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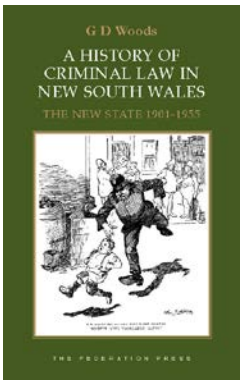


# *A History of Criminal Law in New South Wales – Volume 2: The New State, 1901–1955*

by G D Woods QC

This book is the second volume of Dr Woods' work in writing about the history of criminal law in NSW. The first volume dealt with the period 1788–1900, i.e. the start of the colony and all of the convict inspired criminal laws and punishment that we are all too familiar with. Volume Two deals with life after 1900, i.e. the start of a new century and the start of Federation, and finishes at 1955, which was a significant year as it was the year that the death penalty was effectively abolished in NSW for all offences (notable exceptions were treason and piracy).

What we have in this book is a wonderfully detailed summary of what seems like the most famous/infamous/important criminal law cases and legislation (both substantial laws and procedural laws) that were dealt with by the Courts in NSW during this period, and it is through these cases and laws that we learn about the life and times of the day, the feelings and prejudices of the times and the political issues that were grappled with. The research is from standard sources of the law, and also from the major city and regional newspapers which apparently reported parliamentary proceedings very fully, at least between 1901 to about 1945.

The book also shows us how the social, cultural and political issues of the day shaped the decisions of the Courts and the introduction of particular pieces of legislation, and it is this understanding that makes a history of criminal laws so important and fascinating because its history is, indeed, history itself.

The author notes in the Preface that

> *In this half century, life and the law were disrupted by the two great international wars of 1914-1918 and 1939-1945, by the Great Depression, and by major demographic, social, technological and economic changes. 'Crimes' are not decreed to be so by heavenly fiat, but through political decisions. Over the decades studied, the question of what conduct should be regarded as criminal was the subject of intense controversy, particularly in the field of industrial relations and in the policing of so called 'victimless crimes.'*

He also notes –

> *I remain influenced by the jurisprudence of American legal realism, the thrust of which is that criminal law is better understood as what police and Courts actually do, rather than from its exposition in textbooks; and by the central message of Julius Stone's The Providence and Function of Law that senior Courts do sometimes make policy decisions, and thus create the law, rather than merely apply it in accordance with logical syllogisms. Realpolitik dictates, of course, that judges cannot always frankly expound this latter truth, at least while they are on the bench, but what I call the Stone High Court – otherwise the High Court under Sir Anthony Mason and under Sir Gerard Brennan – has shown it to be so. However it is important not to be distracted by arguments about so called 'judicial activism'. Parliaments make vastly more laws than judges do, which is why in this study… I have focussed on the central work of the parliaments in changing the criminal law.'*

There are 38 chapters and in each chapter the author gives us a summary of what legislation was introduced, what government was in power and who were the main politicians involved, what cases were decided, the facts of those cases, who were the lawyers involved in the cases and some of the history of the day, either State, Federal or in the world. Some of my favourites are as follows:

In chapter 1 we start with 1901 and the author summarises our 'Legal inheritance' although there was of course the *Crimes Act 1900*, English judge-made law dealing with the standard of proof, criminal procedure, criminal defences and right to trial by jury (12 men) continued to apply. The author summarises the Courts that existed in NSW and it is quaint to note that one of these Courts was the beautiful sandstone Water Police Court at Circular Quay, now a fabulous museum I love to visit (as it has very good historical exhibitions about criminal law in NSW). The other Courts were the Central Court of Petty Sessions in Liverpool St and of course the Central Criminal Court at Taylor Square in Darlinghurst. We are told of the emergence of Commonwealth Criminal Laws and a new High Court and the 'Breelong Blacks' murder cases which resulted in the first executions for the new State (Aboriginal accused, extreme racism, brutal murders and one of the accused saying 'Will I be in heaven by dinner time?')

In chapter 2 we learn of how the vice regal prerogative of mercy was used in the 'Friedman affair' (a case of receiving stolen goods) and how Banjo Patterson, who was the editor of the *Evening News* at the time wrote a verse about the case, mocking the procedure. We learn of the efforts towards a Criminal Code and the influences of Jeremy Bentham and Sir Harry Gibbs as well as the realization for the need of a Children's Court to deal with children who commit crimes. There is of course a chapter on two ex ministers of the NSW government who, in the years shortly after Federation, were prosecuted for fraud or corruption. Chapter 7 deals with the beginnings of Legal Aid and public defenders.

