A BLAZE IN THE SKY - THE CENTENARY CONFERENCE OF THE HIGH COURT OF AUSTRALIA*

*The Hon Justice Michael Kirby***

ABSTRACT

In conjunction with the centenary of the High Court of Australia in 2003 a conference was held in Canberra to review the decisions of the Court since 1903. In this article, based on a talk at the University of Notre Dame, Justice Kirby describes the celebration and the conference. An examination of some of the comments on controversial decisions in the fields of Aboriginal land rights, criminal law, administrative and constitutional law, international law and the private law of obligations is provided. Further, Justice Kirby records some of the most striking ideas advanced in the papers and suggests that more interaction is needed with constructive critics, young people and minorities in future conferences. Thus, the article leaves the reader with a realization that while adulation and praise have a place in a court's celebrations, so do suggestions for improvements and fresh ideas.

I AFTERBURNERS FOR A CENTURY

As the participants in the centenary conference of the High Court of Australia assembled for the closing dinner, held on 11 October 2003 in the splendid hall of the National Museum of Australia in Canberra, a blaze appeared in the sky. Indeed there were two.

As if to emphasise the contrast between the contemporary world and the welcome to country ceremony performed by Aboriginal dancers that had taken place on the shore of Lake Burley Griffin[1], two F-111 aircraft of the Royal Australian Air Force thundered overhead. They opened their fuel tanks and engaged their afterburners to create two vivid golden streaks in the sky. On the eve of the anniversary of the bombings of Bali, which claimed so many Australian lives, some residents of the national capital reported alarm that the city was under terrorist attack. Such are the times we live in.

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* Text of an address given in the Faculty of Law, Notre Dame University Fremantle, Western Australia, 19 October 2003.

** Justice of the High Court of Australia.

1 Geoff Lindsay, 'The High Court's Centenary Conference' (2003) 24 *Australian Bar Review* 110, 111 see the text of the Aboriginal welcome.

Was there deliberate symbolism in these two streams of light in the dark blue sky? Was it of two nations: indigenous and settlers? Was it of the past and the future? Did each stream represent a century, one burnt out and finished, the other just beginning and surging on? Were they a symbol of activism and restraint; of 'strict and completely legalism' and of a more urgent search for justice? Or were they none of these things but just the climax of 'a lakeside nosh-up for scores of judges brought in from around the world' to celebrate the centenary of the High Court of Australia?[2]

Such fly-pasts are not, it seems, uncommon at funerals of famous airmen and military warriors. Whilst the shock of the supersonic sound thrilled some of the participants in the High Court conference, it left others with a sense of dismay. A female judge remarked to me: 'Only a court comprised solely of men could involve the military in the culmination of its centenary celebrations'. Others, however, loved the drama of it all. As is usually the case, the High Court was controversial. Even at its centenary celebration, there were dissenting opinions.

The centenary of the first sitting of the original Justices of the Court in the Banco Court of the Supreme Court of Victoria in Melbourne took place on 6 October 2003. Crammed onto the small platform in the biggest courtroom of that court, where the oaths were administered to the three foundation Justices, the seven present members of the High Court sat exactly a hundred years later to mark the Court's century of service.

The Prime Minister of Australia (Mr J W Howard) spoke for the Commonwealth with generous praise on the achievements of the Court. He took the occasion to declare his continued opposition to the adoption of a Bill of Rights. The Attorney-General for Victoria (Mr Rob Hulls) spoke for the State and Territory law officers. He reasserted the obligation of the Attorney-General to defend the courts and the judges. He addressed these remarks not only to the Bench but to the outgoing Federal Attorney-General (Mr D R Williams QC), who sat silent in the front row on his last day in that office. Mr Hulls said that the euphoria of the centenary should be kept in check in the realisation that all was not well in the law. Most especially he mentioned the high, even increasing, levels of incarceration of indigenous Australians in the nation's prisons. Speeches of appreciation followed, made by leaders of the Australian legal profession. Chief Justice Murray Gleeson, in response, reminded those present that the Court's function inevitably involved it restraining the powers of those normally unfamiliar with such controls. It was a function of the Court that was fraught with the potential for strong, even passionate, disagreement.

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2 Tony Wright, Blitzkrieg flop *The Bulletin* 21 October 2003 15; Simon Kearney 'Jets Cause Alarm' *Sunday Telegraph*, 9 November 2003, 36.

