

FOREWORD
ACCESSIBILITY, EXCELLENCE, LEGAL WRITING
AND LAW REVIEWS

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*There are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground.*¹

The university law review is a contribution of North America to contemporary legal education and research. In 1906 when the sixth university law review, the *Illinois Law Review*, now the *Northwestern Law Review*, appeared the editors noted that the field ‘is already overcrowded.’² Thirty years later Fred Rodell lay down the challenge to their editors and authors to write better about things which mattered. A Realist, Rodell believed that law only mattered because people did: ‘the law is nothing more than a means to a social end and should never... be treated as an end in itself.’ He continued to write about law but in popular magazines read by many more people than lawyers. Legal writing for him was about accessibility to ideas to resolve social issues. He praised ‘writing so any bloke could understand.’ Twenty years later the Dean of Northwestern Law School, Harold Havighurst, referred indirectly to Rodell’s criticisms. He claimed that law reviews were unique in ‘that they do not exist because of any large demand on the part of the reading public. Whereas most periodicals are published primarily in order that they may be read, the law reviews are published primarily that they may be written.’³ Consequently editors of law reviews have obligations to spare their readers from articles poorly written only for the sake of being written on issues which do not matter.

The editor of an Australian university law review may not be the best source on whether the Australian field is overcrowded or that reviews are published not to be read but to be written. In a small jurisdiction in Oceania on the borders of Asia the issues are different from those of North America. For those who remember the absence of local research and writing on local law and policy in Australia during law’s British empire the current extensive, lively and deep debate on Australian law and its place in international and transnational law is still appreciated. The internet has also changed the readership of law reviews including Australian ones which are no longer published on what others may have seen as the far side of the world. This is the second volume of the journal made more accessible by being published on the internet and indexed by its algorithmic programs. Law reviews have become more like the *Atlantic Monthly* in which Rodell published and the *Atlantic Monthly* more like them in that many more readers may read or skim an article but few will now read or skim them from cover to cover. Rodell’s test of what makes a good law review article however remains: is it well written about something which matters?

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¹ Fred Rodell, ‘Goodbye to Law Reviews’ (1936) 23 *Virginia Law Review* 38, 38.

² Dawn Clark Netsch & Harold D. Shapiro, ‘100 Years and Counting’ (2006) 100 *Northwestern University Law Review* 1, 1.

³ Harold C Havighurst, ‘Law Reviews and Legal Education’ (1956) 51 *Northwestern University Law Review* 22, 23–4.

From its beginning this review has been about legal issues of interest written to be understood by general readers. It has welcomed judges and legal practitioners as well as law teachers and researchers and students in its pages. Those pages have dealt with legal practices and processes, legal doctrines, public policies and legal theories. They represent the accessibility, opportunity and excellence also seen in other activities of the College of Law & Justice at Victoria University. This volume is a continuation.

This part commences with the customary interview with a senior member of the judiciary. This time it is with the Chief Judge of the County Court, the Hon Michael Rozenes AO QC. His Honour became the third chief judge of that jurisdiction in 2002 after a distinguished career at the bar including five years as the Commonwealth Director of Public Prosecutions. This breadth of experience is reflected in his comments. He has good advice for law students and legal practitioners and for students transitioning into practice. Rodell would commend his suggestion to adopt Hemingway's style of short sentences without adjectives. He discusses a wide range of topics. They cover the transition from law school to legal practice and how to remain engaged and continue in the profession. Engagement includes pro bono work and its importance in assisting the otherwise unrepresented in an expensive legal system. This turns to accessibility including the experience in court of those with poor mental health. The need for the courts to explain themselves to the community leads into a short discussion of the courts' use of social media. The interview then turns to two persistent issues. One is delays in tort litigation, this time produced by insurers opposing serious injury claims. The other is whether sentencing should be based on mandatory minimal terms or judicial discretion.

The part continues the focus on practice and engagement as lawyers in a Law Week panel discussion on women in the law. It was convened by the former federal Attorney-General and new adjunct professor in the College of Law & Justice, the Hon Nicola Roxon. The panel included other women who have made a difference through law: Dr Helen Durham, Director of International Law and Strategy, Australian Red Cross; Clare Francis, State Coordinator, Children's Court of Victoria; and Jelena Popovic, Deputy Chief Magistrate, Magistrates' Court Victoria. The discussion was entitled 'Magistrate Peace Keeper Politician Administrator'. The composition of the panel intentionally excluded solicitors and barristers to better reflect the wide scope of contemporary lawyering. The speakers reflect on the different ways they have had the opportunity to make a difference, particularly in their impact on people's lives including as mentors. The conversation ranged from how to get the most out of a first job as a lawyer, to work and life balance around family responsibilities and to the importance of being passionate about what you do. At the end Professor Roxon highlights the background of the speakers and questioners. They reflect the diversity within the room on that May evening. Many were mature aged students who, like the lawyers present, had had experiences in other occupations including as chefs, accountants and police officers.