The author notes that at Federation in 1901 there were hardly any motor cars in NSW but by 1910 there were many and this led to the *Motor Traffic Act 1909*. Regular strikes started to occur and the Premier of the day (CG Wade) embarked on major amendments to the industrial arbitration law. This led to many protests and the inevitable criminal charges including a charge of riotous behaviour against the socialist orator and organiser, Tom Mann and then charges against the Newcastle Union leader Peter Bowling and others of conspiring to instigate certain persons to do an act 'in the nature of a strike'.

Chapter 12 deals with the *Girls' Protection Act 1910* and the hard-fought battle to raise the age of consent. The common law age of consent was 12 years and only went up to 14 years as late as 1883. The Act ended up identifying the principles which governed consenting sexual relations between men and young women in NSW for most of the 20th century, particularly the general age of consent of 16 years. Chapter 13 deals with the introduction of the *Criminal Appeal Act 1912*, as parliament acknowledged the possibility of wrongful convictions. Importantly, it allowed an appeal against jury error on the facts adverse to an accused: 'The Court… shall allow the appeal if it is of the opinion that the verdict of the jury cannot be supported, having regard to the evidence…' This was qualified by the proviso that an appeal would be rejected if the appellant could show only a minor error not amounting to a substantial miscarriage of justice. There was also the issue as to who should sit on this Court and what appeal then should be permitted to the High Court. There was also provision for an appeal against sentence, as there had been numerous complaints about inconsistency in sentencing in NSW Courts.

On 4 August 1914, Britain declared war

on Germany, and Australia also was at war. The most important effect upon the criminal law of NSW and Australia was the creation of many new laws and regulations. Up until this time, most of the criminal law was State based, but after 4 August 1914, the Commonwealth defence power-section 51(vi)-assumed overriding legal significance. The result was the Commonwealth *Crimes Act 1914* and the main aim was secrecy concerning the war effort. The Commonwealth *War Precautions Act 1914* was enacted shortly after and delegated to the Governor General in Council a very wide power to make regulations 'for securing the public safety and the defence of the Commonwealth'. This dealt with the control of enemy aliens, censorship of newspapers and media and the safeguarding of strategic assets such as the docks. We learn of various cases in the Courts dealing with some of these crimes eg Mr Farey's appeal to the High Court to test the legality of a regulation controlling the distribution and prices of various primary products and staple goods. There was Arthur Kidman who was a business man a prosecuted for defrauding the Commonwealth, a retrospective criminal law in his case. Others were prosecuted for 'trading with the enemy', including Frank Snow who in 1914 had a firm which had extensive commercial arrangements with German manufacturing interests to supply metal ores. The author notes how the 1915 High Court judgments in *Snow* were important to understanding Commonwealth criminal law and the role of the High Court in criminal appeals from all the states. There were also cases dealing with fortune tellers, publishing cartoons which resulted in charges of 'prejudicing recruiting', conscription and the suppression of dissent against government policy.

After WW1 the Courts were filled with numerous criminal cases of 'shell shock' and the shocking problem of how to deal with such defendants with such 'mental illness' in the face of serious criminal actions. 'Clear up Razorhurst' was a headline in the *Truth* magazine on 23 September 1928, being a reference to the 'razor gang' period in Sydney and the author tells us of the very famous case of Gordon Henry Barr and his prostitute wife 'Diamond Dolly'. The Great Depression and its effect on NSW criminal law is detailed in chapter 19 and we learn of how the extensive job losses, serious industrial disputes, strike action and evictions led to for example, cases of conspiracy to instigate a strike, charges of rioting and charges of obstructing police. Of course, we also learn of the infamous case of Horatius de Groot at the opening of the Sydney Harbour Bridge on 19 March 1932.