As if to symbolise the heavy burdens that the High Court has always carried, the Justices hurried back from Melbourne to Canberra for three sitting days before the commencement of the centenary conference at the end of the week. From Australia and overseas, judges, practitioners and academics gathered in Canberra for the conference. It was organised on behalf of the Court by the Australia Bar Association, particularly the Bar Association of Queensland (led by Mr Glen Martin SC), by the Law Program of the Australian National University (led by Professors Peter Cane and Jane Stapleton), and by officers of the High Court (led by Mr Christopher Doogan, the Chief Executive and Principal Registrar of the Court).

The opening ceremony of the conference convened on 9 October 2003 in the Ballroom at Canberra's art-deco Hyatt Hotel. It was addressed by the new federal Attorney-General (Mr P M Ruddock MP) in his first hours in that office. He praised the Court for its achievements. Chief Justice Gleeson welcomed the participants. The Governor-General (Major General Michael Jeffrey) delivered a strong speech about the role of the Court in upholding the rule of law in Australia. This, he said, was the core value of the Australian Constitution. He reminded his audience, as Lord Denning did in *Gouriet v Union of Post Office Workers*[3], of Thomas Fuller's words long ago: 'Be you ever so high, the law is above you'. The High Court has ensured that this aspiration is a reality throughout the nation.

With that, the participants repaired to the forecourt of the High Court building. There, on a chilly night, in front of the Great Hall of the High Court, a military band from the Royal Military College, Duntroon led defence personnel in a precision performance of ceremonial drill. Despite the cold, the spirits of the participants were high and eager with anticipation of what was to follow.

II THE HIGH COURT IN AUSTRALIAN SOCIETY

The papers of the centenary conference have been published.[4] As presented, they were of a uniformly high standard. The writers had nearly two years in which to gather their thoughts. This was no superficial collection of throw-away opinions and comments but a detailed scrutiny by hand-picked speakers of the work and contributions of the High Court to law and to Australian society. Necessarily, this summary can record only a few of the ideas, being those that appealed to this reviewer. Ask another participant, and you will receive a different

3 [1977] 1 QB 752, 762 (Lord Denning MR).

4 Peter Cane (ed), *Centenary Essays for the High Court of Australia* (Sydney: Lexis Butterworths 2004).

set of impressions. Yet for those who did not attend, or could not afford to travel to the conference, this collection of memories of some of the main themes may suffice to give its flavour until the book of the papers is generally available.

As an introduction to the conference, an excellent documentary film, *The Keystone of the Federal Arch*, was screened after the formal opening speeches. It contained new clips from the early days of Australia's federal story, showing the inauguration of the Commonwealth and some of the participants in the High Court's first years. With a little dressing up, this documentary, produced in Queensland, could serve as a suitable visual text for secondary schools and even university law schools throughout the nation. In the general community, and even in circles that ought to know, there is a profound ignorance about the institutions of Australian government. As most people now obtain their knowledge on such things from electronic and visual sources, the film would be a good starting point for a broader civic education about the Court in its second century. More instruction in this new genre is obviously needed.

The first substantive session was addressed by Professor Leslie Zines of the ANU, doyen of Australia's constitutional law scholars. He made a point that, from the start, the High Court was required to resolve tensions and differences. Professor Zines also highlighted the different visions of Australia's destiny at the time of federation: both nationalistic and imperialist. These differences were reflected in the constitutional text – including within the judicial arrangements provided by the Constitution – the High Court and the Privy Council. Professor Zines' analysis of the work of the Court in its first century was complemented by a paper by Dr Helen Irving of the University of Sydney. These sketches of the main contours of the work of the Court, and many of the chief controversies that it has had to face, provided a foundation for all the sessions that followed.

The second part of the general review involved presentations by the only non-lawyers who spoke at the conference. They were Professor Brian Galligan of the University of Melbourne and Professor John Henningham of the Queensland University of Technology.

Professor Galligan examined the role of the High Court from the point of view of a political scientist. His analysis was generally sympathetic. He acknowledged the necessary role of the High Court in adapting the 1901 Constitution over its first century to suit vastly different times. Thus, Professor Galligan directed some remarks to the recent public debates about the issue of so-called judicial activism. He said that much of the heat in those debates arose out of public ignorance over the role of the Court. To some extent, this was a result of the retreat of the Justices to what he described as an 'ivory tower' where they felt safe from political

intrusion. Nonetheless, Professor Galligan's view was that the Court needed to explain better its work and its methods of operations. He said that the Court now operated in a more demanding environment, where some of old ways of pretended value-free decision-making were unlikely to be accepted without question.

