

## Conversations with Justice Paul Finn PhD

by

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Second Interview: 23 June 2011

*This is the second part of the third interview for the Eminent Scholars Archive with an incumbent of the Arthur Goodhart Visiting Professor of Legal Science. Justice Finn is a former Professor of Law and Head of Department at the Australian National University, Canberra, and is currently a Judge of the Federal Court of Australia.*

Interviewer: Lesley Dingle, **her questions and topics are in bold type**

Justice Finn's answers are in normal type.

Comments added by LD, *in italics*.

All footnotes added by LD.

**38. Judge, seven months ago, at the start of your tenure as the Goodhart Visiting Professor, I asked you what you hoped to achieve in Cambridge, and you said, and I quote, “The principal thing is to reconnect with an intellectual life that I’d put aside when I became a Judge”. I wonder whether, in retrospect, you feel you’ve achieved this?**

I have, but not in ways that I had anticipated. That doesn't surprise me. I don't think anywhere I've ever ended up in my life was the place I thought I'd end up in, and that's definitely been true here. It had been my intention to pursue a course of study, which in the event I did not do because I have deflected in another direction. I thought I would spend a deal of time looking at statute law in particular. It's fair to say this is not an environment in which that would have been easily undertaken, but the more I prepared lectures here and the more I read of what was going on in the areas of law in which I was teaching, I became vitally aware of the great divergences between the law in my own country and this country. Given that 40 years ago when I was a student here one could write about Anglo-Australian law, one could not sensibly do that today. I wanted to enquire into the reasons for the differences and I found that has been very interesting, very revealing, and it's something about which I will write when I get the opportunity when I go home.

That's only half an answer to your question. I did have a deal to do with a number of your scholars here. They range from people like Professor Kevin Gray, who's been a very old friend of mine, and whom I have always thought to be one of the jewels in Cambridge's crown and I've had a wonderful time discussing property law with him, just the concept of property, to people I had never met before, like Lionel Bentley, who's been a terrific discovery and a great intellectual companion while I've been here. I won't go on naming people, it's invidious to do so, but I have enjoyed the intellectual engagements that I've had.

**39. You said that you planned to teach commercial equity, intellectual property and restitution in the LLM course. Did you enjoy the experience and did you find that your ideas were well received by the students?**

Did I enjoy the experience? I hadn't taught for 20 years or, taught systematically. Obviously, I'd given the occasional lectures and many of them, but to have to prepare a

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course, or a large part of a course, I found challenging in that it meant there was a lot of catching up to do. And to deliver them was a completely challenging experience. As time went on you almost felt as though the rust was falling off you. By the end of it I thoroughly enjoyed the process because talking to a group of post graduate students, many of whom are interested in what you've got to say, some of them, perhaps their minds stray a little bit from the matter at hand, but it's a form of communication quite remote from the courtroom and taking yourself back into the classroom has its challenges, I think.

**40. You also mentioned, in your first interview, that you were going to give a seminar to the Anthropological Research Association on the subject of the Haddon expeditions to the Torres Strait area at the turn of the last century. How did this go Judge, and did you learn anything extra about Haddon and his work from your interaction with anthropologists here?**

I thoroughly enjoyed the experience. I did it with an archaeologist who happened to have been a non-contentious witness in a case I did, so we had a mix of anthropology and archaeology to start with. From my side of the encounter, it was an explanation to them of what is expected of anthropologists in, well in this case, in litigation. It is not just free-wheeling thought in the way that the pursuit of their own academic discipline may permit. The thing I found particularly interesting was bringing home to them that in the practical world that I deal in, where anthropology mattered, it mattered along with other disciplines that one cannot decide a native title case where one was concerned with the history, customs and mores of the people without the assistance of historians, anthropologists, archaeologists and linguists. It had to be a co-operative enterprise involving all of them if a sensible decision was to be arrived at. What emerged in discussion is there would seem to be a real gulf today between archaeology and anthropology and I think there was some recognition that that might have been to the detriment of both of them.

