Preface

Murray Gleeson was called to the Bar in 1964 and appointed Chief Justice of New South Wales in 1988. In 1998, he was appointed Chief Justice of Australia. In more than a century, only two State Chief Justices have also become Chief Justice of Australia, the other being the Queenslander, Sir Samuel Griffith, the original Chief Justice of Australia and one of the Founding Fathers of the Federation.

One of the outstanding Australian barristers of his generation, and perhaps of any generation, Murray Gleeson was highly regarded not only in Australia but also in the United Kingdom where he appeared several times in the Privy Council, including in the last case it heard from the High Court of Australia. Although few judges in this country become – or remain – household names, within the legal profession in Australia and overseas few Australians stand higher in repute than Murray Gleeson. Unsurprisingly, he is mostly known for his judgments. Yet in the course of a career at the Bar and on the Bench that began in 1964, he produced hundreds of papers and speeches on various themes.

Although judicial biographies, memoirs and collections of essays or papers are relatively common in Britain and the United States, it is not so in Australia. This may reflect reticence on the part of the judges, the lack of a large market for such works, or both. Either way, it is perhaps unfortunate because the experience and wisdom distilled in such works can provide enlightenment and insight into a powerful profession known from the inside only by a tiny minority of the population. As readers of the papers in this book will see, the learning, experience and reflections of an outstanding lawyer are valuable and well worth preserving for current and future Australian lawyers, but also for the wider community.

Although Murray Gleeson is known as a judge, he is also one of our great legal writers. These papers deserve a wider audience than they can have on the internet or in an archive. They are models of elegant expression, clarity of thought, deep contemplation, and scholarship. One of the most difficult (but pleasurable) tasks in editing this collection of papers has been selecting the final cut. Even with the generous word allowance granted by the publisher, there has been no room for many papers that are worthy of publication in this book.

The papers selected cover several broad themes: advocacy, judging, legal history, the judiciary as an arm of government, the application of legal principle, and international commercial arbitration. Some overlap categories and some fall into no clearly defined category.

Sir Owen Dixon once wrote:

> It is not case law that determines the result; it is a clear and definite solution, if one can be found, of the difficulty the case presents – a solution worked out in advance by an apparently sound reconciliation of fact and law. But you may learn that the

> difficulty which has to be solved must be felt by the Bench before the proper solution can exert its full powers of attraction.[1]

That Dixon thought that the difficulty of a case "must be *felt* by the Bench" shows how acutely he understood the psychology of advocacy, as well as the difficulties advocates can have in advancing their arguments in the face of a sometimes abrasive Bench. Like Dixon, Gleeson shares a belief in a judicial technique of strict legalism. Nevertheless, both recognise the indispensability of advocacy and persuasion. The first step towards persuasion is to get someone to listen and pay attention.

In his speech on "Advocacy and Judging", Gleeson's simple anecdote about his discussion with Lord Alexander of Weedon concerning their forthcoming appearances in the Privy Council makes an essential point about effective advocacy: judges want to be just. So the advocate's object is to persuade the judge (or decision-maker) to think, "That seems fair". The papers in this collection are a master class in ways of reaching that point. While the internet and libraries are awash with books and papers on advocacy, few say anything original. In contrast, Murray Gleeson's both say original things and explain things already well known in an original or striking way. These three papers could be core readings in any advocacy course.