Professor Henningham had been appointed in 1989 to the first Chair of *Journalism in an Australian university*. He examined the High Court from the perspective of a professional journalist. The introduction to his paper contained what was probably the cleverest humour of the conference:[5]

> The mass media and the High Court are two formidable institutions which have each brought a profound influence on the development of modern Australia. But they are quite different in almost all respects. On the one hand we have an institution which despite its great power and influence is elected by and responsible to nobody, is often obsessed with trivia, often out of touch with its audience and in some sections guilty of bias and sensationalism. On the other hand we have a small and dedicated group of people who labour hard to produce newspapers and news bulletins to inform the general public.

Professor Henningham picked up, perhaps unconsciously, a theme stated by the Prime Minister in his remarks in the Banco Court earlier in the week. Mr Howard had listed as the key institutions of Australia, the Parliament, the High Court and the free media. As such, the media are *not mentioned in the Australian Constitution*. Yet undoubtedly they have come to play a critical and even institutional role in Australia, as in every modern nation. Professor Henningham examined the news stories on the High Court and its work. He responded to complaints, regularly made by the Justices, concerning the lack of analysis of, or sustained attention to, the decisions of the Court, even when they were objectively important for the Constitution, the general law and the nation.

Professor Henningham put the blame for this lack of attention upon the Court itself. He called for better presentation of decisions, whilst praising the work of the newly appointed High Court Public Information Officer (Ms Fiona Hamilton), one of his former students. He analysed the number of mentions of the Court and its Justices in the Australian print media. He pointed out that the majority of references to the High Court were contained in news items concerned with the Prime Minister. Thus, Professor Henningham suggested that this put the Court in what the media regarded as its proper position in the governmental pecking order. Lawyers, with a vision of priorities extending beyond daily deadlines, might not agree.

Professor Henningham commented on the improved coverage of the Court during the days immediately prior to the centenary conference.

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5 Professor John Henningham quoted *The Australian* (Media Section) 15 October 2003.

Thus, he referred to the way in which the centenary had been treated in the print and electronic media. It was suggested that management of news, during such events, could sometimes be useful in educating the public about an institution like the Court. Professor Henningham did not explain how the Justices would find the time to perform this role of media management. Presumably, it had to be left to others without embracing uncritically the media attraction to 'spin' and the manipulation of news, often based on considerations of entertainment and shock value, rather than accurate public information.

The final unit in the first session of the conference involved the presentation of papers by Sir Anthony Mason, past Chief Justice of the High Court and Lord Bingham of Cornhill, the senior Law Lord of the United Kingdom. Each of them examined the internationalisation of the common law and the way in which, over the course of its first century, the High Court slowly broke away from the legal doctrines espoused in the United Kingdom and set out upon its own path. Inevitably, the gradual end of Privy Council appeals, finally concluding with the passage of the *Australia Acts* in 1986, ended the automatic deference of Australian judges, including in the High Court, to decisions of the judges of England. Nonetheless, an enormous intellectual debt remains. The ironical feature of the current House of Lords, commented upon by Lord Cooke of Thorndon,[6] is that, since the decline of the Privy Council's judicial responsibilities throughout the Commonwealth of Nations, the use of Commonwealth jurisprudence by the Law Lords has greatly increased. They have now joined the world of common law borrowings. Sir Anthony Mason paid a tribute to Australia's debt to the Privy Council and to English law. Lord Bingham returned the compliment.

III The Jurisprudence of the High Court

These historical and general reflections were followed by eight specialised sessions of the conference that addressed the work of the High Court of Australia in particular disciplines. Appropriately enough, the first session concerned the law and indigenous peoples. Also appropriately, it was led by Chief Justice Beverley McLachlin, Chief Justice of Canada. The other participant was Mr Noel Pearson, adviser to the Cape York Land Council and Cape York Partnership, a leading Australian Aboriginal lawyer.