The rest of the book details much of NSW legal history involving the importance of *Woolmington v the DPP* [1935] AC 462, the prosecution of homosexuals, illicit betting, the 'thousands of new criminal offences' as a result of the outbreak of the Second World War, 'gingering' (a trick performed by two prostitutes to remove a wallet from the customer), socialism and 'advancing unlawful doctrines', Australian fraudsters and the influx of American servicemen, the introduction and failure of the dock brief, 'confessions' to the NSW police and the famous case of Frederick Mc Dermott, a new Jury Act which included women but only if they submitted their names for inclusion in jury service lists, the Cold War and the laws of sedition, 'New Australians' and racial tensions in the criminal Courts, the Liquor Royal Commission between 1951-1954 and finally the abolition of the death penalty. Although the last person to be executed in NSW was John Trevor Kelly in August 1939 at Long Bay Gaol, the death penalty was commuted in every case between 1939 and 1955. Nevertheless, NSW could now see itself as a more humane and tolerant society than it had been in the previous century – at least in some respect.

The book is beautifully written, with a story book feel rather than a text book, and there is much to learn. One can only imagine what the next period of criminal law would look like, from 1956 to now. Changes to the role of women affecting the Jury Act and personnel in our Courts, the rise of corporate criminal law, significant changes to sexual assault legislation, necessary changes to sentencing, a new form of immigration and the law of terrorism, are just some of the key topics we may see being dissected and discussed, in such a detailed and interesting way.

**Reviewed by Caroline Dobraszczyk**

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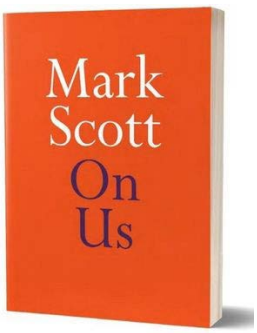


## *On Us*

by Mark Scott

'*On Us*' is a short and bittersweet book. The ideas with which it grapples stay with the reader for a long time. The book deserves a close reading. The book is part of a small series of books by University of Melbourne Press featuring current day personalities 'on' social issues. Scott meditates on how, we as a society embraced technology without reservations. The book invites us to step outside our own echo chamber to consider what we might have gained or lost in this process of being buffeted on a wave of technological genius.

Mark Scott is the secretary of the NSW Education Department. He was for some time the Chairman of the ABC and prior to that he was a traditional print journalist for many years. He is eminently qualified to speak about the rise of technology and its effects upon the world of the written word.

Scott lulls us into the reflection by opening with a reverie of a summer holiday and it ends similarly. The questions posed by the book are manifold and deep. Were we too hasty in embracing technology without understanding its ultimate cost? We adopted each new advance without censure. The sophistication of the technology now leaves us in an invidious situation. The internet, social media, the real time interactions, is it all as good as we are told?

Smart phones are the platform upon which most of the world bases its reality today. Smartphones are how most people conduct their daily lives and communicate with each other by message and social media. Scott asserts that we did not prepare ourselves adequately for this technology laden life.

We did not engage in much forethought on the subject of how technology would affect us both physically and ethically in the future. Some questions would have been so vague as to defy any meaningful answer – i.e., accepting all technologies – how would the world of the future play out?

Scott spares a thought for children in our society and he considers how schools might help future generations avoid this mistake. More saliently, a question in the book emerges – what chance do we have of preparing current day youth to live in the world of tomorrow? Will children today even need to be prepared for the relentless onslaught of technological advancement? Will the world change more quickly and dramatically in the years to come? Undoubtedly.

Progress is hardly ever predictable or linear. What are the technologies that the author is considering? It's the use of mobile phones and the thousands of digital applications and additions which facilitate some aspect of our lives. The technologies layer upon each other, to the extent that they reinforce each other. It's that widespread cumulative effect which causes the trickle of fear even in the most fervent of supporters. That layering makes the technology truly remarkable. For example, the humble mobile phone – it is the access point of the internet, it is the source of most communications – text and verbal. It allows a volume of information and learning that was hitherto unfathomable. Mobile technology correlates to and amplifies social distribution. Location tracking and algorithmic targeting are now the buzz words of our times, as people are considered in their tribes and are objects of marketing – it is a whole new paradigm.

While we wait another dozen years for Moore's Law to make everything even smaller, faster and cheaper – the ethical problems which arise over personal use of social media will have only become worse.

There are few answers for the young adults of the 2030s. But Scott's personal reflection is a salutary one. We can attempt to help a new generation find the right questions to ask. Since classical times, this has been the essence of a good education. It's an old formula. One poses the right questions first. One challenges the assumptions. That is the way one gets an insight and some understanding into an area. One ends up asking the questions why things are the way they are. That all may be so – but how many of us did this in the last 25 years when confronted by the vast array of new gadgets, phones and screens.

