,000 were made and will prove a good investment, for the recipients are all experienced researchers with substantial publications in the field of legal or general history to their credit.[187]

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182 <http://www.forbessociety.org.au/> (accessed 24 November 2009).

183 <http://www.forbessociety.org.au/Publications/FFlyer/documents/winter09.pdf> (accessed 13 December 2009).

184 I Barker, *Sorely tried. Democracy and trial by jury in NSW*, Dreamweaver Publishing, Sydney, 2003 (includes bibliographical references). The book is available online <http://www.forbessociety.org.au/documents/trial_jury.pdf?> (accessed 12 December 2009).

185 P Powell, *The origins and development of the protective jurisdiction of the Supreme Court of New South Wales*, Forbes Society, Sydney 2003 (2003 lecture); T D Castle and B Kercher, *The Dowling legacy: Foundations of an Australian legal culture 1828–1844*, Federation Press, Sydney, 2005 (2004 lecture); B H McPherson, above n 123 (2005 lecture); R Annable, *Setting for justice: Building for the Supreme Court of New South Wales*, UNSW Press, Sydney, 2007 (2006 lecture); A Tink, *William Charles Wentworth: Australia's greatest native son*, Angus & Robertson, Sydney, 2009 (2007 lecture). The 2008 lecture by Professor Rosalind Croucher is available online <http://www.alrc.gov.au/events/speeches/RC/2008/20081106.pdf> (accessed 10 December 2009). For 2009 lecture by Associate Professor Mark Lunney, see <http://www.forbessociety.org.au/Publications/FFlyer/documents/winter09.pdf> (accessed 10 December 2009).

186 The Judge-Advocates had judicial and also a number of non-judicial functions: see Currey, *The Brothers Bent*, above n 97; see also the entry in the *Australian Dictionary of Biography*, <http://adbonline.anu.edu.au/biogs/A010086b.htm> (accessed 11 December 2009).

187 L Ford, *Settler sovereignty: Jurisdiction and indigenous people in America and Australia, 1788–1836* (publication by Harvard University Press expected in 2010) (Lisa Ford is a member of staff of the School of History and Philosophy of the University of New South Wales); L Ford and B Salter, 'From pluralism to territorial sovereignty: The 1816 Trial of Mow-watty in the Superior Court of New South Wales' (2008) 7.1 *Indigenous LJ* (Toronto) 67; T Castle, 'The practical administration of justice: The adaptation of English law to colonial customs and circumstances as reflected in Sir James Dowling's "Select Cases" of the Supreme Court of New South Wales, 1828–1844' (2004) 5 *Jnl of Australian Colonial History* 47 (see also other publications already mentioned); P J Byrne, *Criminal law and colonial subject*, Cambridge University Press, Melbourne, 1993; A Cunneen, *Beecroft and Cheltenham in WW I*, Hornsby Shire Library and Kingsclear Books, Berowra Heights, NSW, 2006 (Tony Cunneen is the Senior Studies Coordinator at St Pius X College).

c Publications

I Barker's book on jury trial was the first published by the Society. Two books on Justice Dowling by Tim Castle and Bruce Kercher and a book by John Bennett followed.[188] Publication by commercial publishers is preferred and support is sought from other sources. For example, the work titled 'Dowling's select cases, 1828 to 1844' was also supported financially by the Council for Law Reporting of New South Wales.

d The Australian Legal History School Essay Competition

The initiative was launched in 2007 by eight organisations with either a commercial or non-commercial interest in promoting the study of Australian legal history including The Australian, a Murdoch newspaper with a national, as distinct from regional, focus. The 2009 competition has as its theme the meaning and significance of land ownership and invites school students to write about the story of Aboriginal land rights, the Torrens system, or the question whether Australia should adopt a republican form of government. The Society takes this exercise very seriously, for it has provided four 'background research papers' to stimulate interest and provide a basic store of facts and ideas to participants. The winner not only receives a prize, he or she also may have the essay published if it is of sufficient merit.[189]

2 The Supreme Court of Queensland Library; the Queensland Supreme Court History Program

During the last 3 decades the Supreme Court of Queensland Library, guided by the Library Committee,[190] has taken many initiatives to create and cultivate a sense of legal tradition and to promote the study of legal history in Queensland. In March 2000 the Library, advised by the Librarian, Aladin Rahemtula,[191] and Michael White QC,[192] established the Supreme Court History Program which enjoys considerable support from judicial and legal circles. It is intended 'to preserve Queensland's legal heritage and ensure its accessibility to the legal and the wider community'.[193] White has been its Convenor from its inception. In 2002 a Churchill Fellowship enabled Rahemtula to study legal history programs in the United States, the United Kingdom and Canada. Although the legal history of Queensland is the focus of the History Program, broader themes are not excluded.

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188 Castle and Kercher, above n 185; Castle and Kercher (Eds), above n 175; J M Bennett (Ed), *Callaghan's diary, the 1840s Sydney diary of Thomas Callaghan, B.A. of the King's Inns, Dublin, barrister-at-law*, Federation Press, Sydney, 2005.

189 J Triggs, 'Authority, democracy and the rule of law' (2008) 30 *Aust Bar Rev* 221 (Triggs was the winner of the 2007 competition).

190 Annual reports may be consulted under <http://www.sclqld.org.au/about/reports.php> (accessed 20 November 2010).

191 He first joined the staff of the Library in 1983 and was Librarian in 1987. In 2003 he was awarded the Queensland Centenary Medal for having served the Library with distinction. He is also a member of the Library Board of Queensland and of the National Archives of Australia Advisory Council.

192 Convenor of the History Program, Adjunct Professor and Executive Director of the Marine and Shipping Law Unit in the University of Queensland.

193 M White, A Rahemtula and N Petzl, 'Recording and preserving legal history' (2002) 23 *Aust Bar Rev* 75.

Since 2005, the History Program has been publishing Yearbooks.[194] These are substantial publications with scholarly articles,[195] tributes (obituaries) to former judges and other legal personalities, book reviews (some dealing with books on legal history),[196] reviews of recent decisions of Queensland state courts and of state legislation, and legal personalia covering Queensland courts, law officers, professional associations, Queensland law schools and, last but not least, the Supreme Court Library Committee and its sub-committees.

The Library also publishes a Review of Books, the last issue of September 2010 being the 48th in the series. Book reviews, often written by Queensland judges and other prominent lawyers, cover topics from philosophy and jurisprudence to history, politics, religion, language, music, business management and other subjects of general interest. There are also articles on legal history and, occasionally, substantial features concerning the impact made by 'master minds' like Edward Gibbon (47th Issue) or Montesquieu (48th Issue).

Since 1983 the Library has been collecting legal memorabilia. An oral history program has been recording recollections of 'the elders of Queensland's bench and legal profession'.[197] In 2000 the Rare Books Room was opened[198] and in 2001 a replica of the Smoking Room of the Queensland Government Steam Yacht Lucinda was constructed within the Supreme Court Building. On that yacht the then Queensland Premier, Sir Samuel Walker Griffith, and other leading personalities of the time finalised the draft bill which later became the Australian Constitution.[199] A Queensland Legal Heritage Museum, for which a substantial endowment has been received, will be part of the new courts complex being constructed in Brisbane.