Chief Justice McLachlin outlined the course of authority in Canada concerned with the recognition of customary laws and the land rights of

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6 Lord Cooke of Thorndon, *Turning Points of the Common Law* (The Hamlyn Lectures Forty-Seventh Series) (London: Sweet & Maxwell, 1997) 1, 2. See also, F C Hutley, The Legal Traditions of Australia as Contrasted with those of the United States (1981) 55 *Australian Law Journal* 63, 69.

that nation's indigenous peoples. As she explained the development of doctrine in Canada, it became clear that the problems of recognising and upholding the rights of indigenous peoples are a special challenge for the countries of the common law. In many of those countries (Canada, the United States, Australia, New Zealand, South Africa, Zimbabwe, Malawi and Kenya), large pockets of settlers settled upon land previously occupied by indigenous peoples who were not in a state of military capacity or governmental organisation to present a significant challenge to the settlers.

Where the indigenous people of the British Empire were ready for the new-comers, they could usually negotiate arrangements for respect for their own legal rights and traditions. Where they had a settled system of law, the Crown would often agree to execute treaties with them. So it was with some of the first nation peoples of Canada and the Maori in New Zealand. However, the latter did not occur in Australia. Before *Mabo v Queensland [No 2]* ('*Mabo*'),[7] the right of Australia's indigenous peoples to their lands was not recognised by the common law; nor had a general statute been enacted to provide such recognition in lands not yet acquired by settlers and their descendants. It was *Mabo* that revolutionised Australian law in this respect. To some extent, the development in *Mabo* was stimulated by decisions of the Supreme Court of Canada and by the case law in other countries, notably the United States of America and New Zealand.

Probably the strongest speech of the entire conference was given by Mr Noel Pearson. He was highly critical of decisions of the High Court since *Mabo*. He claimed that in its more recent decisions in *Commonwealth v Yarmirr* ('*Yarmirr*'),[8] *Western Australia v Ward* ('*Ward*')[9] and *Members of the Yorta Yorta Aboriginal Community v Victoria* ('*Yorta Yorta*'),[10] the High Court had 'misinterpreted the definition of native title' under the *Native Title Act 1993* (Cth). It had 'fundamentally misapplied the common law'. In this, he challenged the view expressed by the High Court to the effect that, once the law of native title was stated in terms of that Act, it was the duty of courts to give obedience to the text of the Act, rather than of the pre-existing common law, on the given ground that the rights were then derived under the statute, conventionally regarded as a higher source of law-making because of the democratic character of parliamentary law.

Mr Pearson agreed with the opinion expressed by Justice McHugh in *Yorta Yorta* that the purpose of s 223(1) of the *Native Title Act* was to reflect the key elements of the common law, as stated by Justice Brennan

7 (1992) 175 CLR 1 (*Mabo*)
8 (2002) 208 CLR 1 (*Yarmirr*)
9 (2002) 213 CLR 1 (*Ward*)
10 (2002) 214 CLR 422 (*Yorta Yorta*)

in *Mabo*, and not to supplement, amend or replace the definition of native title at common law by a statutory formula. In a tribute to Canadian developments, he referred with admiration to the work of a Canadian professor, Kent McNeil, whose writings had influenced the decisions in *Mabo* and in Canadian cases.

Mr Pearson was especially critical of the decision in *Yorta Yorta* which, he said 'now requires us to prove the details of the traditional laws and customs that existed more than two centuries ago'. He ended on a sombre note:

> The situation is not good. The situation is pregnant with the prospect that the opportunity which *Mabo* represented for the settlement of land grievance in accordance with the three principles [there stated], will ultimately be unfulfilled. In my view, this situation can only be fixed if the definition of native title in section 223(1) of the *Native Title Act* is restored to its original intention by Parliament, and that the explication of native title be undertaken by [the High Court] in accordance with the time-honoured methodology of the common law. This is the least that indigenous peoples having faith of the common law heritage of this country expect from the country's Parliament and High Court.

Mr Pearson's remarks drew a strong indication of support from sections of the audience.

The next session of the conference concerned criminal law and procedure. It was led by Dame Sian Elias, Chief Justice of New Zealand. The presence of two Commonwealth Chief Justices, both of them women, was significant in the Australian judicial context where no women presently serve on the High Court. Each of them made a big impact by the power and content of their presentations.

Chief Justice Elias outlined the way in which, in criminal cases, decisions of the High Court of Australia had been utilised by courts in New Zealand. She differed from many practitioners who espouse the merit of single reasons from a final appellate court. Whilst understanding the desire of trial judges, practicing lawyers and law students for a single court opinion, she praised the nuanced reasons of the High Court, particularly in criminal cases. She instanced a number of fields in which the complexity and difficulty of the issues to be addressed were only really explained and understood by a reading of all of the opinions, with their differing reasoning.

