

## PAUL DESMOND FINN

To eulogise Paul Finn from a professional perspective is no easy task. That is not because of any want of professional achievements by him, or any want of professional writing by him or by others about him. It is not because of any fading of the memory of him.

It is because of the impossibility of compartmentalising him. It is impossible to separate what he did in his professional life as a scholar, as a teacher and as a judge from who he was as a man. It is impossible to talk about the breadth of his ideas without also talking about the depth of his humanity. It is impossible to talk about his law without also talking about his morality.

The solitary figure sitting amidst the piles of manuscripts in the dimly lit smoke-filled room in the Research School of Social Sciences producing original research on underexplored topics of enduring public importance was also the gregarious, thoughtful, generous, and loyal friend of many.

Had he been assimilated into the German legal tradition, Paul Finn's accumulated professional achievements at the height of his career would have been captured in the title Justice Professor Doctor the Hon Paul Finn. He would have fitted each descriptor perfectly and without contradiction. In him, the judge, the teacher, and the scholar coalesced in harmony.

The man Paul Finn would, of course, have rejected as ludicrous the entire premiss of the thought experiment of him having been assimilated into another

legal tradition. He was not a Rudolf von Jhering. Despite overlapping in his fields of interest in equity and corporations law and overlapping as well in his place of study in Cambridge, he was not even a Frederic Maitland. To Paul, his Australianness was an essential part of his identity.

To reduce it to its essence, and to be just a little controversial, Paul Finn's professional identity was as an Australian equity lawyer who was not from Sydney. That description alone is enough to place him within a category which is almost unique. The esteem in which he is held by Australian equity lawyers who are from Sydney is a testament to his profundity. His vision was national. His impact was, and will doubtless continue to be, international.

Paul spent the first two decades of his life in and around Brisbane. He spent the last two decades in Adelaide and in the McLaren Vale. In his youth, he spent enough time studying in London and then studying and teaching in Cambridge to recognise that his destiny was to be an academic lawyer in Australia.

And so, to make a long and contingent story seem short and deterministic, he spent the greater part of his career here in Canberra at the Australian National University, first at the Law School and then at the Research School.

Here, Paul Finn taught. Here he published. Here he researched. Here he hosted the seminars of invited academics, practitioners and judges which gave rise to his fabled series of edited essays. To be invited to sit at the table observing "Finn's Rules" was considered the height of professional achievement.

Here he made the giant leap from being a non-practising academic to being a judge. And metres from here, just off campus in University Avenue, he landed.

There, in his own estimation, he made the practical transition from having been an academic lawyer to truly becoming a judge. He knew the transition was complete after he had determined liability in the case of Hughes Aircraft Systems International v Airservices Australia in a judgment of 125 pages delivered nine months after a six-week trial and after he had then presided over the second stage of the trial in which the quantum of damages flowing from the liability he had determined was whittled to insignificance through relentless cross-examination of the principal witness for the applicant over the course of another sixteen weeks. He had come to experience the highs and the lows of litigation in a single case. He had come to appreciate the essentially symbiotic relationship between bench and bar in the administration of justice.

The choice for the young Paul to become a lawyer was not really a choice at all. He was naturally selected for the role. It was in his DNA. The choice initially to become an academic lawyer rather than to enter legal practice as a barrister was one which he consciously made. The reason he often gave was that he was concerned that legal practice would exacerbate what he thought of as a dark side of his character: what he thought was his competitive nature.

Paul made the right choice for the wrong reason. Engaged though he was, he was never combative. True, he was confident. But his confidence was not tinged by arrogance, and he was the opposite of doctrinaire. He would, had he chosen differently, have made an excellent barrister, just as he went on to make an excellent judge.

The choice Paul made was right because academia provided him with the time and the space to make the better use of his always inquiring, always creative and progressively reflective mind. He set out on a journey of intellectual discovery which he consciously never brought to completion. In doing so, he inspired others to journey with him and afterwards to continue where he left off.

The arc of that intellectual journey can be traced in the three principal publications in the field of law which Paul pioneered and for which he remains internationally renowned. Indeed, it can be traced in the timings and titles of those publications: "Fiduciary Obligations", his Cambridge doctoral thesis, published in 1977 towards the beginning of his academic career; "The Fiduciary Principle", a long and important essay, published in 1989 by which time he was a mature scholar; and "Fiduciary Reflections", a paper published in 2014, shortly after his retirement after 17 years from the Federal Court, where one of his last judicial acts had been publication of the monumental decision of a Full Court of that Court over which he presided in *Grimaldi v Chameleon Mining NL (No 2)*.

