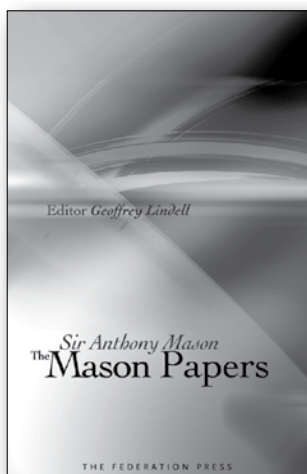


The Mason Papers

Geoffrey Lindell (ed) | Federation Press, 2007



Many members of the Bar will have on their bookshelves a copy of *Jesting Pilate*, a compilation of papers and addresses of Sir Owen Dixon, collected by Judge Woinarski in 1965 (and reprinted in 1996). The publisher's Foreword to that work observed that there was:

so much of value in his extra-curial addresses not only intrinsically but for the purpose of historical record and research that it was felt a volume of selected addresses would appeal to a large reading public overseas as well as in the Commonwealth, and not be confined to professional lawyers. Otherwise much of the author's experience in the law as well as in administrative and international affairs would become if not lost with the passing of the years at least difficult to discover. His continuity of thought upon matters of legal and public concern possesses in itself an inestimable worth.

With the excellent example of *Jesting Pilate* in mind, and for the same reasons stated in the Foreword to *Jesting Pilate*, Professor Geoffrey Lindell, the noted constitutional scholar, has collected a large number of Sir Anthony Mason's extra-judicial writings, spanning a period well in excess of 30 years. The selection process must not have been easy as Sir Anthony was (and remains) prolific in his output. A number of papers published were delivered after Sir Anthony's retirement as chief justice in 1995 and may be thought to reflect the liberation from the strictures on public comment on particular

issues which necessarily attach to that office.

The time of Sir Anthony's chief justiceship (1987-1995) was one of great stability in terms of the composition of the High Court (only Sir Ronald Wilson retired in that period, replaced by Justice McHugh in 1989) and what became known as the 'Mason Court' developed a distinct identity and international reputation. It was certainly regarded by senior legal scholars in the United Kingdom at the time as the outstanding and most influential appellate court in the common law world. That eight year period saw a large number of landmark decisions of the High Court including: *Cole v Whitfield* (1988) 165 CLR 360, *Street v Queensland Bar Association* (1989) 162 CLR 461, *Mabo v Queensland* [No. 2] (1992) 175 CLR 1, *Jago v District Court* (1989) 168 CLR 21, *R v Dietrich* (1992) 177 CLR 292; *Minister for Immigration v Teoh* (1995) 183 CLR 273, *Walton's Stores v Maher* (1988) 164 CLR 387, *Commonwealth v Verwayen* (1990) 170 CLR 394, *Coco v The Queen* (1994) 179 CLR 427, the path-breaking restitution decisions, *Pavey Matthews v Paul* (1987) 162 CLR 221, *ANZ v Westpac Banking Corporation* (1988) 164 CLR 662 and *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, and, perhaps most notably, the brace of free speech cases – *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106, *Nationwide News Ltd v Wills* (1992) 177 CLR 1, *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104.

In a recent address in Adelaide, Justice Kirby expressly pondered whether many or indeed any of the landmark Mason Court decisions would have been reached by the current High Court (or, perhaps more accurately, the current High Court other than Justice Kirby). That is an intriguing question. Whatever the answer, and whatever views people may have as to the proper boundaries of judicial law making, there is no doubt that the years of what has become known as the Mason Court were highly significant in the history of the High Court of Australia, and the country more generally. Professor Lindell's contribution now preserves in one place a well chosen repository of the extra-judicial writings and reflections of the

leader of that court.

The publication is timely given recent and periodic attempts by some journalists to demonize the work of the High Court under Sir Anthony Mason's leadership with superficial and often simplistic claims of judicial activism. It will serve as a permanent reminder of the vitality of Sir Anthony's intellect, the breadth of his knowledge, the depth of his insight and the crystal clarity of his expression.

The book's contents, contained in some 27 chapters, include papers on constitutional law, administrative law, contract, equity and international law. Also included are papers on ancillary topics such as:

- ◆ the use and abuse of precedent;
- ◆ the role of the modern judge;
- ◆ the function and importance of legal research; and
- ◆ the role of counsel and appellate advocacy.

There are also papers delivered on topics of great public significance including in respect of 'Democracy and the Law', 'The Decline of Sovereignty', 'Legislative and Judicial Law-making', an Australian Bill of Rights and models for a republic. There is also an interesting historical reflection on Alfred Deakin entitled 'Deakin's Vision, Australia's Progress'. A number of these papers have not previously been published.