Chief Justice Elias especially emphasized the line of authority in the High Court insisting upon judicial instruction to juries concerning the risks and difficulties faced by an accused person against whom allegations of sexual misconduct are made, years or decades after the alleged conduct.[11]

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11 *Longman v The Queen* (1989) 168 CLR 79; *Gipp v The Queen* (1998) 194 CLR 106; *Doggett v The Queen* (2002) 208 CLR 343, 357 [55], 377-378 [126]-[129].

She pointed out that, recently, in New Zealand, she had to sit at trial in such a case. Before charging the jury, she read a series of recent decisions of the High Court where, against some apparent resistance on the part of trial judges in Australia, the Court had insisted upon the need of judges to inform juries of the basic fact that, delay in the prosecution of such allegations necessarily presents serious forensic disadvantages for most accused. Although, in New Zealand, court authorities have not always gone so far (and although some resist such instructions as an illicit way of reviving the discredited common law requirement for corroboration of such allegations), Chief Justice Elias pronounced herself convinced about the necessity and fairness of the High Court's authority in this respect. To the surprise of the prosecutor in a trial, over which she presided, she gave what she described as the 'extended *Longman*' warning required by the High Court.[12] She said that this put into the jury's mind, with the authority of the judge, the forensic realities that every lawyer knows but that a lay person may need to be reminded of. As a footnote, she reported that the jury had proceeded to convict the accused. But they did so, after having their attention drawn to the risks of injustice in cases of greatly delayed complaints of sexual wrongdoing.

In the course of her remarks, Chief Justice Elias also referred to the uniform *Evidence Acts*, now in force in Australia in federal courts and in New South Wales, the Australian Capital Territory and Tasmania. She expressed the view that the Acts combine rationality and principle in an appropriate mixture; and pointed out that evidence law, commonly neglected elsewhere, is usually critical in criminal trials.

Chief Justice Elias' paper was succeeded by one given by Justice Mark Weinberg, a Judge of the Federal Court of Australia and formerly a professor with a specialist interest in criminal law. Justice Weinberg traced the history of the High Court's resistance to notions of imputed intention and its strong adherence to the need for subjective intention on the part of the accused, to establish the essential elements of criminality.[13] He traced other controversies, including in relation to the law of provocation and self-defence. It was a masterful *tour d'horizon*.

The succeeding session concerned federalism and federation. The first paper was given by Professor Cheryl Saunders of the University of Melbourne. Drawing upon her study of federations in many parts of the world, Professor Saunders suggested the need for closer attention in the High Court to theories of federalism and to the experience of other federations and similar inter-governmental arrangements, including outside the world of the common law. She instanced the contemporary

12 See eg, *Doggett v The Queen* (2002) 208 CLR 343, 357 [55], 377-378 [126]-[129]

13 Mark Weinberg 'Moral Blameworthiness - The "Objective Test" Dilemma' (2003) 24 *Australian Bar Review* 173

development of the federal idea in Germany. Further, she acknowledged that, until advocates address the Court and provide analogies and materials to illustrate the way other nations have tackled federal questions, the High Court would probably continue to ignore the wider sources now available on federal and like intergovernmental arrangements. Allowing fully for the peculiarity of Australia's constitutional compact, and the way in which it has been developed and interpreted, Professor Saunders suggested that there was a rich source of comparative law materials that had so far been neglected in most considerations of the Australian federal Constitution.

The second paper in this session was given by Professor George Winterton now of the University of Sydney. He confronted the question of whether, as some commentators had alleged, the High Court had failed to protect the States and been unduly supportive of the expansion of the power of the Commonwealth. He acknowledged that federalism was one of the main foundations of the Australian constitutional document. It was 'the foundational institution' and 'central structural feature'. Professor Winterton quoted the words of Quick and Garran, that the federal idea 'pervades and largely dominates the structure of [the Commonwealth]'.