Mr Danial Kelly writes of the law of the Yolgnu nation, known to them as Madayin. He focuses on two issues of importance both to legal practice and to legal theory, what is the source of authority or legitimacy which makes law binding? In its origin in Yolgnu society Madayin achieves the objectives of all legal systems, 'a state of people living in peace with

each other'. From the perspective of non-indigenous people he also deals with two interactions between Madayin and the legal system and its institutions introduced by the British in 1788 which have had a lasting impact on Australian society. The first was the recognition by the Methodist missionaries to the Yolgnu of the correspondence of the Madayin with their own systems of beliefs. In 1963 this recognition of these commonalities led to the two bark petitions presented to the House of Representatives and now displayed in Parliament House demonstrating the development of an Australian democracy. The typed text in English and Gumatj, pasted to the bark, pray for an inquiry into the revocation, without consultation, of 300 square kilometres from the Arnhem Land Aboriginal Reserve for the Gove bauxite mine. The borders of the petitions are painted representations of the law of the Yolgnu people and their rights. The stamp and signature of the Clerk of the House certifies that the petitions comply with the standing orders of the House of Representatives. The failure of the resulting inquiry led into the second event described, the *Gove Land Rights Case*.⁴ While this claim to native title also failed Blackburn J recognised that Mayin was a system of laws. Subsequently there was legislative recognition of land rights and then common law recognition of native title. In this way the introduced legal system reconnected itself with the knowledge and practices of its first judges in the Supreme Court of NSW. Sir Francis Forbes' decisions in cases such as *R v Ballard*⁵ reveal that he was aware that he was a judge of an alien legal system in territories long governed by legitimate authority through law which he, lacking legitimacy and authority, could not disturb.

Two articles take up practical issues about access to justice in contemporary Australia. Professor David H Denton QC and Mr Michael DG Heaton QC write of another system of customary law, arbitration, based on the authority and legitimacy of merchants now further reformed in revised legislation in Australian jurisdictions. Part of the context of their article is the opening in the William Cooper Justice Centre, near the Queen Street home of the College of Law & Justice, of the Melbourne Commercial Arbitration and Mediation Centre and related Hub. William Cooper, a citizen of the Yorta Yorta nation, showed similar abilities to Sir Francis Forbes in recognising how alike the different societies coexisting in Australia after 1788 were. Now that the two articles may not be read together an editor may be excused for a longer aside. William Cooper in his early life was a participant in an experience like the Yirrkala bark petitions of 1963 which the alien legal system did not use to address injustice. The legitimacy and authority of the Yorta Yorta over their nation under the influence of different Methodist missionaries led to the Maloga Petition of 1887 to the governor of New South Wales. '[A]lways bearing in mind that the Aborigines were the former occupiers of the land' the petition prayed for the recognition of the title of the Yorta Yorta to their land. Recent research involving the Sir Zelman Cowen Centre in the College of Law & Justice as part of Victoria University's Bonmarart Leewik Project has sought to document places in the western region of Melbourne significant to Aboriginal people. William Cooper's residence in Footscray is one. It is in the suburb where Victoria University and its law school emerged. From Footscray, amongst many other things, William Cooper established the Aboriginal Advancement League and petitioned George V for recognition

⁴ *Milirrpum v Nabalco* (1971) 17 FLR 141.

⁵ [1829] NSWSupC 26

of indigenous rights in 1937. In 1938, confirming the place of Aboriginal peoples in a global society, he led a demonstration at the German Consulate-General in Collins Street in a protest against the persecution of Jewish people in Kristallnacht.⁶

Long existing in parallel to the formal legal system as part of a law merchant controlled by traders, commercial arbitration has always had an international dimension to it. Professor Denton and Mr Heaton write in the context of the *Commercial Arbitration Act 2011* (Vic). It, like legislation in other Australian jurisdictions, follows the *UNCITRAL Model Law on International Commercial Arbitration*. This is a reminder of how international law and practice provides another form of authority and legitimacy for the reformed Australian law and practices based on it. Their research indicates that the advantages claimed for commercial arbitration have been made out, including recent additions such as the scope for interim measures analogous to interlocutory orders in other litigation. In the second part of the paper they discuss issues raised in recent appeals to courts against arbitral practices or awards. There are a surprising number of such cases if the point of arbitration is to avoid the formality and associated delays in the state's legal system. The tendency of those cases, as they point out, is to uphold the validity of arbitral processes and awards limiting the chances of a challenge being successful and minimising the intervention of the courts in this system of private law making.