The Library acts as a publishing house.[200] Publications often grow out of exhibitions, seminars or lectures.

a Exhibitions

An exhibition concerning human rights in the twenty-first century was displayed in the Rare Books Precinct of the Library from October 2001 to

194 M White and A Rahemtula (Eds), *Supreme Court history program yearbook*, Supreme Court of Queensland Library, Brisbane, 2005–2009.

195 Some of these had been sponsored by the Library or the Queensland Chapter of the Selden Society. An example is K W Ryan, 'Crises in parliamentary government', in *Yearbook for 2009* (delivered as a lecture in the Supreme Court in October 2000).

196 Random examples from the *2009 Yearbook* are W Prest (Ed), 'Blackstone and his commentaries, biography, law, history', Hart Publishing, Oxford, 2009, reviewed by Justice Patrick Keane, Chief Justice of the Federal Court of Australia; J C Bannon, 'Supreme Federalist: The political life of Sir John Downer', Wakefield Press, Adelaide, 2009, reviewed by Justice Margaret White.

197 'Editorial', *Yearbook for 2009*, p x. See, eg, A Rahemtula, *Bill Cuthbert: A Tribute*, Brisbane, 2002. This booklet commemorates the life of William Joseph Cuthbert, a member of the Queensland Bar.

198 A Rahemtula, *Rare Books Room*, Brisbane, 2000 (a booklet).

199 A Rahemtula (Ed), *QGSY Lucinda Smoking Room*, Brisbane, 2001, a booklet which includes Professor Bolton's oration and a brief history of the QGSY Lucinda.

200 Unless stated otherwise, the titles mentioned in this segment were published by the Library.

March 2002.[201] In 2002 the library arranged an exhibition concerning the Queensland Criminal Code of 1899 (often called the 'Griffith Code') as part of the XVIth International Congress of Comparative Law which was held in Brisbane under the auspices of the TC Beirne School of Law in The University of Queensland.[202] In 2006 an exhibition entitled 'Shakespeare and the Law', later also shown in Victoria by the Melbourne Law School, was arranged in conjunction with the VIIIth World Shakespeare Congress held in Brisbane in that year. Smaller exhibitions frequently accompany seminars and lectures.

b Seminars

The inaugural seminar entitled 'Sir Samuel Griffith: The Law and the Constitution' was held on 31 March 2001 to celebrate the centenary of the creation of the Australian Commonwealth. On 29 March 2003 a further seminar entitled 'Queensland judges on the High Court' was held in celebration of the centenary of the High Court of Australia. Speakers examined the contributions made by High Court Justices from Queensland, among them three who served as Chief Justices [Sir Samuel Griffith (1903–19), Sir Harry Gibbs (1981–87) and Sir Gerard Brennan (1995–98)]. Contributions have been published in book form.[203] In 2009 the History Program joined the Centre for Public, Comparative and International Law in the TC Beirne Law School of the University of Queensland in organising a conference as part of the celebrations of the sesquicentenary of the establishment of Queensland as a separate colony. The conference proceedings are available in book form.[204]

c Lectures

In 2000, at the opening of the Rare Books Room, the late Sir Harry Gibbs, Chief Justice of the High Court of Australia from 1981–1987, delivered the inaugural oration in the Banco Court of the Supreme Court.[205] This was followed by numerous further lectures.[206] Many of these have been published in the Yearbook.

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201 A Rahemtula, *Human Rights in the 21st Century exhibition*, Brisbane 2002 (A commemorative catalogue).

202 A Rahemtula (Ed), *Queensland Criminal Code: From Italy to Zanzibar*, Brisbane, 2002 (a booklet); see also Sir Harry Gibbs, *Queensland Criminal Code: From Italy to Zanzibar*, Address at opening of exhibition, Supreme Court Library, Brisbane, 19 July 2002, at <http://www.sclqld.org.au/schp/exhibitions/crimcode/20020719_Harry%20Gibbs.pdf> (accessed 29 December 2009).

The Code was drafted by the then Chief Justice of Queensland, Sir Samuel Griffith, using for certain parts the models of the Italian Criminal Code of 1889 and of the New York Penal Code of 1881. See also G Taylor, 'The Victorian Criminal Code' (2004) 23 *UQLJ* 170, and, concerning an unsuccessful attempt to introduce a criminal code in South Australia, idem, 'Dr Pennefather's Criminal Code for South Australia' (2002) 31 *Common Law World Review* 62.

203 M White and A Rahemtula (Eds), *Queensland judges on the High Court*, Supreme Court of Queensland Library, Brisbane, 2003. This was the Library's inaugural publication.

204 M White and A Rahemtula (Eds), *Queensland's Constitution, past, present and future*, Supreme Court of Queensland Library, Brisbane, 2010.

205 The oration is available under <http://archive.sclqld.org.au/lectures/rare_books/speech.pdf> (accessed 22 November 2010).

206 A list of lectures and seminars may be consulted under <http://www.sclqld.org.au/schp/lectures.php> (accessed 27 November 2010).

In July 2007 Bruce McPherson delivered the inaugural McPherson Oration on Legal History ('Queensland's only naval prize case'), an annual event instituted by the Library Committee.[207] In March 2008 J J Spigelman, Chief Justice of New South Wales, delivered three lectures on statutory interpretation and human rights.[208] In 2009 Linda Mulcahy spoke on 'Fortresses, cathedrals, and monuments to law: An account of the architecture of the English law court over time'.[209]

d Publications

A list of titles published by the Library is accessible in the internet.[210] There are books on subjects of mainly regional interest such as the history of the North Queensland Law Association,[211] the District Court of Queensland[212] and protection of civil liberties in Queensland.[213] Bruce McPherson, a former Justice of the Supreme Court, has played a prominent role in promoting and supporting the Library's activities. His book on the history of the Supreme Court preceded the establishment of the History Program.[214] In 2007 his work on the introduction of English law and of fundamental aspects of the English system of government in all parts of the British colonial Empire was published.[215] In recognition of his outstanding contribution a Festschrift has been published.[216] Like W J V Windeyer before him, Bruce McPherson is a Vice-President of the Selden Society (London).[217]

e Legal History Studentships

The History Program proposes to offer each year a number of selected students the opportunity to conduct research on an appointed topic in the Library's archives in conjunction with their university legal history studies under a studentship which will last from November until February. This year the studentship projects will have a regional focus. Research which is sufficiently meritorious may be published in the Yearbook.

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207 See the Library Committee report for 2007/8, at <http://archive.sclqld.org.au/annual-reports/ar2007-08.pdf> (accessed 27 November 2010).

208 Subsequently published by the University of Queensland Press: J J Spigelman, *Statutory Interpretation and Human Rights*, Brisbane, 2008.

209 Linda Mulcahy was then Professor of Law and Society at the School of Law, Birkbeck College, University of London. She has since joined the staff of the London School of Economics.

210 See <http://www.sclqld.org.au/publications/catalogue.php> (accessed 26 November 2010).

211 G Dean, *Law North: A history of the North Queensland Law Association*, Supreme Court of Queensland Library, Brisbane, 2009.

212 D Beanland, *A Court apart: The history of the District Court of Queensland*, Supreme Court of Queensland Library, Brisbane, 2009.

213 E Clarke, *Guardian of your rights*, Supreme Court of Queensland Library, Brisbane, 2008.

214 B H McPherson, *The Supreme Court of Queensland 1859–1960: History, Jurisdiction, Procedure*, LexisNexis Butterworths, Sydney, 1989. He also published *The Law of Company Liquidation* (first published in 1968, and now available also in a UK edition).

