

# Chapter 1

## Law, Values and the Advocate

*Justin T Gleeson SC*

### Introduction

One might be tempted to view the topic raised by this chapter – Law, Values and the Advocate – as at once both self-evidently small and impossibly large.

Small, in the sense that the advocate faces a barrage of daily challenges which seem to leave little scope for attention to values. The tasks of mastering the facts in the instant case, identifying the law from the exploding body of cases and statutes and meeting the demands of the particular client and judge(s) are of themselves all encompassing. Further, the High Court has often emphasised over the past 10-15 years that cases should be approached with devotion to the traditional, seemingly self-contained tools of the lawyer: what issues do the pleadings permit the court to consider; what do binding precedents require or permit through close analogy; what lines of reasoning are essential as opposed to peripheral in deciding the given case; and when are courts in an integrated national legal system required to abide by the decisions of coordinate or superior courts.<sup>1</sup>

Further, reasoning which too readily relies on very general value laden concepts, such as unjust enrichment or unconscionability, has been disapproved as illegitimate “top down reasoning”.<sup>2</sup> Instead, what is often favoured is reasoning from a narrow set of values such as coherence, certainty, consistency and predictability.<sup>3</sup> While such values should not be dismissed as unimportant – they play an “architectural” role in assisting law to achieve its purposes – they are confined to being internal and instrumental. They do not open to the much larger and more varied set of values with which we are familiar in human discourse beyond the law.

1 For example, *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [132]-[158], [177]-[178] and *Friend v Brooker* (2009) 239 CLR 129 at [90], [109] and [115].

2 For example, *Lumbers v W Cook Builders Pty Limited (in liq)* (2008) 232 CLR 635 at [77]-[80].

3 For example, *Tabet v Gett* (2010) 240 CLR 537 at [18]; *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at [100]; and *Sullivan v Moody* (2001) 207 CLR 562 at [5] and [60].

This is a preview. Not all pages are shown.