

The other side of midnight

Michael Finnane QC, looks at Athol Moffitt's recently released book A Quarter to Midnight. Finnane QC was the Inspector appointed to inquire into the affairs of the Sinclair Pastoral Company Pty Ltd and other companies, appeared for Ms Schreiner SM in the special Commission of Inquiry into allegations made by Bob Bottom, and more recently was counsel for the Crown in the inquiry into the convictions of Anderson, Alister and Dunn.

Athol Moffitt, QC, formerly the President of the Court of Appeal Division of the New South Wales Supreme Court has produced a book of some 242 pages, entitled, somewhat melodramatically "*Quarter to Midnight*".

The book is an interesting one, not least because it records in one place, the views of a recently retired judge on a number of matters on which he has been expressing his interest for some years.

Moffitt devotes about half of the book to the subject of organised crime. The rest of the book is concerned with the deficiencies of the National Crime Authority, the role of Judges as Royal Commissioners, the deficiencies of Special Commissions of Inquiry, the failings of some judges, politicians, political parties (particularly the ALP), the separation of powers and recommendations for various steps to be taken to combat organised crime.

"Organised Crime", says Moffitt may be described as "repetitive, high profit crime, conducted virtually as a business, based on syndicates of some permanence, having among its essential characteristics the use of sophisticated business practices (particularly in the area of money laundering) to conceal its enormous profits, the deliberate abuse of civil liberties to protect its agents, and, most importantly, the systematic use of bribery and corruption to hamstring the normal operations of the law, and to facilitate its entry into more legitimate areas".

He correctly points to the threat to our society posed by organised crime and the vulnerability of any government long in office, to be entrapped by interests controlled by organised crime. The assertion is made that the ALP is particularly vulnerable because of its philosophy of strong party loyalty or "mateship".

It would be more correct in my view to assert that all political parties are vulnerable and particularly because of the tight party discipline that operates in all parties, no party willingly concedes even the slightest possibility of vulnerability to corruption.

However, if Moffitt's premise that mateship creates vulnerability is correct, the most vulnerable party, without doubt is the National Party, particularly its Queensland Branch.

The valid point is made, however, that the reaction in Australia to allegations of corruption and the existence of organised crime is for the relevant government to set up an inquiry.

As he says "In Australia we have an inquiry obsession". Very often, it occurs that when an inquiry has presented its report, its recommendations are ignored sometimes with insult (for example, the Vernon Inquiry

in the Menzies era, and the Woodward Inquiry into the Asia Dairy scandal).

Quite a deal of the book is concerned with instances or organised crime in the US and Australia, meetings of known crime figures, details of money laundering methods, involving in one instance at least a rather notorious disbarred Sydney barrister who operated at relevant times out of Zurich.

Much of what he says about organised crime and some of the anecdotal material is not new. Nevertheless it is quite interesting to read.

It is also interesting to read what he has to say about his own inquiry (held in 1974) and the Woodward, Williams, Stewart and Costigan inquiries. There can be no doubt that these inquiries all revealed the existence of widespread crime, tax evasion, graft and corruption.

It also seems to be the case, as he claims, that many of the recommendations made by these Royal Commissions have not been accepted by the Government to whom they were made.

In Chapter 6, *Sideswipes*, Moffitt considers, particularly in relation to the Costigan inquiry, the vexed problem of the applicability of the rules of natural justice to inquiries into crime. Moffitt's view, which I share, is that the mere fact a person is being investigated, does not entitle him to be present during the evidence of all witnesses giving evidence which might concern him nor should he necessarily be entitled to cross examine anyone.

After all, whether a policeman or a Royal Commissioner is getting evidence, there is no difference in principle.

If a person's rights are likely to be affected as a result of the investigation (other than by prosecution) then it may be appropriate to give him an opportunity to make submissions or even take a larger role. This would depend on the circumstances.

Another matter he touches on in this chapter is the attempt to discredit everything Costigan said because of his making a few demonstrable factual errors and because of his disputes with Packer. This criticism of Costigan and similar types of criticism of other Commissioners and persons conducting inquiries (eg, Inspectors of Companies) must make many, particularly Judges, reluctant to embark on such inquiries.

Chapter 7 is devoted to Moffitt's criticisms of the National Crime Authority as being a "toothless tiger" subject to too much political interference from governments and too little scrutiny by Oppositions and Parliaments. I found this chapter the least satisfactory of the whole book.

It is often repetitive and it suggests failure although the Authority is quite new and obviously will need time to operate effectively. Furthermore, whilst it does not have all the powers of a Royal Commission (eg, it is unable to require answers where there is a claim for privilege unless the relevant Minister or Ministers give authority), it is a statutory authority without precedent in Australia, in effect a standing Royal Commission with investigative and prosecuting powers. Government caution is perhaps understandable.

I was somewhat amused to read the following on page

139: "Most of the criminals of earlier days were less intelligent than those of today and were in awe of the law. Detectives were smarter than they and outwitted them when cornered. Despite the right to silence, they usually made some admissions and often confessed".