215 McPherson, above n 123.

216 A Rahemtula (Ed), *Justice according to law: A Festschrift for the Honourable Mr Justice BH McPherson CBE*, Supreme Court of Queensland Library, Brisbane, 2006.

217 See <http://www.law.harvard.edu/programs/selden_society/about.html> (accessed 27 November 2010).

3 The Queensland Chapter of the Selden Society

In 1887 Frederic William Maitland founded the Selden Society in England. It is devoted to the study of English legal history and has members throughout the common law world and beyond, many of them in Australia. Led by the Supreme Court Library, the Queensland members of the Selden Society have formed a chapter which has extended the scope of the activities of its English parent to include Australian legal history. Papers are read at the Annual General Meetings of the Chapter. A book with fifteen papers delivered during a 20 year period has been published.[218]

D The history of particular subjects

The Australian history of subjects such as torts or contract is much shorter than the history of their English counterparts, so that Australian researchers are not yet ready to write books such as Simpson's history of the law of contract.[219] At any rate, much of the early material in such areas of the law which has become readily accessible in recent years is likely to be included in books on the current law in those subjects. However, two areas of the law require some attention.

1 Australian constitutional history

The system of responsible government and many other aspects of Australia's constitutional arrangements are a part of the Imperial legacy which has been accepted without a sense of dissatisfaction. Most Australians would regard Alister Davidson's argument that the law is the silent oppressor of the people[220] as an oddity. The republican movement sees its cause as the final step on the road to independence from Britain. To make it acceptable, its protagonists have tended to point out that it would make little difference to the actual working of government.[221]

The very gradual moves towards legal independence have attracted a substantial literature. The early granting of self-government to the various colonies has been covered by the general histories already mentioned.[222] Currey's and Castles' works on the early history of New South Wales deserve particular mention. Concerning the growth of government in colonies other than New South Wales, there is Hague's lively and detailed account of South Australia's governmental arrangements during the first few years which he

218 M White and A Rahemtula (Eds), *Table talk of the Selden Society in Queensland*, Papers delivered at the Annual General Meetings of the Selden Society Brisbane, 1989–2004, Brisbane, 2004.

219 A W B Simpson, *A history of the common law of contract: The rise of the action of assumpsit*, Oxford University Press, New York, 1975.

220 A Davidson, *The invisible state: The formation of the Australian state 1788-1901*, Cambridge University Press, Melbourne, 1991.

221 A referendum which would have turned Australia into a republic was lost in 1999. See also M McKenna, *The captive republic: A history of republicanism in Australia 1788–1996*, Cambridge University Press, Melbourne, 1998.

222 See, in addition, the following much-quoted work: A C V Melbourne, *Early constitutional development in Australia*, Oxford University Press, London, 1963.

described as a 'reign of squabble' and an 'administrative pandemonium'.[223] Though one of the smaller colonies, South Australia was destined to become important by virtue of the Supreme Court's unduly strict application of the principle that colonial statutes must not be repugnant to the law of England. Eventually the British authorities relaxed that principle by Imperial legislation.[224] All colonies except Western Australia were granted responsible government in the 1850s while the latter colony received its grant in 1890.[225]

Fundamental constitutional change often comes about as a result of great upheavals such as revolutions or lost wars. Without there being any such emergency, colonial politicians who met as delegates at the conventions which were held in the 1890s drew up a compact for a new federal structure which was subsequently approved by the people of the various colonies at referendums. Thus Australian politicians succeeded, despite considerable obstacles, in bringing into being a new federal political entity. The new constitution had to be enacted by the Imperial Parliament,[226] but there had actually been little interference from the Imperial Government in the process of formulating its terms. As the historian John Hirst has said: 'The Union was accomplished peacefully without external threat or internal coercion.'[227]

General historians have taken an intense interest in the federation story. One of these, *J La Nauze*, has published one of the best accounts of the Australasian Conventions which drew up what was to become the Australian Constitution.[228] Manning Clark has also covered the story in some detail in his six-volume history of Australia.[229] H Irving has published an account from a feminist perspective.[230]

Quick and Garran's work,[231] first published at the time of federation, is a very influential commentary on the Australian Constitution and has covered

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223 Hague, above n 89, p 36. See also the following much-quoted account: D Pike, *Paradise of dissent: South Australia 1829–1857*, 2nd ed, Melbourne University Press, Melbourne, 1967.

224 The Colonial laws validity Act 1865 (28 & 29 Vict c 63); the long title of the Act is 'An Act to remove doubts as to the validity of colonial laws'.

225 See A C V Melbourne, 'The Establishment of responsible government' in E Scott (Ed), *Australia: A reissue of The Cambridge History of the British Empire*, vol. VII, part 1, Ch X, Cambridge University Press, Cambridge, 1933, 1988.

226 Commonwealth of Australia Constitution Act 1900 (UK) (63 & 64 Vict c 12); J M Williams, *The Australian constitution: A documentary history*, Melbourne University Press, Melbourne, 2005.

227 J B Hirst, *The Sentimental nation: The making of the Australian Commonwealth*, Oxford University Press, Melbourne, 2000, p 2, a book which has attracted very favourable reviews.

228 J La Nauze, *The making of the Australian Constitution*, Melbourne University Press, Melbourne, 1972. See also A Martin (Ed), *Essays in Australian Federation*, Melbourne University Press, Melbourne, 1969.

229 C M H Clark, *A history of Australia*, vol 5, Melbourne University Press, Melbourne, 1981; see particularly Ch 5 ('Federation or Revolution?') pp 129–76. See also W McMinn, *Nationalism and federalism in Australia*, Oxford University Press, Melbourne, 1994. For a detailed account of the federation story written by lawyers, see Castles and Harris, above n 132: see particularly Ch 7 (South Australia and Federation), pp 223–42. See also J Bannon, *The crucial colony: South Australia's role in reviving federation 1891 to 1897*, Federalism Research Centre, Canberra, 1994.

230 H Irving, *To constitute a nation: A cultural history of Australia's constitution*, Cambridge University Press, Melbourne, 1999. The author was a general historian before she became a legal academic.

231 J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus

the story in some detail. Alfred Deakin, one of Australia's early Prime Ministers, has left an engaging account of the creation of the constitution with interesting comments on his contemporaries.[232] L F Crisp has published a widely-read account of the main personalities who were involved in the federation debates (the 'founding fathers').[233] A number of books and articles deal with individual personalities who have helped shape Australia's constitutional arrangements.[234]

2 Aboriginal dispossession, native title

As Jeremy Finn has noted, one of the important works on this subject was published as early as 1942.[235] However, a real upsurge of interest occurred not before the 1970s.[236] During the last few decades much has been written about the treatment of indigenous Australians and Torres Strait islanders following white settlement. Of special interest has been the fate of the Tasmanian Aborigines, for they have not survived British colonisation.[237] What has been called the 'black armband view of history'[238] holds that there had been virtual warfare and that the native population had been treated with great cruelty.[239] The proponents of this view have been attacked as having been insufficiently

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& Robertson, Sydney, 1901; see particularly pp 79–261. See also R Garran, *Prosper the Commonwealth*, Angus & Robertson, Sydney, 1958, pp 87–151, a lighter account written by Sir Robert Garran many years later.