To be seen in those publications is his progression of legal thought corresponding to his changing appreciation of the legal landscape. *Fiduciary Obligations* saw a young and energetic technician bring cultivated rules-based order to what had been previously an untilled thicket. *The Fiduciary Principle* saw the undisputed master of the field mapping out the contours in terms of broad legal principle. *Fiduciary Reflections* was a view from the mountaintop, surveying the much-altered landscape with a mixture of satisfaction and concern.

Noticeably absent from those publications or any other publications by Paul was any hint of dogmatism. He was not a scholar to stake out a claim and then defend it against all comers. He was prepared to learn from those who took different views. He was prepared to modify a previously expressed view of his own where he was convinced that another had more merit. And he was always prepared to give credit where credit was due.

Celebrated though *Fiduciary Obligations* was, nationally and internationally from the time of its publication here in Australia, it never went through a second edition. The reason was that, by the time he got to write *The Fiduciary Principle*, Paul simply did not think the same way anymore. He had done the groundbreaking work. But his perspective had changed. He had moved on.

The major topic which had by then come to occupy his attention can be described in general terms as integrity in government. From his earliest days of researching *Fiduciary Obligations*, Paul had been struck by the similarity between the principles employed by courts of equity when conducting judicial review of exercises of powers conferred on fiduciaries and the principles employed by common law courts when conducting judicial review of exercises of powers conferred on administrators.

It led him to ponder the essential unity of public and private law. He was much attracted by the notion of "public trust", a concept which he linked to popular sovereignty. He came to think of it as "the forgotten trust". Though the notion was to yield little by way of judge-made law, it was to have a profound

influence on public discourse concerning integrity in government and on legislative design in Australia.

The earliest legislative appropriation of the term was through the inclusion of "conduct of a public official that constitutes or involves a breach of public trust" in the definition of "corrupt conduct" in the *Independent Commission Against Corruption Act 1988* (NSW). The most recent legislative appropriation of the term has been a similar reference in the equivalent definition in the *National Anti-Corruption Act 2023* (Cth). Expanded into a more generalised "fiduciary political theory", the notion of public trust has gained some traction in academic circles in Canada and the United States, especially as a way of thinking about issues of intergenerational equity relating to the environment.

Another major topic which came to occupy Paul's attention can be described in general terms as the history of Australian legal thought.

For so long as appeals lay from Australian courts to the Privy Council, and for so long as the Privy Council maintained its policy of conforming the legal principle it was prepared to endorse with legal principle as laid down by English courts, there had seemed to be little scope for conceiving of there even being a body of distinctively Australian legal thought let alone there being one that had a history worthy of study.

The dominance of the Privy Council had waned, however, by the time Paul arrived in Canberra, and in 1986 appeals to it from Australian courts were abolished entirely. On the other side of Lake Burley Griffin, the High Court under the leadership of Sir Anthony Mason was forging a distinctively Australian path in

the formulation of contemporary legal principle. Paul, on this side of the Lake, looked backwards to uncover a distinctively Australian past.

His "Law and Government in Colonial Australia", published at that time, blended legal and general history to provide an account of colonial innovation in the provision of private rights to bring civil claims against officers and agencies of government. This led him to explore the idea of a distinctively Australian form of public morality capable of informing the contemporary development of distinctively Australian legal principle.

He never referred to the idea of the "fair go", but he did write this: "The history of our social policy has been marked by cooperative behaviour, by the acceptance of social responsibility and by concern for the vulnerable in society, and this in an environment which espoused and accepted a large measure of individual freedom". "History", he wrote, "is with the courts if only now they are reflecting it".

For Paul, "good faith", "fair dealing", "conscience", "custodianship", "entrustment" and "loyalty", as imported into legal doctrine, were unashamedly moral concepts. He demonstrated in his writings as a scholar and a judge that embracing those moral concepts and applying them in the development and application of legal doctrine is wholly compatible with the maintenance of intellectual rigour.

Paul's thoughts will always be with us because we will always have his writing. We will read and re-read it. We will continue to reflect on it. But let us

not forget the resonance of his voice, the breadth of his smile, the sparkle in his eye, his humour, his camaraderie, and his kindness.

Many who have chosen to live in the world of ideas have aspired to leave the world a little better than they have found it. Few could have been confident at the end of their careers of having done so. Paul was one of those fortunate few. We many are fortunate to have known him.