Professor Tanya Sourdin also writes of the very practical issues of delay and timeliness in dispute resolution and its relationship to justice. William Cooper experienced both the law's delay and the insolence of office about which Shakespeare has Hamlet reflect. The Aboriginal Advancement League's petition to George V, retained by the Prime Minister, Joseph Lyons, was finally delivered to his granddaughter, Elizabeth II, 77 years later in 2014. William Cooper's family do not now expect a response from the sovereign.⁷ As Professor Sourdin recognises the legitimacy and authority of a legal system depends on its demonstration that justice is being done. In the context of research undertaken by the Australian Centre for Justice Innovation she includes alternative dispute resolution processes as well as more conventional litigation. A key issue in the study is how timeliness and delay are defined and the different perspectives of varying stakeholders. This is also an area marked by international standards set by the International Framework for Court Excellence. The measures include opportunities taken to resolve the conflict before litigation, efficient procedures in which avoidable delay is minimised with fair and just outcomes which, at least in the court system, are consistent with the rule of law. In this context the cultural practices of lawyers across Australia are relevant with some indication that Melbourne litigants and practitioners are more willing to settle than those in Sydney. Professor Sourdin also deals with the obligations being imposed on participants including acting in good faith and through case management. She considers the collection and analysis of qualitative and quantitative evidence and the impact of alternative dispute resolution and mediation in particular on delays and backlogs in the court system. While acknowledging

⁶ The International Institute for Holocaust Research, Jerusalem has named the Chair for the Study of Resistance During the Holocaust in his honour; *William Cooper* (2014) Bonmarart Leewik <<http://www.bonmarartleewik.net/william-cooper/>>; Timna Jacks, 'Queen Accepts Petition for Aboriginal Rights 80 Years On', *The Sydney Morning Herald* (Sydney), 4 October 2014.

⁷ Ibid.

that delay may be inevitable in doing justice she considers that better data and analysis is required and that alternative dispute resolution is likely to be part of any solution.

Justice underlies the recognition and protection of human rights which the two following articles take up. Roddell would have been aware of the term human rights in 1936 when he wrote his farewell to law reviews. The expression didn't come into more widespread use until nine years later in the aftermath of World War II. In the reaction to the revelations of the atrocities committed across the world a number of statements of human rights were produced. Two of the articles in this part reflect the interests Rodell had and wrote about in more popular magazines, such as his article in the *Atlantic Monthly* on the centenary of the US Supreme Court's decision in upholding the lawfulness of slavery in *Dred Scott v Sandford*.⁸ Rodell had been taught by another Realist at Yale Law School, Justice William O Douglas, who remains the longest serving justice of the Supreme Court of the US. Rodell corresponded with Douglas during the rest of their lives over their shared interests in freedom. Douglas, like Rodell, also wrote for popular magazines particularly about environmental legal issues. Douglas became known for his short and forceful judgments but late in life launched a new law review, the Lewis & Clarke Law School's *Environmental Law Review*.

Dr Colleen Davis critically evaluates the life and death issues in the separation of conjoined twins, where one of the twins will die. She does this in the context of the criminal law of homicide and two judicial decisions in England and Wales and Queensland, *Re A (Children)* (conjoined twins: surgical separation)⁹ in England and *Queensland v Nolan*.¹⁰ The defences of necessity, duress of circumstances and emergency are considered at common law, in the situation of England and Wales, and under the codified law of Queensland. One difference between them is that the code does not recognise the common law principle of double effect. Dr Davis draws attention to the significance in both cases of proportionately and reasonableness and also to the attempts by the judges to limit the extent of any precedent which the decisions might create as either common law or interpretation of the code. The article concludes by drawing attention to the absence of any principle which would provide a defence to a charge of homicide for medical practitioners in future cases. The Court of Appeal decision in *Re A (Children)* demonstrates the uncertainty in common law with the three judges giving different reasons for authorising the operation. In that case another difference between the two jurisdictions emerges. England and Wales is subject to the *European Convention on Human Rights* which contrasts with the absence of such a statement in Australian or Queensland law.

Bill Swannie refers to the *European Convention on Human Rights* as well the *International Covenant on Civil and Political Rights* in the context of things which do matter, the 'home' and the protection of the family. They are relevant to interpreting the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The article critically analyses the law on the rights of residents in public housing who are not the tenant under provisions of the *Residential Tenancies Act 1997* (Vic). The legislation gives such residents the right to apply to the Victorian Civil

⁸ (1857) 60 US 393 (1857); Fred Rodell, 'Dred Scott - A Century After' [1957] (October) *Atlantic Monthly* 60.