232 A Deakin, *The Federal Story: The inner history of the Federal cause 1880–1900*, Robertson & Mullens, Melbourne, Vic, 1963. Deakin is regarded as one of Australia's most important political figures and many of the papers he left have been published in book form: see the entry in the Australian Dictionary of Biography at <http://adbonline.anu.edu.au/biogs/A080275b.htm> (accessed 17 December 2009).

233 L F Crisp, *Federation fathers*, Melbourne University Press, Melbourne, 1990; D Headon and J M Williams (Eds), *Makers of miracles: The cast of the federation story*, Melbourne University Press, Melbourne, 2000.

234 J C Bannon, *Supreme federalist: The political life of Sir John Downer*, Wakefield Press, Kent Town, 2009; J Reynolds, *Edmund Barton*, Angus & Robertson, Melbourne, 1948, republished 1999; W G McMinn, *George Reid*, Melbourne University Press, Melbourne, 1989; M E Glass, *Charles Cameron Kingston: Federation father*, Melbourne University Press, Melbourne, 1997; G O'Collins, *Patrick McMahon Glynn, a founder of Australian federation*, Melbourne University Press, Melbourne, 1965; J M Williams, *In search of the federal citizen: Andrew Inglis Clark and the 14th amendment*, Federalism Research Centre, Canberra, 1995; idem, 'Race, citizenship and the formation of the Australian constitution — Andrew Inglis Clark and the "14th Amendment"' (1996) 42 *The Australian Jnl of Politics and History* 10.

235 Finn, above n 41, p 71. The work Finn referred to is P Hasluck, *Black Australians: A survey of native policy in Western Australia 1829–1897*, Melbourne University Press, Melbourne, 1942.

236 E Eggleston, *Fear, favour or affection: Aborigines and the criminal law in Victoria*, ANU Press, Canberra, 1976; A Ward, *A show of justice: Racial 'amalgamation' in nineteenth century New Zealand*, Auckland University Press, Auckland, 1974; Ward's book deals with the Maori population of New Zealand, but it was published in Australia and helped focus attention upon the problems faced by Australian Aborigines.

237 J Boyce, *Van Diemen's Land*, Black Inc, Melbourne, 2008. Robert Hughes has given a horrifying account of the fate of the Tasmanian Aborigines: R Hughes, *The fatal shore*, Knopf, New York, 1987, pp 414–24.

238 The phrase was coined by Geoffrey Blainey in his 1993 Sir John Latham Memorial Lecture, see G Blainey, 'Drawing up a balance sheet of our history' in (1993) *Quadrant* 37; see also G Blainey, *A shorter history of Australia*, William Heinemann, Port Melbourne, 1994.

239 H Reynolds (Ed), *Aborigines and settlers: The Australian experience, 1788–1939*, Macmillan, North Melbourne, 1972; idem, *The other side of the frontier: Aboriginal*

rigorous in their conclusions and in particular in their evaluation of early documents.[240] As one would expect, this criticism has evoked a vigorous refutation.[241] Associated with this debate is the literature around the so-called 'stolen generation', the government policy pursued for many decades of taking children of mixed parentage from their aboriginal families and educating them in government agencies and church missions.[242] The extensive literature which make up these Australian 'history wars' is beyond the scope of this report. However, one part of the wider story, land ownership, requires attention.

The Australian Continent was clearly not a territory ceded by some sovereign power. It followed under the then-existing common law principles that it was either a conquered or a settled territory. If the former, the laws prevailing there would have remained intact until changed by British legislation. As for the latter, the English common law had accepted the principle put forward by Emmerich de Vattel in his book, The Law of Nations:

> When a Nation takes possession of a country which belongs to no one, it is considered as acquiring *sovereignty* over it as well as *ownership* . . .[243]

The common law had also concluded that, to the extent that it could be sensibly applied to the circumstances of the new territory, enacted and unenacted English law was in force as soon as possession had been taken.[244] Did the great southern land belong to no one? Were the Aborigines who had been living here as hunter-gatherers for at least 40,000 years its owners? Again the common law had been content to accept Emmerich de Vattel's guidance:

> The whole earth is destined to furnish sustenance for its inhabitants . . . Those who . . . pursue [an] idle mode of life, occupy more land than they would have need of under a system of honest labor, . . . may not complain if other industrious nations, too confined at home, should come and occupy part of their lands.[245]

Under these principles the Continent was *terra nullius*, settled rather than conquered territory and it was owned by the Crown after settlement. Aboriginal land ownership and the capacity of Aborigines to dispose of it were

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resistance to the European invasion of Australia, Penguin, Melbourne, 1982; idem (comp), *Dispossession: Black Australia and white invaders*, Sydney, Allen & Unwin, 1989; idem, *Aboriginal sovereignty: Reflections on race, state and nation*, Allen & Unwin, Sydney, 1996; L Ryan 'Massacre in Tasmania? How Can We Know?' [2006] *ANZLH E-Journal*, paper 6.

240 K Windschuttle, *The fabrication of Aboriginal history, vol 1, Van Diemen's Land 1803–1847*, Macleay Press, Sydney, 2002.

241 R Manne (Ed), *Whitewash: On Keith Windschuttle's fabrication of Aboriginal history*, Black Inc, Melbourne, 2003.

242 In 1997 the Australian Human Rights Commission issued a report entitled 'Bringing them home: The Stolen Children Report 1997' which chastised the practice as a severe violation of human rights, at <http://www.hreoc.gov.au/social_justice/bth_report/index.html> (accessed 28 December 2009).

243 Bennett and Castles, *Source book*, above n 111, p 250.

244 The evolution of these principles is explained by Castles, above n 53, Ch 1. See also McPherson, above n 123.

245 Bennett and Castles, *Source book*, above n 111, p 252. Vattel might have based this on Genesis 1, 26, 28 and 3, 19, 23. Blackstone is also often quoted for the view that land which is 'desart (sic) and uncultivated' may be seized by right of occupancy: Blackstone, above n 38, vol I, pp 26–8.

tested in 1835 when John Batman purported to purchase, by two documents in the form of deeds, about 600,000 acres of land in what is now the state of Victoria. The deeds were later declared null and void by the colonial government: granting land to settlers was a Crown monopoly![246]

The situation in colonies other than New South Wales was no different in effect. When South Australia was established, concern for the welfare of the natives prompted the British Colonial Office to insist on the avoidance of native dispossession by concentrating settlers on a small district not already occupied by Aborigines. The settlers' view was more in tune with Vattel's theory. As one, Robert Thomas, an early newspaper proprietor, stated in a letter to the Secretary of State for the Colonies:

> the millions of fertile acres over which [the natives] tread, like the beasts of the earth, unconscious of their value and ignorant of their use, may be taken possession of by a colony of civilized people, without doing them the smallest injury. . . . I confess myself at a loss to comprehend how . . . [they] can be called its actual proprietors . . .[247]

A compromise was proposed: one fifth of any 80-acre block sold to a settler was to be transferred after some years to the Protector of Aborigines for use by the natives; because of the improved value, the returned part was to be sufficient compensation for the 64 acres taken. Needless to say, this well-meaning but illusory scheme was never carried into effect.[248] It shows how narrowly constrained was the thinking of nineteenth century British administrators by European agricultural practices.