As to learning more about Haddon. I don't think I did because what I most learned more about was the movie that came out about the Haddon Expedition prepared by a man, Michael Eaton, who was a graduate in anthropology here. Haddon had taken a camera, a moving camera, on his expedition. It only arrived two weeks before the expedition finished, but they had four minutes of dancing filmed on the Murray Island or the Island of Mer and the dancing was of members of a cult, the Malo Cult on that island<sup>3</sup>, and that brought out quite a lot that I was unaware of before. Equally, I think, after [our first] interview (November 2010) I discovered that the Haddon reports had been re-published by Cambridge University press and they are still in the process of coming out, so I have been dipping into them as well so that that's been more my source of learning. But my interest, I think, in Torres Strait and its people continues to grow.

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<sup>3</sup> Malo-Bomail myth. Malo, a Murray Island god, is believed to have arrived on Mer in the form of an octopus, to unite the island's eight clans, which previously worshipped different gods. Islanders say that Malo gave them laws and religious leaders to govern their lives. They claim that land ownership and cultivation were regulated by Malo's laws and that his teachings continue to influence their relationship to the land. It was this claim which made Malo worship a central issue in the Murray Island case. In the Mabo case (see fn 11, Question 11 in the first Finn interview: *Mabo and Others V. Queensland (No. 2)* [1992] HCA 23; (1992) 175 CLR 1 F.C. 92/014.) Queensland's lawyers argued that no such system of land law or government could be proved, and that Malo worship ceased to exist when the London Missionary Society converted islanders to Christianity at the end of the nineteenth century.

See [http://www.nfsa.gov.au/digitalllearning/mabo/mabo\\_11.shtml](http://www.nfsa.gov.au/digitalllearning/mabo/mabo_11.shtml)



**41. Very interesting. You mentioned in this interview, and in your previous interview, that you wish to work on statutes and the Common Law and, in your first interview, you re-iterated the view that, I quote “Australia was born for statutes”. You said you didn’t really make much good progress in this area?**

No.

**42. Were you able to lay your hands on the materials that you required?**

Well that was one of the principal reasons I didn’t. It would have required the acquisition of a significant amount of material which I had in Australia and which clearly can be found in the United States jurisdictions. While I would not for a moment say that the significance of statutes is undervalued in this country and indeed there is a Statute Law Society, the forms and level of legal scholarship about statutes seems, to me, not to have taken off to anything like the same extent in this country that it has in Australia or the United States. I am perfectly aware of the difficulties under which the library here labours and, it seems to me, it would have been untoward for me to have asked that the library acquire books that would not be used, I think, systematically in the foreseeable future.

**43. Judge, can you share any highlights of your time here?**

That’s very hard to actually give a simple answer to. It’s been a thoroughly rewarding and enjoyable experience and the idea of....Let me start again on that. The highlight to me was simply, if I could sound as though I’m opting out of the question, to have the opportunity to be here. I’ve enjoyed an awful lot of it. I think that’s where I’d leave the question, actually.

**44. I understand. It’s the Cambridge experience?**

Yes. I’ve just enjoyed, well not only that, but it’s a real luxury to be able to walk out of your courtroom and have a year to think, and Cambridge gave me that opportunity. So I hope I’ve used it profitably.

**45. Coming to the two papers published during your time here - the *Federal Law Review* paper and your chapter in *Exploring Private Law*. Did you work on these while you were in Cambridge?**

No, I didn’t, both of them were substantially written before the year. The one on the *Federal Law Review*, I gave a revised version to the public law discretion group here and I adapted that but, in a sense, both of them represent an on-going interest. The one on contract law, I in fact gave a more sophisticated version of that paper to the Max Planck Institute in Hamburg, and another variant on it to the European and Comparative Law Group in Oxford.

So they represent interests, both publications represent interests, that have had a past and will have a future, so I have been doing continuing work on them, rather than them just being set pieces which I’ll put aside and not look at again.