⁹ [2000] 4 All ER 961.

¹⁰ [2002] 1 Qd R 454.

Administrative Tribunal for such an order. In 2012 VCAT made an order against an indigenous housing association to enter a housing agreement with such an applicant. Previously VCAT had been reluctant to make such orders in respect of public housing bodies as it may produce hardship in the management of waiting lists. This is difficult to distinguish from the hardship of applicants on the waiting lists. The article notes that making such orders are also in conflict with principles of freedom of contract and the rights of the owners of property. The *Charter* applies to both the Director of Housing and VCAT itself as public authorities. Mr Swannie points out that the reluctance of VCAT to make such orders in respect of the Director of Housing is consistent with the legislation in other jurisdictions which do not permit such orders to be made against public housing bodies. Balancing the rights of individuals who have been living in the home against those recognised as having priority for housing where housing is limited involves difficult issues of individual, collective, distributive and procedural justice. A Realist, like Rodell, may find it significant that the order when made was against Aboriginal Housing Victoria, an independent not for profit company, rather than against the government itself represented by the Department of Human Services and its Director of Housing.

Mr David Thorpe turns to major interests in Australian society, sport and gambling. Sports law is taking up more space in law reviews. The commercialisation and commodisation of sporting codes and players have given prominence to sports law in the past 20 years. This has been growing with the increasing regulation that such commercialisation has brought with it. The change in gambling law produced by changes in public attitudes to gambling is also now impacting on sport. It is the subject of increasing legislation in Australia and internationally as indicated by the national agreement of Australian governments in 2011. Mr Thorpe discusses the cheating at gambling provisions which have been inserted in the *Crimes Act 1900* (NSW). He points to technical definitions more like those to be found in law regulating futures markets – long exempted from gambling legislation – such as ‘bet’ and ‘event contingency’. The legislation, also like securities law, seeks to deal with inside information. He points out that the legislation is focused on the outcomes of the activity of betting rather than the on-field sport. Other features of the legislation include the use of expected standards of integrity in place of dishonesty as an element of the offences. He also identifies problems in the legislation including its coverage of underperformance to achieve an advantage. This would be difficult to prove because of the many reasons players may be seen to lose and because the rules of some sports make it permissible for players to underperform for a tactical advantage. Overall Mr Thorpe sees the legislation as being desirable now that the rules and spirit of the game are insufficient. He makes a final point about the people of which Rodell would approve, this law is about them and their enjoyment in the unpredictable outcome of games.

Ms Elizabeth Shi, in the final article, returns to one of Rodell’s major criticisms of law reviews, poor writing, but in the context of legislation highly relevant to many people in 2014, job security. Rodell himself had taught labour law at Yale Law School. The analysis starts with the peel back in the *Fair Work Act 2009* (Cth) of provisions in the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) which had included in the list of prohibited matters, which could not be the subject of employment agreements, items known as ‘job security clauses.’

These included any restrictions on the engagement by the employer of independent contractors or labour hire workers. While the provisions have been repealed it is unclear whether they are now permitted matters in enterprise bargains. Whether they are or not depends on the meaning of ‘matters pertaining to the relationship between an employer ... and that employer’s employees.’ The Explanatory Memorandum explained that for ‘job security clauses’ to be permissible they must ‘sufficiently relate to employees’ job security.’ Ms Shi indicates how this provision, as well as clauses relating to the ‘interests of employers and employees’, has been inconsistently interpreted. She acknowledges that the legislation is intended to confer considerable discretion on Fairwork Australia. Her argument is framed in Wesley Hohfeld’s critique of indeterminate words leading to unclear thought and analysis. Roddell, who was a student at Yale Law School a decade after Hohfeld’s death, may have approved of Hohfeld publishing few articles in law reviews. He may not have approved of Hohfeld’s theoretical language. Roddell pointed out that such writing had limited the influence of law reviews which Hohfeld himself had hoped would be increasingly influential in developing both public policy and law.¹¹ In respect of the uncertain language used in this legislation it is not unknown for parliament to leave courts and tribunals to resolve issues when conflicting interest groups are unable to agree on the policy and the text to be used in the legislation.

Rodell did have sympathy for some people associated with law reviews. These are ‘the super-students who do the editorial or dirty work’. This review would not exist or meet Rodell’s two-pronged test for law reviews without them. Super students, alumni and alumnae indeed! Thank you.

¹¹ Wesley Hohfeld, ‘A Vital School of Jurisprudence’ (1914) 14 *AALS Handbook*, 76, 88.