In the twentieth century the struggle for aboriginal land rights began. It was supported by many white Australians. In 1971 the traditional owners of the Gove Peninsula in Arnhem Land brought legal action against Nabalco, asserting their right to their land in opposition to mining rights granted to Nabalco by the Federal Government.[249] Blackburn J of the Federal Court was sympathetic to their case, but felt unable to disturb what had for so long been accepted as law in Australia.

Henry Reynolds published a book which challenged the traditional understanding of the law[250] and he persuaded his friend Eddie Mabo to bring legal action asserting his right of ownership over the land traditionally occupied by his family on Murray Island, in the Torres Strait.[251] The revolutionary judgment of the High Court in *Mabo v Queensland (No 2)*[252] repudiated the doctrine of terra nullius as one aspect of 'a national legacy of unutterable shame', to use the terms chosen by Deane and Gaudron JJ. The

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246 Castles, above n 53, pp 29–30.

247 Hague, above n 89, p 751.

248 Ibid.

249 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141; [1972-73] ALR 65.

250 H Reynolds, *The law of the land*, Penguin, Melbourne, 1987. Prest has argued that Reynolds' interpretation of Blackstone's views is rather confused: W R Prest, 'Law for historians: William Blackstone on wives, colonies and slaves' (2007) 11 *Legal History* 105 at 109–11. See also P Matthew, R Hunter and H Charlesworth, 'Law and history in black and white' in R Hunter, R Ingleby and R Johnstone (Eds), *Thinking about law: Perspectives on the history, philosophy and sociology of law*, Allen & Unwin, Sydney, 1995, pp 3–37.

251 H Reynolds, *Why weren't we told?: A personal search for the truth about our history*, Allen & Unwin, Melbourne, 2000.

252 (1992) 175 CLR 1 at 104; 107 ALR 1; BC9202681. For a brief analysis of the abolition of

Australian common law now recognised native title as having survived British settlement of the Continent and thereby raised awkward issues. Did the native population have sovereignty over the country before the arrival of the Europeans and, if so, how can that be reconciled with the sovereignty asserted by the Crown?[253] Should compensation now be paid for land grants which have extinguished native title?[254]

Mabo was followed by the enactment of the Commonwealth Native Title Act 1993[255] under which aboriginal groups may claim title to land with which they are able to show an uninterrupted connection. The High Court had safeguarded the rights of the owners of land held in fee simple — any such grant was said to have extinguished any inconsistent native title. However, the decision left uncertain the important question whether native title had also been extinguished by the granting of pastoral leases. This question came before the High Court in 1986 in *Wik Peoples v Queensland*[256] and, in a split decision, the High Court decided that pastoral leases (about 40% of the Continent) were subject to native title.

There is a considerable literature on this subject which has become an important area of Australian law and legal practice.[257] The most valuable areas in Australia are those on which towns and cities have been built and most of that land is being held in the form of fee simple ownership. There is a continuing debate concerning the question whether compensation is due to the native population for the expropriation for these lands.[258]

IV Phase 3: Broadening the perspective

At Macquarie University Kercher, together with Andrew Buck (a historian), established the Centre for Comparative Law, History and Governance. Volume 6 of the *Australian Journal of Legal History* (renamed *Legal History* in 2005) was the last produced by the Adelaide Law Review Association in 2000. Thereafter, it was transferred to the Macquarie Centre which decided to broaden its editorial policy. Andrew Buck, the new editor, disavowed any

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the doctrine of terra nullius, see P Parkinson, *Tradition and change in Australian law*, 3rd ed, LawBook Co, Pyrmont, NSW, 2005, pp 112–18. For a defence of the decision against attacks upon it by historians, see H Reynolds 'The judges judged: *Mabo* and the disaffected historians' (2007) 11 *Legal History* 231. For an analysis of native title and the relationship between law and history, see A Reilly and A Genovese, 'Claiming the past: Historical understanding in Australian native title jurisprudence' in (2004) 3 *Indigenous LJ* 19. The Federal Parliament has produced a website which details the complex story of the events following the *Mabo* decision, at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=(Id:library/prspub/raf10);rec=0> (accessed 30 December 2009).

253 L Popic, 'Sovereignty in law: The justiciability of indigenous sovereignty in Australia, the United States and Canada' (2005) 4 *Indigenous LJ* 117 at 128–36.

254 S Berg, *Coming to terms: Aboriginal title in South Australia*, Wakefield Press, Adelaide, 2010.

255 Amended in 1998, 2007 and 2009.

256 (1996) 187 CLR 1; 141 ALR 129; BC9606282. See also J Fulcher, 'The *Wik* judgment, pastoral leases and Colonial Office policy and intention in NSW in the 1840s' (1998) 4 *Australian Jnl of Legal History* 33.

257 See, eg, M Perry and S Lloyd, *Australian Native Title Law*, LawBook Co, Sydney, 2003.

258 Berg, above n 254.

exclusive concentration on Australian writing.[259] This pronouncement and, indeed, the very name of the Macquarie Centre mark yet another turning point in Australian legal historiography. The nature of the change was made even clearer in 2006 by Andrew Buck's editorial statement which accompanied the name change to 'Legal History':

> I have . . . embarked on a strategy of internationalising its readership and content . . . legal history as an area of scholarship is a broad church, confined by neither geographical nor disciplinary borders.[260]

Without any lessening of interest in Australian legal history, there has been a broadening of perspective in three directions: (1) a qualified return to English legal history, (2) the addition of an interdisciplinary dimension and (3) a gradual strengthening of comparative studies on a Commonwealth and, indeed, a global basis.

A English legal history

Not having witnessed Ralph Hague's humiliation at such close quarters, general historians have had less reason to de-emphasise English legal history and to remain in a narrow Australian channel. To them, there were no fracture points separating the Australian story, the story of the Empire (now the Commonwealth) and, indeed, the story of the wider world. Wilfrid Prest, an Adelaide historian, cooperated closely with Alex Castles on matters of purely Australian concern but also moved seamlessly from his early studies of the Inns of Court to the production of a number of important recent studies concerning William Blackstone.[261] Another Adelaide historian, Peter Howell, had no difficulty reconciling his work concerning the broad functions of the Empire-wide Privy Council[262] with numerous studies confined to Australian and indeed South Australian developments.[263]

Buck's close associate, Bruce Kercher once insisted that 'the history of

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259 'While continuing to showcase the finest legal-historical scholarship from Australia, the journal encourages submissions from all jurisdictions . . . [It] is dedicated to publishing the high quality research of those scholars from different disciplinary backgrounds who are interested in the dynamic relationship between law and history', at <http://www.austlii.edu.au/au/journls/AJLH/> (accessed 15 December 2009).

260 (2006) 10 *Legal History* ii.

261 W R Prest, *Inns of court under Elizabeth I and the early Stuarts, 1590–1640*, Longman, London, 1972; idem (Ed), *Lawyers in early modern Europe and America*, Croom Helm, London, 1981; idem (Ed), *Professions in early modern England*, Longman, London, 1987; idem, *Rise of the barristers: A social history of the English bar, 1590–1640*, Oxford University Press, Oxford, 1986; idem (Ed), *Diary of Sir Richard Hutton 1614–1639*, with related texts, Selden Society, London, 1991; idem, *Wakefield companion to South Australian history*, Wakefield Press, Adelaide, 2001; idem and S R Anleu (Eds), *Litigation: Past and present*, UNSW Press, Sydney, 2004; idem (Ed), *Letters of Sir William Blackstone 1744–1780*, Selden Society, London, 2006; idem, *William Blackstone: Law and letters in the eighteenth century*, Oxford University Press, Oxford, 2008; idem (Ed), *Blackstone and his commentaries: Biography, law, history*, Oxford University Press, Oxford, 2009.