**46. Just coming to your paper in the *Federal Law Review*, as we discussed last time, fiduciary principles have been one of the enduring themes of your career. At the beginning of the paper you refer to a quote from Professor Leslie Zines. He’s someone I’ve met because he always used to come and say hello to Kurt [Lipstein]. In an earlier paper in 1995, on which your later paper builds, he said that you were lured into a heresy on public fiduciaries and I wondered what he was referring to.**

Let me backtrack slightly. Leslie now, two days ago, returned to Cambridge and he’s here for four months. So you will be able to have the opportunity to see him again. He is a



marvellous man and a great scholar. Leslie and I disagree on an awful lot of things. When I said being lured into a heresy, I'd say this with tongue in cheek. Leslie does think a lot of my views are not ones he would share and I think a lot his views are not ones I would share. When I say "a lot of", that's overstating it.

**47. Your book chapter in *Exploring Private Law* to celebrate the work of Professor Michael Bryan is about the general question of Australian reaction to internationalisation of laws and legal systems, and you take contract law as an example. Now, obviously, I've only managed a cursory read but I was very interested in one of your remedies on page 65, and I quote "How we teach contract law can be a significant aspect of our solution".**

Well that very much is the case. I talked earlier about, or mentioned earlier, trying to understand the reasons for the divergence between English and Australian law. If you look at bare contract law in the two countries you would see, in a lot of areas, apparent similarities. When you actually look at the context of the two bodies of law of the two countries, they're very different. The thing that's made them very different, I think more than anything else....well there are two things, sorry, I should be more accurate.

One is the continuing development of equity in Australia and its near demise in England and that's had significant impact on things. [*For instance*] whether estoppel can be a cause of action - whether you can have reliance liability without consideration in contracts. That's the case in Australia, as it is in the United States and New Zealand, but not in England. So equity's one thing, and I could go on in length about that.

The other is statute. While we have very few statutes that deal with contract law generally, again, as with the United States, we have very, very significant legislation which deals with unfair and misleading practices in trade and commerce. It doesn't have to be contractual but it impacts on contract. When you look at contract law against the background of these statutes, much of contract law loses its significance, because you may not have a cause of action in contract, as in England you would not have a cause of action in contract. But you sure as hell have a cause of action under what was the Trade Practices Act. And I'm not just talking about consumer law I'm really talking about business law, so the context really matters. And it seems to me our educators, particularly when they teach contract, teach bare contract law far more than contract law in its context.

[*So*] when it's taught in its context, you see a completely different scheme of regulation of business behaviour than contract law would lead you to believe is the case. And that's what makes very sharp differences when you read English cases and you'll get a party loses for some contract reason and the very conduct in question in that case, these English cases, would unquestionably result in relief being given under our legislation.

**48. So, would you say that this approach, the sort of conscious moulding of law in a certain direction, to be a goal of university teaching? Is this something that you could apply across all subjects, or just for contract?**

Oh, no across many subjects. This goes back to something I spoke about at the beginning, in the first interview, and that really it's saying nothing new to say we live in an age of statutes and common law subjects, for the most part now, can only be seen against a statutory backdrop. Common Law is largely concerned with regulating human relations and social organisation, but you just can't teach the common law when you're looking at particular behavioural concerns. You've got statutes there dealing with it as well, and there has to be a moulding of it. There's a very large United States literature starting with, in



modern times, Roscoe Pound at the beginning of the 20<sup>th</sup> century, and I think I mentioned before, Calabresi's<sup>4</sup> book on the Common Law in the age of statutes.

That's really all I'm talking about. This is just one example and contract happens to be the one I picked because it's the one I've got, I think, the greatest interest in.

**49 So Judge, what awaits you on your return to Australia?**

I could give you a very banal response to that and it's an eight day corporations law appeal, which I'm not looking forward to I have to say, but that is as it is.

**50. You will return to the Federal Court?**

Returning to the court. One of the great advantages of this year to me has been to explore what might be a life after the judiciary and I think it's convinced me that perhaps I can put something back into universities, from whence I came without necessarily becoming a mainstream teacher, which I don't think I'm suited for anymore. But, I still would like to teach.

**51. Well I have greatly enjoyed your very frank and lucid expositions of aspects of Australian law and history. It's been a great and a very genuine pleasure listening to your accounts, particularly where there are certain analogues which we don't have in the UK, such as native title, state socialism, and I know that this is of great interest to listeners. So, all that remains is to thank you very much indeed for your outstanding interviews. I'm very grateful.**

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<sup>4</sup> Goodhart Professor in 1980 - 1981