There will be no revolution in the classroom. The time-honoured procedure is adopted. Demand a hypothesis. Challenge the assumptions, using the data and the evidence. Press for a greater insight and understanding. The uncertainty of the future workplace means the only guarantee is consistent and insistent change, coupled with the need to learn and relearn. There is a certain quality of resilience that is required by taking on the new ad infinitum. We need to think carefully about how the current curriculum is shaped and structured to help prepare young people for all they will face: we must gauge the extent of change, the speed of change and its inevitable unpredictability. No one has any idea of the world of the 2030s, when those who started school this year will finish year 12.

There have been countless examples of how biases shape the programming that changes the outcomes we take for granted. For decades in schools, English classes would explore how language could be deployed to manipulate meaning – persuasion – propaganda. Film studies showed examples of propaganda and image manipulation. Now we must help young people understand how insidiously we can be shaped by the barrage of images, text, sounds, algorithms and new experiences which less than a generation ago did not exist. Those images and that data in constant exposure also means something. We must help the new generation to be sceptical, to be critical, to be wise and to take a moment to consider.

It is more important than ever for us to ask questions for the young adults of tomorrow to find the false news and to be alert to it or to seek out the facts. This book, at its heart, encourages independent thought. A great lesson in all of this is for youth to understand there is something wonderful about being different.

**Reviewed by Kevin Tang**

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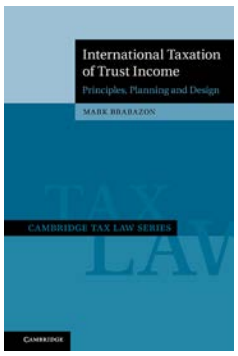


## *International Taxation of Trust Income: Principles, Planning and Design*

by Mark Brabazon SC

Cambridge Tax Law Series
Cambridge University Press, 2019

There's more than one way to tax trust income: while trusts usually serve legitimate non-tax purposes recognised by the general law, they can also be viewed as a vehicle for tax evasion and avoidance. This book identifies the principles and policies by which Australia, New Zealand, the United Kingdom and the United States tax income derived by, through or from a trust in an international setting where more than one country may have a claim to tax. The author considers various questions of tax design, as well as who should be regarded for tax purposes as deriving the income of the trust and how they should be taxed.

The book examines and compares the principles and policies underpinning the various methods for the taxation of settlors, beneficiaries, trustees and trust distributions. Differences in taxation regimes invariably reveal a conflict of approach. The author identifies a set of important common themes for the taxation of trusts and highlights potential cross-border mismatches which can present issues of unintended non-taxation or double taxation that sometime comes with the presence of a trust. This book addresses these and many other issues and provides practical insight for taxpayers and revenue authorities. As part of that analysis, the author outlines a range of tax design solutions as well as points for practitioners, tax administrators, legislators and academics.

The international taxation of trusts is seldom written about due to the lack of global cohesiveness on the topic. A standalone study on the subject is welcomed, though

no general review is undertaken of countries whose tax laws are not representative of the four countries surveyed. Nor does the book address the taxation issues presented by exotic entities not recognised by common law jurisdictions which are not trusts per se but have some of the attributes of a trust. This is deliberate as the work is foundational, and serves to provide a basis for similar analysis to be extended to other jurisdictions (and trust-like entities) not considered by the book. Nevertheless, this book is an essential read for those who advise on the taxation of trusts in an international setting.

At just over 400 pages in length, the book is concise and comprehensive. The chapters in Part I examine the settlor/grantor (chapter 2), the beneficiary (chapter 3), the trust (chapter 4) and trust distributions (chapter 5). These chapters focus on the principles underlying the attribution and taxation of trust income in the four surveyed countries, while chapter 6 considers the circumstances in which double taxation and double non-taxation can occur as a result of the interaction of countries' domestic laws.

Further developing the international taxation discussion in chapter 6, Part II delves into the interaction of domestic laws with respect to the taxation of trusts in treaty and non-treaty situations. Part II also includes consideration of the OECD Partnership Report and Actions 2, 6 and 15 of the BEPS project and how they apply to trusts (chapters 7 and 8). The Partnership Report and BEPS project concern perceived international tax avoidance which are significant current global taxation issues. Part II identifies risks in relation to the issue of double taxation and double non-taxation and posits a range of suggested solutions to prevent those unintended outcomes (chapter 9).