262 P A Howell, *The Judicial Committee of the Privy Council, 1833-1876, its origins, structure, and development*, Cambridge University Press, Cambridge, 1979.

263 To give just two examples: P A Howell, *South Australia and federation*, Wakefield Press, Adelaide, 2002; idem, *The office of Governor of South Australia*, South Australian Constitutional Advisory Council, Adelaide, 1995.

Australian law is not English',[264] but later, it appears, he supported a broader approach which, one assumes, did not exclude English legal history. Legal historians remembered that Australia's democratic and, on the whole, successful system of government was, to a large extent, part of the English legacy. As Michael Kirby said in his recent Bolton lecture:

> We needed to abandon a purely English legal history approach; but not to abandon the teaching of English legal history which is in part our own.[265]

Indeed, no account of an Australian legal development could be completely severed from its British origins. As Paul Finn has shown, an effective way of telling an Australian legal story is to commence with English law and then show how the Australian counterpart diverged from its model.[266] The great events of English legal history can indeed still excite public interest in Australia. In 2005 a much-publicised debate took place about the fairness and legality of the trial and execution of King Charles I. Geoffrey Robertson QC, an Australian human rights lawyer now working in Britain, defended the trial as fair in the circumstances of the time[267] and Justice Michael Kirby of the High Court, an avowed monarchist, attacked it as having been illegal.[268]

The times of Justice Windeyer and of Samuel Stoljar are not likely to return, yet the *Australian Journal of Legal History* is not reluctant to accept articles on English topics when they are offered.[269] Even Roman law has come back from oblivion.[270]

B Law and history

In most societies the law is so closely intertwined with their general development that many legal issues are of great interest to general historians. General historians deserve credit for having been a driving force in developing law-related interdisciplinary studies. In 1982 members of the Legal Studies Department (Faculty of Humanities and Social Sciences) of La Trobe University in Melbourne organised the first Australian Law and History Conference to which lawyers and historians were invited. Stanley Katz (Princeton) attended and affirmed the value of such interdisciplinary ventures,

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264 B Kercher 'Why the history of Australian law is not English' (2004) 7 *Flinders Jnl of Law Reform* 177. This was the title of Kercher's second Alex Castles lecture, delivered in 2000. The title recalls Maitland's most famous lecture, 'Why the history of English law is not written', see above n 68.

265 Kirby, above n 23, at 42.

266 P Finn, *Law and government in colonial Australia*, Oxford University Press, Melbourne, 1987.

267 G Robertson, *The tyrannicide brief: The story of the man who sent Charles I to the scaffold*, Vintage Books, London, 2005.

268 Justice Kirby's arguments are contained in his review of Robertson's book, at <http://www.theage.com.au/news/reviews/the-tyrannicide-brief/2005/08/18/1123958166549.html> (accessed 13 December 2009).

269 See, eg, D X Powell, review of A D Boyer, *Sir Edward Coke and the Elizabethan Age*, 2003 in (2004) 9 *Australian Jnl of Legal History* 139; M Milgate, 'Human rights and natural law: From Bracton to Blackstone' (2006) 10 *Legal History* 53.

270 P J Furlong, 'Justinian and mathematics: An analysis of the Digest's compilation plan' (2005) 9(1) *Australian Jnl of Legal History* 85; S Randazzo, 'The nature of partnership in Roman law' (2005) 9(1) *Australian Jnl of Legal History* 119.

stressing the great success of the American law and history movement.[271] Further such conferences followed, the last at the University of Adelaide in 1989. The five volumes of conference proceedings[272] contain many interesting papers.[273] Participants from New Zealand were included — in itself a sign of a broadening of interest. Contributions by historians outnumbered those by lawyers and even more so those by lawyers from law schools.

In 1993, an interdisciplinary group of scholars founded the Australian and New Zealand Law and History Society, acknowledging in its foundation statement that it had grown out of the La Trobe conferences.[274] The Society's areas of interest are not confined to Australia or New Zealand, although historical themes from these countries tend to dominate at the annual conferences. The 28th conference was held in 2009. Papers presented are often published in the *Australian and New Zealand Law and History E-Journal*.[275] The papers so published during 2005–2007 may be inspected on the E-Journal's website. May it suffice here to mention a few which show the Society's broad orientation. English themes are not avoided, particularly when there is some link with Australasia.[276]

In a brief review of the Law and History approach, Rosemary Hunter has placed the emphasis upon history rather than law and has postulated that one should commence with historical problems and explore their legal dimensions, that one should not just read legal texts as statements of law but rather 'read them as historical documents to be mined for what they say about contemporary society and for evidence of how characters performed on the legal stage'.[277] In her view, success with this approach had been achieved in two areas in particular: the dispossession of indigenous peoples[278] and gender relations in the law.[279]

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271 Tomlins and Duncanson, above n 21, p ii (Preface).

272 They are all titled 'Law and history in Australia' and were published under varying editorships as follows. vol 1, 1982: C L Tomlins and I W Duncanson; vol 2, 1986: D Kirkby and I W Duncanson; vol 3, 1987: D Kirkby; vol 4, 1987: D Kirkby; vol 5, 1991: S Corcoran.' Volumes 1–4 were published by the Legal Studies Department, La Trobe University, volume 5 was published by the Adelaide Law Review Association.

273 See, eg, W R Prest, 'Law and history: Present state and future prospects', vol 1, 29–36; A Buck, 'The politics of primogeniture: Metropolitan law in colonial New South Wales', vol 2 (not paginated); A McGrath, 'History and land rights', vol 3, 14–26; A Buck, 'Women, property and English law in colonial New South Wales', vol 4, 2–14; M Meehan, 'The fallen world of Judge Advocate Atkins', vol 5, 35–46. One might note that four of these articles, selected for their legal interest, were written by historians. M Meehan (see the last of the papers) was a member of the Flinders English Department.

274 See <http://www.anzlhsejournal.auckland.ac.nz> (accessed 21 November 2009).

275 International Standard Serial Number, ISSN 1177-3170.

276 E Rogers, 'The impact of the Australian Torrens system on the land transfer debate in the United Kingdom, 1858-1914' [2006] *ANZLH E-Journal,* paper 4; S Banks, 'Challengers chastised and duellists deterred: Kings Bench and criminal informations 1800–1820' [2007] *ANZLH E-Journal*, paper 4.

277 Hunter, above n 87, at 613.

278 See above III D 2.

279 Hunter referred in particular to two works written from a feminist perspective: D Kirkby (Ed), *Sex, power and justice: Historical perspectives on law in Australia*, Oxford University Press, Melbourne, 1995; and J Allen, *Sex and secrets*, Oxford University Press, Melbourne,

C Comparative legal history

There has been a growing recognition of the links between Australian legal history and the discipline of comparative law. Australian legal historians are now moving beyond the narrow confines of the England/Australia relationship to a Commonwealth-wide and, indeed, a global perspective. To quote Michael Kirby's Bolton lecture again:

> We now certainly need to introduce the teaching of basic information about world legal history.[280] ... The Commonwealth itself is a kind of comparative law workshop. We are linked within it by commonalities of language, legal tradition, professional connection, trade and culture. But all lawyers today need to be aware of the enormous growth of international and regional law, including the international law of human rights.[281]

Commonwealth comparative law is much facilitated by the fact that most of the systems involved share a common language. Such studies have been under way for some time.