Preparation, selectivity, courtesy, tact, and a careful attention to the merits of the case – those points that may be attractive to a judge trying to be just and fair – were exemplified in Gleeson's style as an advocate, and, when he joined the Bench, in his judicial approach. Michael Pelly described the Gleeson style on the High Court:

> If Gleeson believed an oral presentation was being disrupted for any reason, he might invite counsel to return to the beginning and present a structured account of their arguments. Dyson Heydon said Gleeson was "extremely fair in oral argument":
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> > He would tend to fill gaps for counsel. If he didn't feel that the argument had covered all the points he saw as available, he would outline them. He would invite counsel to accept a proposition for which he had sympathy and which he felt would assist that counsel's case. Counsel could reject the proposition or accept it … [I]f counsel accepted the proposition, opposing counsel would have received notice of the point and would have to deal with it.[2]

Like advocacy, judging is an art and a set of skills that can be learned. Murray Gleeson's judgments are renowned for their clarity, precision, conciseness and elegance of expression. Prolixity in judgment writing is frequently criticised.[3] While prolix advocacy undoubtedly contributes to this, anxiety on the part of judges to ensure that their reasons are not only adequate, but are seen to be so, may also be part of the problem. Both as an advocate and as a judge, Murray Gleeson was able to distinguish between essentials and inessentials. In his extra-judicial papers on judging, the role of the judge in a democratic society, and on judicial independence and legitimacy, he is equally selective. He poses a question and, eliminating surplusage, works with precision towards an answer.

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1 Woinarski, Severin (ed), *Jesting Pilate: Papers and Speeches of Sir Owen Dixon* (Sydney: Law Book Co, 1965) pp 250-251.

2 Pelly, Michael, *Murray Gleeson – The Smiler* (Sydney: Federation Press, 2014), p 200.

3 See, for example, the speech of Chief Justice Kiefel, "Judicial Methods in the 21st Century", Supreme Court Oration, Supreme Court of Queensland, Brisbane, 16 March 2017.

As their introduction to legal studies at Sydney University, new law students of Murray Gleeson's generation were steeped in English and Australian legal history. Legal history has, perhaps to the detriment of the legal profession, become a minority interest. But those who enjoy it will find pleasure in the several papers on history included in these papers. One of the most interesting episodes related in the paper, "Constitutional Decisions of the Founding Fathers", is Chief Justice Griffith's scathing critique of the Privy Council's approach to constitutional issues in a federation. Although we are accustomed to thinking of the Founding Fathers as "British to the bootstraps", and to Australians of that time as suffering from "cultural cringe", Griffith had no hesitation in telling the English judges who sat over him in the judicial hierarchy exactly what he thought of their capacity to deal with Australian constitutional issues.[4]

As these papers show, however, from a rather prickly start, the relationship between the British and Australian courts developed respectfully, although not always in the same direction. Again, although we are inclined to think of the Founding Fathers as oriented almost exclusively towards London, the influence of the United States, and especially of the famous constitutional decision of the United States Supreme Court in *Marbury v Madison*,[5] on their thinking and their design of the Australian Constitution, as well as later in the High Court's jurisprudence in the interpretation of the Constitution, was significant. This too is brought out in these papers.

In his play, *A Man For All Seasons*, which concerns Sir Thomas More's fatal conflict with Henry VIII, Robert Bolt portrays an argument between More and his son-in-law, William Roper, about Richard Rich whom Roper believes is an informer against More. Roper urges More to arrest Rich, and More refuses:

> **More**: Go he should, if he were the Devil, until he broke the law.
> **Roper**: So now you'd give the Devil benefit of law!
> **More**: Yes. What would you do? Cut a great road through the law to get after the Devil?
> **Roper**: I'd cut down every law in England to do that!
> **More**: Oh? And when the last law was down, and the Devil turned round on you – where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast – man's laws, not God's – and if you cut them down – and you're just the man to do it – d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.[6]

This scene appears in a few of Murray Gleeson's papers that, unfortunately, did not make the cut for this volume. But his adoption of the story reveals an important aspect of his philosophy and practice of law. In "Courts and the Rule of Law" he says:

> The common law judicial method, whether applied by trial judges, judges of intermediate appeal courts, or judges of courts of final resort, is a method of legalism. Justice Ginsburg … referred to the "decision-making mores to which legions

4 See *Baxter v Commissioners of Taxation (NSW)* [1907] HCA 76; 4 CLR 1087 at 1111-1112.
5 5 US (1 Cranch) 137 (1803).
6 Bolt, Robert, *A Man for All Seasons* (London: Heinemann Educational Books, 1973), p 39.