Also reproduced are the observations made by Sir Anthony on the occasions of his swearing in as a justice of the High Court in 1972, and as chief justice in 1987, as well as the transcript of his 1995 *Four Corners* interview with Liz Jackson on the eve of his retirement as chief justice, which was the first ever television interview by a High Court judge. This wide-ranging interview aired in a context of controversy in respect of the court's judgments as to implied constitutional rights, a controversy that was fanned by interventions at the time by Sir Anthony's two predecessors, Sir Harry Gibbs and Sir Garfield Barwick, through the auspices of the Samuel Griffith Society. Also on display in this interview is Sir Anthony's well known wit. Asked what he would like to see as his legacy, he replied 'I never

encourage the process of self-assessment – except, of course, in relation to taxation returns’.

An extremely useful feature of the work is Professor Lindell’s editorial notes which follow each chapter. Many of these notes draw attention to subsequent decisions both of the High Court and House of Lords or other developments which touch on or affect observations made by Sir Anthony in his addresses. They also include cross-

references to other writings. There is also a comprehensive Table of Cases and Statutes, a detailed and useful index and a detailed biographical entry in respect of Sir Anthony’s career. In that context, he has been since 1997, and remains, an active member of the Hong Kong Court of Final Appeal on which he sits for two to three months a year. (Sir Gerard Brennan and Justice McHugh are also non-permanent members of that court.)

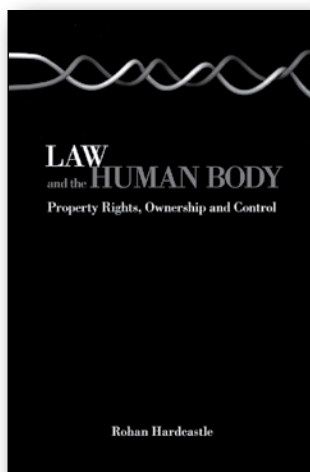
This publication, for which Federation

Press and Professor Lindell are to be congratulated, is a more than worthy sequel to *Jesting Pilate*. It should find a place on the bookshelves of not only every barrister but also of those with any interest in the role and rule of law in this country and some of the great philosophical debates as to this nation’s constitutional make-up at the close of the 20th century.

Reviewed by Andrew Bell SC

Law and the Human Body

By Rohan Hardcastle | Hart Publishing, 2007



The author opens with the question: ‘Do you own your body?’ Although the question sounds simple enough, a clear answer is surprisingly elusive. It has been settled in Australia since 1908 that, in some circumstances (the application of work or skill), ‘a human body, or a portion of a human body, is capable in law of becoming the subject of property’ (*Doodeward v Spence* (1908) 6 CLR 406 at 414). However the status of living bodies — and in particular the status of biological material removed from a living body, such as tissue, cells, fluids or genetic material — is by no means as clear.

In this work adapted from his doctoral dissertation, Dr Hardcastle navigates a broad variety of material from around the common

law world and formulates a principled structure for dealing with this area. He identifies a mix of difficult legal issues that are affected by inconsistent common law principles, a myriad of different statutes, competing commercial interests and significant moral and policy concerns.

The book is divided into two halves. The first half analyses how English, Australian and American jurisdictions currently deal with legal questions concerning biological materials separated from dead bodies and from living persons. The second half deals with future development of the law, and attempts to lay down a coherent framework to assist in resolution of the issues likely to arise.

Chapter 2 is concerned with the legal protection of dead bodies. It starts with the general English principle (of dubious ancestry) that there is no property in a dead body and then traces the exceptions to that principle that have developed. It examines the issue of who might have any property rights that are found to exist in bodies or body parts and how such rights are to be protected (usually in an action for conversion), and draws upon competing strands of American authorities that are in a better developed state than English or Australian ones. The author also examines the various other rights relating to dead bodies, including those that stray close to being proprietary, such as the right to possession for burial.

Chapter 3 deals with the legal rights of a living person in respect of biological material removed from their body, an issue that is likely to be of importance in future but that has so far been dealt with only in American authorities, notably *Moore v Regents of the University of California*, 793 P 2d 479 (Cal SC 1990) and *Washington University v Catalona* 490 F 3d 667 (8th Cir 2007). The author analyses these authorities and argues that the courts have focussed mainly on the posterior question of the competing policy considerations of individuals being permitted to sell separated biological materials without properly dealing with the anterior legal question of how the law of property actually applies to those materials. The author then considers the various authorities in which the possible status of biological materials as property has incidentally arisen as an issue in the course of actions other than proprietary claims made by their source, such as actions under consumer protection or sale of goods legislation, actions for larceny and disputes relating to embryos or gametes in the context of IVF procedures. Finally, he considers non-proprietary interests relating to the information comprised in biological material, such as DNA, retinal prints or fingerprints.

Chapter 4 deals with the *Human Tissue Act 2004* (UK). Although not of direct day-to-day relevance to an Australian audience, the Act is still significant as the most recent and most comprehensive attempt by a common law