1 Commonwealth studies

Identifying a third phase is neither meant to imply that pure Australian legal history has been abandoned, nor that work with a broader perspective was not produced much earlier. However, Australian legal historians have become more conscious of the need to work in a Commonwealth context, emphasising particularly the white settler societies of Australia, New Zealand and Canada. One quite early example of a book written in that spirit is Evatt's analysis of the reserve powers of the Crown, written in 1936.[282] It dealt with constitutional issues concerning not just Australia but the whole of the Commonwealth. In 1955 the then Chief Justice of Pakistan, Munir CJ, quoted extensively from it in a case involving the dissolution of the Pakistani Constitutional Assembly by the then Governor-General.[283] Its relevance to crucial constitutional issues was again demonstrated in Australia in 1975 when the dismissal of the Whitlam Labor Government by the then Governor-General caused a constitutional crisis.[284]

Relations between Australian and New Zealand academic institutions have been very close for many years. As the creation of the Australian and New

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1990: Hunter, above n 87, at 608 n 6. See also H Golder and D Kirkby, 'Mrs Mayne and her boxing kangaroo: A married woman tests her property rights in colonial New South Wales' (2003) 21 *Law and History Review* 587.

280 In his footnote (numbered 48), Kirby referred in support to to D A Funk 'World legal history needs you' (1987) 37 *Jnl of Legal Education* 598 and idem, 'Introducing world legal history: Why and how?' (1987) 18 *Toledo LRev* 723.

281 Kirby, above n 23, at 42.

282 H V Evatt, *The King and his dominion governors. A study of the reserve powers of the Crown in Great Britain and the dominions*, Oxford University Press, London, 1936. A second edition was published in 1967 and a reprint of it in 1990: *H V Evatt and Forsey on the reserve powers*, with a foreword by George Winterton, Legal Books, Sydney, 1990.

283 *Federation of Pakistan v Moulvi Tamizuddin Khan*, reported in I Jennings, *Constitutional problems in Pakistan,*, Cambridge University Press, Cambridge, 1957, pp 88–9. See also <http://www.understandingpakistan.com/index.php/the-coup-the-constitution-and-the-bureaucratic-musical-chairs-13-1955-58-athar-osama> (accessed 14 December 2009). The decision might well have marked the beginning of the collapse of democracy in that country.

284 For a brief discussion of the legal problems, see G Winterton, *Parliament, the executive and*

Zealand Law and History Society shows, the extension of historical studies to New Zealand was achieved effortlessly. Both the *Australian and New Zealand Law and History E-Journal* and the *Australian Journal of Legal History* contain contributions concerning New Zealand topics.[285]

In 1973 Graham Parker, an Australian legal historian who had moved to Canada, complained that, although Australia and Canada had similar origins, there was a lack of academic interchange between them.[286] His *cri de coeur* did not remain unanswered. By 1982 the law schools at Macquarie University and the Australian National University in Canberra had developed legal history courses with the Universities of British Columbia and Victoria (Canada).[287] It seemed like a very promising initiative, yet, by 2008, little was left of it.[288] The relevant journals have continued to publish Canadian material.[289]

2 Global legal history

Hein Kötz has aptly called comparative law and legal history 'twin disciplines'.[290] Stefan Vogenauer's comparative work on the interpretation of statutes has shown, if any demonstration had been needed, how profound were the influences which crossed borders separating common law and civil law countries.[291] Both in this respect and in relation to the wider common law world, Australia has its own stories to investigate. At this stage, little more than a few glimpses can be expected and two examples must suffice to show that such glimpses are indeed under way.

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the Governor-General, Melbourne University Press, Melbourne, 1983, Ch 7, particularly pp 125–7. For further literature, see <http://en.wikipedia.org/wiki/Gough_Whitlam> (accessed 15 December 2009).

285 R Tobin 'The defamation action in mid 19th century New Zealand' [2005] *ANZLH E-Journal* 49; M Dickson, 'He Waiata Tawhito na Turupa mo Kereti' [2005] *ANZLH E-Journal*159; Finn, above n 41, at 53–72; D V Williams, 'Gold, the case of mines (1568) and the Waitangi Tribunal' (2003) 7 *Australian Jnl of Legal History* 157; J Finn, 'Particularism versus uniformity: Factors shaping the development of Australasian intellectual property law in the nineteenth century' (2000) 6 *Australian Jnl of Legal History* 113.

286 G Parker, 'The politics of legal education' (1976) 4 *UTasLR* 276. See also idem (Ed), *Canadian legal history*, Carswell, Toronto, 1983, and idem, 'The Masochism of the Legal Historian' (1974) 24 *University of Toronto LJ* 279.

287 Prest, above n 17, at 267, 272.

288 According to Kirby's survey, the course was last taught as an elective in 2006 with only six enrolments: Kirby, above n 23, at 35–6. The ANU was still offering legal history as an elective, but whether it still has the same format is not disclosed: ibid.

289 T G W Telfer 'A Canadian 'world without bankruptcy': The failure of bankruptcy reform in Canada at the end of the nineteenth century' (2004) 8 *Australian Jnl of Legal History* 83; J McLaren, 'The judicial office . . . Bowing to no power but the supremacy of the law: Judges and the rule of law in colonial Australia and Canada, 1788–1840' (2003) 7 *Australian Jnl of Legal History* 177; J Phillips, 'Albion's Empire: Property, authority and the criminal law in eighteenth-century Canada' (2006) 10 *Legal History* 21.

290 Review of Reinhard Zimmermann's *Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford University Press, Oxford, 1996 in (1999) 54 *Rabels Zeitschrift* 770 at 773.

291 See H K Lücke, 'Statutory interpretation: New comparative dimensions' (2005) 54 *International and Comparative Law Quarterly* 1023.

a Taggard's bibliography

At the 2005 conference of the Australian and New Zealand Law and History Society, the late Michael Taggard of Auckland explained the plan behind his Bibliography of Common Law Festschriften,[292] inspired by what he called 'the encyclopaedic 10-volume work by Dr Helmuth Dau'.[293] Although the bulk of the work is concerned with current law, there is a historical category with 123 titles, including 12 English-language titles to be found in Dau's magnum opus.

b The origin of the Torrens system

In the Australian colonies plots of land soon became objects of commerce and speculation; the inherited English law lacked the kind of registration system which is to be found in the German Grundbuchordnung. To assure a purchaser that the vendor owned what he or she offered to sell, a lawyer had to be employed at great expense to conduct a 'title search', ie, to find and examine sometimes numerous private documents in order to establish that the title proffered by the vendor was linked to the original Crown grant by an unbroken chain of titles.

