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Launch of "Capacity and the Law" (2nd ed)

By Nick O'Neill and Carmelle Peisah

by

Justice Geoff Lindsay

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1. Nick O'Neill and Carmelle Peisah have done the Australian community – not limited to lawyers, doctors and their clientele – an important service in producing a second edition of their seminal work, *Capacity and the Law*, and in collaborating with Austlii to secure its publication online as a free-to-air research tool.

2. The subject matter of the book covers topics that are increasingly important for large sections of Australian society, but which are not routinely taught at law schools or sufficiently familiar to practitioners. Few Australian families are untouched by a need to prepare for, or to grapple with, "incapacity" in one form or another.

3. The book mediates between law and medicine, placing both in an institutional setting and offering historical insights critical to present understanding.

4. Publication of a second edition has allowed the authors to canvass medical research relating to capacity not available at the time of publication of the first edition in 2011; to take note of significant legislative changes in Australian states and territories since that time; and to digest a number of cases decided by Australian courts and tribunals in the interim.

5. The dimensions of the subject matter of the book are so large, and the circumstances to which the principles discussed may apply are so diverse, that it is sometimes difficult to find a single, consistent set of words to describe particular topics.

6. There remains merit in viewing the subject from the perspective of the general law, at the same time recognising that the machinery for administration of the law has changed, is changing and will continue constantly to change.

7. Historically, the general law has spoken about decision-making affecting “the person” or “the estate (property)” of individuals affected by an exercise of “protective jurisdiction”.

8. A tendency of the modern mind, in the Australian setting, is to speak of “guardianship” and “financial management” decision-making or to speak, at lower levels of abstraction, about “consent to medical and dental treatment”, or the like. That can be very useful, but an overview of the subject remains important.

9. A full understanding of the subject requires, as our authors fully appreciate, different levels of analysis, ranging from the abstract to the particular, always ultimately tied to particular facts of particular problems required to be solved.

10. As recognised by the High Court of Australia in *Secretary, Department of Health and Community Services v JWB and SMB (Marion’s Case)* (1992) 175 CLR 218 at 258-259, the protective function of “the Crown” (or “the State” as we might well say today) is defined by the purpose to be served: The provision of care for those not able to take care of themselves.

11. Whatever the legal or historical sources of “protective jurisdiction” exercised by the Supreme Courts of Australian States and Territories, and whatever the precise form of similar jurisdiction exercised by *quasi*-judicial administrative tribunals such as NCAT sitting in its Guardianship Division, the jurisdiction can aptly be described as “protective”.

12. An essential feature of any exercise of such jurisdiction is that it is based upon *respect* for the *autonomy*, and *dignity*, of an *individual* person by whom, or for whom, a decision must be made affecting his or her person or property, his or her welfare and interests.

13. Minds can, and do, differ about when, how and by what means “protective” decision-making is to occur (and about the language to be used in describing processes of decision-making); but respect for individual autonomy and dignity is a core ingredient found in any discussion of both “theory” and “practice”.

14. *Capacity and the Law* correctly places the observations of the High Court in *Gibbons v Wright* (1954) 91 CLR 423 at 437-439 at the centre of its discussion of the concept of “capacity”.

15. *Gibbons v Wright* is the primary Australian authority for the proposition that the law does not prescribe any fixed standard of capacity as a requisite for the validity of all transactions. The law requires, in relation to each piece of business transacted, that each party have such soundness of mind as to be capable of understanding the general nature of what he or she is doing by his or her participation in that business. The concept of "incapacity" is relative to the business to be transacted, the task to be performed.

16. In the present understanding of Australian law, the concept of "capacity" is time and task specific, with a distinct focus, not on the *status* of a person, but upon the *functionality* of the person in management of his or her own affairs, with or without assistance.

17. As our authors recognise, there have been large developments over several decades (particularly, and perhaps continuously, since the 1980s) in the way the protective function of the Crown (the State) has been discharged.

18. An embrace of "functionality" as the critical consideration, rather than an attribution of mental illness or the like, has been perhaps the most critical development. Ironically, if I am not mistaken, this can be viewed as a return to the thinking of Lord Eldon (the politically conservative, modern founder of Equity in Anglo-Australian law), whose contribution to development of the law in this area is often overlooked.

19. There has always been an administrative flavour to an exercise of "protective jurisdiction", even by superior courts. That is necessarily the case in "management" of the person or property of a person in need of assistance.

20. Over recent years, though, much decision-making has been allocated to administrative tribunals governed by legislation which has facilitated the involvement of non-lawyers, medicos and community members, in decision making which balances informality, a requirement for procedural fairness and administrative "efficiency". That is a good thing. It has facilitated access to justice, and shared responsibility for difficult decisions across disciplines and the community. It has allowed our Supreme Courts to focus on their supervisory role. Logistically, they could not readily cope with the flow of work routinely managed by NCAT.

21. Another important change has been engagement of "government" and the Australian community at large in a process of "privatisation" which has seen: first, increasing reliance on "self-management" *via* enduring guardianship appointments, enduring powers of attorney and advanced care directives; secondly, de-institutionalisation of care facilities; and thirdly, the encouragement of individuals, their families and their carers to participate actively in doing things which once would have been done institutionally.

22. This process is a work in progress. Involvement of “others” in the making of a decision “for” or “with” a vulnerable person requires close attention to concepts of “accountability”. It also requires close attention to the availability, and design, of regulatory procedures to minimise risks of exploitation and to enforce accountability.

23. The observations of the High Court in *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423 (read with *Clay v Clay* (2001) 202 CLR 410 at 428-430 and 432-433) provide a starting point for an urgently needed discussion about accountability, fiduciary obligations, and the management of conflicts between interest and duty in management of the affairs of a person not fully able to manage his or her own affairs.

24. This area of the law presents a major challenge to the principled development, and administration, of principles of Equity.

25. In their exposition of the concept of “capacity” and its application in contemporary Australian society and law, Nick O’Neill and Carmelle Peisah have provided a foundational text which can justly be celebrated.

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