> of federal judges adhere: restraint, economy, prudence, respect for other agencies of decision … reasoned judgment, and, above all, fidelity to the law."[7]

As they do in More's advice to Roper, the themes of restraint, prudence, respect for the other arms of government, and fidelity to the law and rule of law run through these papers.

Another strong theme in these papers is Murray Gleeson's emphasis on the desirability of adherence to principle. In "Advocacy and Judging", he refers with approval to a submission made in the English case of *Scruttons Ltd v Midland Silicones Ltd*.[8] Counsel for one of the parties argued, "There are circumstances, especially relating to matters of trade and commerce, where it is better that the law should try to be clear than that it should try to be clever".[9] The papers on "Legal Interpretation", "Donoghue v Stevenson", "Presuming Innocence", "The Objectivity of Contractual Obligation", "Finality" and "Suing Governments" all touch on the question of principle and the application of it.

Since his retirement from the High Court in 2008, Murray Gleeson has, among other things, worked in international commercial arbitration. Difficult questions of *forum non conveniens*, evidence in arbitration and other "transnational legal pathologies" are discussed in two papers collected here. In an interview with the ABC at about the time of his retirement from the High Court, he said, "I enjoy the intellectual challenge of judicial work. The best thing about the law as a profession is that you are always learning something, and as a judge you are always learning something".[10] These two papers are proof positive of that proposition.

The final two papers, "Some Legal Scenery" and "Law and Contextual Change", form a group with the first paper in the collection, "A Core Value". These are reflective pieces, surveys of the law, of the things that change and the things that do not, of the essentials in our legal culture, by a great lawyer of immense experience. This whole collection is but a small sample of a lifetime's thinking about these issues of central importance to a democratic society in which the rule of law holds sway.

In Australia we tend to take democracy and the rule of law for granted. We should not. In 1919, most of Europe embraced democratic constitutions, parliamentary democracy and the rule of law. By 1938, there were few democracies left. Then Hitler eliminated most of the survivors. There is no apparent threat to Australian democracy but there is widespread disillusionment with our polity and even with the concept of democracy. Fortunately, while respect for political parties and politicians is low and diminishing, there are no signs that the judiciary is disrespected or that the rule of law is menaced. But we need to be reminded of why this is so. Like all valuable institutions they need understanding and respect if they are to thrive. The publication of these papers is a small but valuable contribution to that end.

The project of collecting and selecting a number of papers for this book was not Murray Gleeson's idea. Self-indulgence and self-advertising are not the Gleeson style,

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7 Ginsburg, Ruth Bader, "Remarks on Judicial Independence: The Situation of the US Judiciary", Melbourne University Rule of Law Series, 2001, published in Saunders, Cheryl and Katherine Le Roy (eds), *The Rule of Law* (Sydney: Federation Press, 2002), p 63.

8 [1961] UKHL 4; [1962] AC 446.

9 Ibid at 459.

10 <http://www.abc.net.au/radionational/programs/lawreport/retiring-chief-justice-murray-gleeson/3200662>.

so I am pleased that he agreed to the suggestion. Working with him on this book has been a pleasure and an education. Not only was he co-operative in every way, but his courtesy and good humour, as well as his intellectual rigour, made the experience of working on this collection a charming one. I thank him for his time and for answering my many questions.

James Spigelman graciously agreed to write a foreword to this volume. I thank him for that. I am also very much indebted to the librarians at the Law Courts Library in Sydney, especially Gail Smith. She worked assiduously to find papers in the library's collection and copy them for me. Without that assistance, this book could not have been produced. I am also grateful to Jason Monaghan of The Federation Press who embraced the idea of this book, and for the fine editing and production skills of the staff of The Federation Press. My respect for their editing skills has increased exponentially as I learned on the job working on this book.

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