In South Australia the inadequacy of the land law became one of the great political issues of the 1850s and Robert Richard Torrens, a prominent colonist, was elected to the Parliament with a reformist platform. He succeeded in steering the Real Property Act 1858 (SA) through the Parliament[294] and the new system became South Australia's most successful legal article of export. Versions of it are to be found in all Australian states,[295] in New Zealand,[296] in 10 Canadian jurisdictions[297] and in many other countries.[298]

Torrens is credited, not just with having achieved political success against determined opposition, but also with having designed and drafted the legislation. The Torrens system closely resembles the system which was in force in Hamburg at the time and there has been a persistent view that the real author of the Act was one Ulrich Hübbe, a Hamburg lawyer who had migrated to South Australia in 1842 and who had supplied Torrens with information

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292 M Taggard, 'Turning the graveyard of legal scholarship into a garden: Common law Festschriften' [2005] *ANZLH E-Journal* 254. See also review by H K Lücke in (2006) 27 *AdelLR* 335.

293 Review by H K Lücke (1985) 10 *AdelLR* 267.

294 See Hague, above n 89, at 253–318, 779–96 for an excellent early account.

295 D Whalan, *The Torrens System in Australia*, LawBook Co, Sydney, 1982; G Taylor, 'The Torrens System's Migration to Victoria' (2007) 33(2) *MonULR* 323; idem, 'Last but not least: The Torrens System's path to Western Australia' (2009) 17(3) *APLJ* 279; S Petrow, 'Knocking down the house? The introduction of the Torrens system to Tasmania' (1992) 11 *UTasLR* 167.

296 D Whalan, 'The origins of the Torrens System and its introduction into New Zealand' in G Hinde (Ed), *The New Zealand Torrens System: Centennial Essays*, Butterworths, Wellington, 1971.

297 G Taylor, *The law of the land. The advent of the Torrens System in Canada*, University of Toronto Press, Toronto, 2008.

298 G Taylor mentions Papua New Guinea, Malaysia, Kenya, Uganda (Commonwealth countries), 'countries as diverse as Tunisia, Ethiopia, Madagascar and Iran' and reports that Russia and the Ukraine had considered adopting the system in the 1990s: ibid, p 4. There is also a brief account of the fate of the system in the United States: ibid, pp 4–5. Concerning the situation in Belize, see G Taylor, 'Torrens' contemporaneous Antipodean simulacrum' (2007) 49 *American Jnl of Legal History* 392.

about the Hamburg registration system.[299] Others have contradicted this view or have doubted some of the evidence on which the 'Hübbe camp' has relied.[300] All the participants in the recent controversy have placed some reliance upon not only English- and German-language documents available in Australia, but also upon German documentation only available in Germany.[301] They have shown that, which the help of electronic resources, Australian legal history research is beginning to develop a comparative dimension which transcends the boundaries of the common-law world.

There is intense interest in the laws of neighbouring countries such as Indonesia, Japan, the Republic of China and the Peoples Republic of China.[302] It may be confidently expected that this interest will, in due course, extend to the legal history of these systems, not least to their partly European origins.

V Conclusion

No more than half a century ago Australian legal historiography was a mere footnote to its English parent. Since then it has grown exponentially, so much so that a report such as this one cannot be entirely without gaps. Biographies and institutional histories have been a very popular genre in Australia. Some have been included in this report; many more could be listed.[303] Little has been said about the history of crime and policing, yet this has been a quite fertile field of scholarly research.[304] Since your reporter arrived in Australia in 1959, the number of law schools has grown from six to 33, so the history of legal education might have deserved further attention.[305] However, a perusal of the *Legal Education Review* (published since 1999) shows that it contains a great deal about ways of making teaching more effective and relatively little about the history of legal education. Although feminism has been an immensely potent force in Australia and elsewhere and has led to many changes in the law, the contributions to the *Australian Feminist LJ* (published

299 A K Esposito, *Die Entstehung des australischen Grundstücksregisterrechts (Torrenssystem) — eine Rezeption des Hamburger Partikularrechts?!*, Tenea-Verlag, Berlin, 2005; M Raff, *Private property and environmental responsibility: A comparative study of German real property law*, Kluwer Law International, The Hague, 2003, pp 25–60, idem, 'Torrens, Hübbe, stewardship and the globalisation of property law systems' (2010) 30 *AdelLR* 245.

300 G Taylor 'Is the Torrens system German?' (2008) 29 *Jnl of Legal History* 253; H K Lücke, 'Ulrich Hübbe and the Torrens System. Hübbe's German background, his life in Australia and his contribution to the creation of the Torrens system' (2010) 30 *AdelLR* 213.

301 G Taylor, 'Ulrich Hübbe's doctoral thesis — a note on the major work of an unusual figure in Australian legal history' (2009) 13(1) *Legal History* 121.

302 The Melbourne University Law School has established the Asian Law Centre with an academic staff of seven and a lively programme of research and teaching, at <http://alc.law.unimelb.edu.au/go/about-the-alc/index.cfm> (accessed 29 December 2009).

303 See particularly the segment on John Bennett, above nn 154–161. The following particularly well-known works in this genre are listed merely as examples: M Finnane, *J V Barry: A Life*, UNSW Press, Sydney, 2007; D Marr, *Barwick*, Federation Press, Sydney, 1992; McPherson, above n 214; A Dean, *A multitude of counsellors: A history of the bar of Victoria*, Cheshire, Melbourne, 1968.

304 See, eg, M Finnane, *Police and government*, Melbourne University Press, Melbourne, 1994, and D Philips and S Davies, *A nation of rogues? Crime law and punishment in colonial Australia*, Melbourne University Press, Melbourne, 1994. Mark Finnane has published widely on this and related subjects; see <http://www.ceps.edu.au/userfiles/file/Mark%20Finnane%20shortCV.pdf> (accessed 12 January 2010).

305 For institutional law school histories see above nn 3–8.

since 1993) and the large number of monographs published by the Journal[306] seem to have been mostly concerned with the here and now rather than with the analysis of the legal history of the subject.[307] The development of Australia's state systems of industrial relations and of the federal system makes for an immensely complex story,[308] yet there is no comprehensive history which would have to consist of many volumes.[309]

Even if research and writing in this country no longer has a purely Australian focus, the major effort should continue to be devoted to the Australian story. Surely more Australian law schools will be persuaded to embrace the teaching and scholarly cultivation of the subject as one of their inescapable responsibilities. If so, a narrative may be distilled from the creative outburst of the last 50 years, which will become part of the ethos of the Australian legal profession and, perhaps, of the nation as a whole. Much progress has been made by the Francis Forbes Society and the Supreme Court of Queensland Library. There are indications that at least some law schools do not wish to be left behind.[310]

306 See <http://www.griffith.edu.au/law/australian-feminist-law-journal/previous-issues/monographs> (accessed 12 January 2010).

307 There is, of course, a great deal of general historical literature about the feminist movement of the last 2 centuries.

308 For the briefest possible account, see <http://en.wikipedia.org/wiki/Australian_Industrial_Relations_Commission> (accessed 11 January 2010).

309 There is some historical coverage in Ch 2 of B Creighton and A Stewart, *Labour Law*, 5th ed, Federation Press, Sydney, 2010; for an account limited to Queensland, see B Bowden, S Blackwood and C Allan, *The history of labour relations in Queensland 1859–2009*, Federation Press, Sydney, 2009. The Parliamentary Library has put together a website concerning the history of employment law, at <http://www.aph.gov.au/library/intguide/LAW/industriallaw.htm#history> (accessed 11 January 2010).

310 An introduction to the Australian legal system for first-year students published in 2008 devotes about one fifth of its nearly 500 pages to Australia's legal history; it includes a brief account of the English background: R Hinchey, *The Australian legal system: History, institutions and method*, Pearson Education Australia, Sydney, 2008.