Professor Winterton addressed squarely the charge that the decision of the High Court in the *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ('*Engineers' Case*'),[14] reversing the immunity of State instrumentalities doctrine devised by the original Justices, had undone the initial federal idea of the Constitution, to the great disadvantage of the States. He examined the later *Uniform Tax Cases* and the *Tasmanian Dams Case*. The implied prohibitions found in the Constitution were also scrutinised by Professor Winterton. He pointed out that, within these, the High Court had fashioned a number of principles protective of the governmental powers of the States. In this regard he instanced most especially *Melbourne Corporation v the Commonwealth;*[15] *Re Australian Education Union, Ex parte Victoria*[16] and the recent decision in *Austin v The Commonwealth*[17] concerning impermissible federal taxes on certain State judicial pensions. Professor Winterton concluded that 'overall, in its century of constitutional interpretation, the High Court has fulfilled the high aspiration of Alfred Deakin'. He said that the charge by Professor Gregory Craven of Notre Dame University that 'the Court had pushed the constitutional order to the brink of breakdown', was unsupported by the evidence. Professor Craven has not recanted but, in typical fashion, has stepped up his criticisms.[18]

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14 (1920) 28 CLR 129 (*Engineers Case*)

15 (1947) 74 CLR 31

16 (1995) 184 CLR 188

17 (2003) 215 CLR 185

18 Greg Craven, *Conversations with the Constitution – Not Just a Piece of Paper* (Sydney: UNSW Press, 2004) 76-86

The next session, which commenced the programme on 11 October 2003, concerned the High Court's contributions to the law of torts. The first paper in this session was given by Professor Stephen Todd of the University of Canterbury in New Zealand. Painstakingly, he traced the developments of the tort of negligence in the High Court in recent years and the struggle of the Court to find a formula or mechanism for giving guidance to decision-makers without embracing wholeheartedly the policy operational approach of the *Caparo* test.[19] He suggested an alternative approach of his own as a means of determining whether particular facts would enliven liability in negligence. Such liability depended, Professor Todd argued, upon principles requiring that the law not interfere unduly in individual autonomy; should keep any response it made to a proportionate one; give protection to the vulnerable; and ensure that legal rules operate coherently in the public interest. Whether these criteria would do better than the *Caparo* test or the 'salient features' test now taken into account in the law of negligence, is a matter for future debate.[20]

An important paper was then given by Professor Jane Stapleton of the Australian National University.[21] She acknowledged that the law of tort, particularly of negligence, had been voracious in Australia until recent years. But she suggested that the core moral concern of the law of tort was the protection of the vulnerable. In this respect, she identified a number of leading decisions of the High Court, including *Bryan v Maloney*[22] which she singled out for special praise. She suggested that protection of the vulnerable was a 'golden thread' that ran throughout the High Court's treatment of tort liability.

Professor Stapleton asked whether the law of tort had any role to play in protecting Aboriginal Australians, for example, in cases of removal of vulnerable children from their natural parents by governmental agencies and church authorities. Was there room in this respect, she asked, for the imperium of negligence and so-called 'judicial activism'?

Professor Stapleton pointed out that Australia's judicial arrangements were ultimately inherited from England. Although now spelt out in the Judicature established by the federal Constitution, the nature of the judicial function was undefined. She suggested that it still took its fundamental character from the judiciary of England which was its

19 *Caparo Industries Plc v Dickman* [1990] 2 AC 605. See now, *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 626 [238]

20 *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 225 [203]

21 Jane Stapleton, 'The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable' (2003) 24 *Australian Bar Review* 135

22 (1995) 182 CLR 609. See, however, now *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 78 ALJR 628; 205 ALR 52

original source and model In that judiciary, the highest court had never observed a complete and total divorce from creative law-making Indeed, the secret and genius of the common law lay in its capacity of judicial adaptation and development Professor Stapleton suggested that Australians should be mature enough to acknowledge that this was also a feature of their legal system, including in the law of tort It was a feature that defied the attempt to superimpose an absolute and rigid division of the judicial power from the other branches of government which, nonetheless, enjoyed superior law-making capacities.[23] This was an important and new insight that attracted much attention at the conference It was really a point of political theory Illustrated by reference to instances within Professor Stapleton's speciality in the law of torts, it was a most important contribution to the insights of the conference