The taxation of trust-related income can raise difficulties and the interaction or impact of the domestic laws of more than one jurisdiction only further complicates matters. This book presents a detailed study of international trust taxation as a topic in its own right and is a useful addition to any tax practitioner's library.

**Reviewed by Keni Josifoski**

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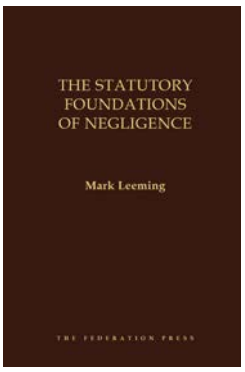


## *The Statutory Foundations of Negligence*

by Mark Leeming
Federation Press, 2019

Leeming J is well-known as a giant in equity: Challis Lecturer in Equity at Sydney University for over 15 years; co-author of the latest editions of *Jacobs' Law of Trusts* and *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*. A search of LexisNexis, however, reveals only 39 decided cases in which Leeming J appeared as counsel and in which the word 'negligence' appears in the text. Of those 39, the cases that were truly about the law of negligence can be counted on one hand. Most of the other cases arise out of claims in negligence, but are in fact authorities dealing with questions of jurisdiction, questions his Honour has addressed in works such as *Authority to Decide* and *Resolving Conflicts of Laws*. Why turn his hand to writing a text on the law of negligence?

In an important respect this is *not* a text about the law of negligence. It is a book about the interaction between statute and judge-made law. In an earlier publication Leeming J wrote:[1]

> Most of what is actually occurring in the legal system is the construction and application of statutes. A great deal of what is simplistically described as 'common law' is the historical product of, or response to, statutes. And much of the contemporaneous 'development' in the day-to-day workings of Courts in fact involves a process of harmonisation informed by statutory norms.

The present work seeks to expose and then to analyse the foundational role of statutes, using the law of negligence as an illustration of the processes of interaction between the two.

Since his appointment to the NSW Court of Appeal Leeming J has decided a number of important cases for the law of tort in NSW. In spite of his Honour's apparent lack of experience with the law of tort, or perhaps because of it, those judgments are scholarly and erudite and trace the long and often tortuous history to arrive at the relevant principle. *White v Johnston*[2] is a good example. His Honour's analysis of the authorities relating to consent and trespass in their historical context, particularly having regard to the extant rules of pleading, led to a rejection of the view expressed by McHugh J in *Marion's Case*[3] that a defendant to an action in assault and battery bears the legal burden of proving a valid consent. It is a classic illustration of Windeyer J's observation that:[4]

> The only reason for going back into the past is to come forward to the present, to help us to see more clearly the shape of the law of to-day by seeing how it took shape.

The analysis of the application of Part 1A of the *Civil Liability Act 2002* (NSW) to questions of causation and the materialisation of inherent risks in *Paul v Cooke*[5]is a masterly exposé of the difficulties in reconciling the language used in that Act. It is a process that his Honour continues in the present work, with a more expansive (albeit not exhaustive) journey through the common law of negligence.

The book has chapters devoted to Duty of Care, Breach, Causation and contributory negligence, Roads Authorities, Damages where there are multiple defendants, Damages for pure mental harm, and particular heads of damages for personal injury (lost capacity to provide domestic services, and discount rates and interest). These are not, nor are they intended to be, comprehensive treatises on these topics. They are simply aspects of the law of negligence that provide a vehicle by which the interaction between statute law and judge-made law may be analysed.

This is an important book for anyone who practises in the area. The historical analysis enlivens each topic area, reminding practitioners that the law was not always thus and need not always be. Despite the precision with which Leeming J writes, it is engaging. It offers fresh perspectives on how statute law engages (or in some cases fails to engage) with the common law. Although directed towards analysing more abstract jurisprudential issues, it nonetheless provides valuable insights relevant to day-to-day consideration of the impact of statutory reforms to the common law.

### ENDNOTES

1 M Leeming, 'Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room' (2013) 36(3) UNSWLJ 1002.
2 *White v Johnston* (2015) 87 NSWLR 779.
3 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 310–11.
4 *Attorney-General (Vict) v The Commonwealth* (1962) 107 CLR 529 at 595.
5 *Paul v Cooke* (2013) 85 NSWLR 167.