No doubt the author pines for those simpler times — the criminals were stupid and owned up — the police were smart and presumably incorruptible.

He also deplors the fact that instead of alterations in the law to "meet the problem of the more intelligent criminal and organised crime" there has been pressure for reform in the opposite direction. Presumably he is referring to demands that oral "admissions" to the police become a thing of the past and that proper recording of interviews be held.

It needs to be said that the present system has allowed corrupt police to blackmail people, extort money and even, it would seem to protect organised crime interests, to drive out rivals in the SP betting, casino and brothel trades by threat of arrests backed up by false oral confessions. Hence, contrary to the view of the author, reform in this area should help to hamper organised crime as well as striking a blow for civil liberties.

However, despite these blemishes, Moffitt puts a strong and well argued case for attacking organised crime by civil actions aimed at the proceeds of the laundering of crime profits. He points to success in the area of recovering tax evasion money and argues convincingly for amendments to the law to enable similar steps to be taken against organised crime figures who would be put in the position of having to explain the sources of their wealth or face its loss.

To some extent, the governments of New South Wales and Queensland have legislated in this regard, though apparently only in relation to money from illegal drug operations.

The remainder of the book (with the exception of Chapter 11 — the *Overview*) is not concerned directly with organised crime at all but rather with the independence of the Judiciary, Commissions of Inquiry and the Separation of Powers.

Many general readers would at this point in the book (P.155) probably put it down. Lawyers may not.

All of Chapter 8 "*Independence of the Institutions of Justice*" could appear in any general treatise dealing with the ideals of judicial independence. He does not favour specialist judges, eg a judge controlling the defamation, commercial or adoption lists or working exclusively in one country area. He is of the view that judges ideally come from the ranks of barristers, particularly those who adhere to the "cab rank" rule, and he believes there have been political appointments to the judiciary in recent years. He also deals with the Attorney General's judicial role when deciding whether or not to prosecute.

The Chapter on Commissions of Inquiry (Chapter 9) is not entirely a happy one. He appears to regard the Special Commissions of Inquiry as quite bad in principle because the complainant is "put on trial". He refers to the Inquiries concerning Bottom, Sinclair and Jackson. Leaving the third inquiry to one side, in each of the other two inquiries, allegations were made by the "complainants" which were demonstrated to be utterly false and without foundation.

Bottom alleged a magistrate was involved in a serious conspiracy to pervert the courses of justice and was in

league with organised crime figures. He had no evidence to back up these allegations and the facts were such that he unequivocally withdrew all allegations.

Sinclair similarly made allegations that were held to be totally false and baseless.

I find it difficult to understand the objection to requiring people such as this to "put up or shut up".

Moffitt also believes that narrowly based inquiries are no good and disagrees with the approach of the Chief Justice in the Farquhar-Humpries Royal Commission, that extensions of terms were a matter for the Government.

He also refers to the practice of the Victorian and High Court Judges refusing to act as Royal Commissioners, of the problems that can arise from the setting of terms of reference, and of the New South Wales tradition of Supreme Court Judges acting as Royal Commissioners. He makes the point that in the past the Chief Justice would play a part in nominating a judge, whereas recently that convention has been ignored and judges have been appointed directly by the Attorney General.

His review of these matters is a valuable one and leads me to conclude that New South Wales Judges also ought to consider refusing to sit as Royal Commissioners, particularly if asked to inquire into criminal activities. They cannot then be dragged into public controversy about such matters.

Additionally such inquiries must give a judge information about people who may well appear in his court later as a party or a witness.

In his penultimate chapter on the separation of powers, Moffitt spoils what is otherwise an interesting chapter by making a direct attack on the present Commonwealth Director of Public Prosecutions, Mr Ian Temby, QC, because the latter was a member of the ALP before assuming office and had previously been an endorsed ALP candidate for a Federal seat.

He says (P.221) "Surely such an appointment is only made because the appointing government expects that on important occasions the party member office holder will not be independent and will not let the party down".

This is a most intemperate and ill considered attack. If Moffitt's view were to be accepted as having general application, then no active member of the ALP would be eligible for appointment to any important judicial or quasi judicial post except by a Conservative Government.

Correspondingly, no active member of the Liberal or National Parties would be eligible for appointments by Conservative Governments. The proposition is ludicrous.

It is difficult to understand why Mr Temby should be the subject of this attack. He is certainly entitled to take strong exception to it.

Despite this strange attack on Mr Temby, the book in general is worth reading. It is not easy reading, and it certainly is not all concerned with organised crime.

Interesting though it is, it does not really make out a convincing case that "We are dangerously close to . . . ruination point . . . the hour is late". Indeed nearly half the book concerns matters other than organised crime.

Nevertheless all Supreme Court Judges and practising barristers ought to read it.

A Quarter to Midnight by Athol Moffitt is published by Angus & Robertson Publishers.