The session on tort law was followed by one on contract and commercial law This was led by Professor Tony Duggan, formerly of Melbourne, now of the University of Toronto in Canada Professor Duggan tackled the issue of the role of the law of equity in commercial cases.[24] He was right up to date, referring in his presentation to decisions handed down by the High Court only days earlier in two cases concerned with equitable relief against forfeiture.[25] Professor Duggan said that the development of the law of equity as a parallel stream of law, operating side by side with the common law, was a significant feature of the English and Australian legal system It had been sustained in Australia by the presence in the High Court of Australia, throughout its history, of judges with acknowledged special interest, and expertise, in equitable doctrine Controversies exist as to the extent to which equity should intrude in commercial disputes between substantial business corporations.[26] Professor Duggan's paper confronted this issue and scrutinised the cyclical nature of many of the debates in commercial and contract law

This discussion was followed by one led by Professor Deborah de Mott of Duke University in the United States She examined the decisions of the High Court in the field of bankruptcy, fiduciary obligations and debt recovery This was done by some well chosen illustrations of nefarious conduct that had come under the attention of the Court in its first century She was able to contrast some of the Australian cases with decisions in the United States It was an illuminating insight into the

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23 Stapleton, above n 21 137

24 Anthony Duggan, The Profits of Conscience: Commercial Equity on the High Court of Australia (2003) 24 *Australian Bar Review* 150

25 *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 77 ALJR 1853; *Romanos v Pentagold Investments Pty Ltd* (2003) 77 ALJR 1882

26 Discussed in *Tanwar* (2003) 77 ALJR 1853, 1875 [113]-[114] citing and explaining *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1986) 7 NSWLR 170 177

commonalities of the two legal systems operating in a broadly similar economic environment upon common human conduct, evidencing all too often infidelity to duty, deception and greed

The following session addressed issues of judicial review of administrative action. Mr Patrick Keane QC, Solicitor-General of Queensland, examined the contributions of the High Court to administrative law, specifically in the field of judicial review of administrative action.

He traced the adoption in Australia of the principles enunciated by the Supreme Court of the United States in *Marbury v Madison*,[27] whose bicentenary was being celebrated in 2003. Mr Keane then suggested a number of areas where judicial review might need adaptation to contemporary circumstances. These included its application to bodies and persons to whom some aspects of federal activity had been 'outsourced'.[28] He also referred to the attempts of legislation by privative clauses to remove, or limit, the scope for judicial review.[29] Finally, he described the issues presented where power was delegated to a Minister with open-ended discretions or where non-binding guidelines were established within the executive government. In such cases, avoidance of merits review was necessary if the traditional role of the courts was to be observed and the principle of separation of powers obeyed. Mr Keane emphasised the important role that judicial review and constitutional review had played in the decisions of the High Court and as a means of upholding the rule of law in Australia during the past century.

There followed an examination of administrative law decisions by Professor Peter Cane of the Australian National University. He divided his analysis into an examination of substantive law and institutional developments.[30] The culture of administrative law was traced to Australian constitutional provisions, notably s 75(v), affording an irreducible means of invoking the jurisdiction and power of the High Court to scrutinise the legality of the conduct of federal officers. He said that insistence upon this cardinal role in the Court could be traced to its earliest days.[31]

Professor Cane described the remarkable developments of federal administrative law in the 1970s, manifested most especially in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and the

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27 1 Cranch 5 US 137 (1803)

28 See eg, *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 77 ALJR 1263; 198 ALR 179

29 See, *Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476

30 Peter Cane, 'The Making of Australian Administrative Law' (2003) 24 *Australian Bar Review* 114

31 *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 513-514 [103]-[104]

Administrative Appeals Tribunal Act 1975 (Cth) He instanced what he said was a form of Australian 'exceptionalism' as some of the then radical provisions of the federal legislation had been overtaken in other common law jurisdictions by developments in the common law Several commentaries on recent decisions in the High Court have called attention to advances in judicial review in English decisions not yet embraced in Australia.[32]

There followed a session on human rights, international standards and the protection in minorities The first paper in this session was presented by Sir Gerard Brennan, past Justice and Chief Justice of the High Court. It was he who, in *Mabo*[33] propounded the often repeated principle which became the central focus of this session There he said:

> The opening up of international remedies to individuals pursuant to Australia s accession to the Optional Protocol to the *International Covenant on Civil and Political Rights* brings to bear on the common law the powerful influence of the Covenant and the international standards it imports The common law does not necessarily conform with international law but international law is a legitimate and important influence on the development of the common law especially when international law declares the existence of universal human rights

Perhaps in keeping with these more cautious times, Gerard laid emphasis on the 'deep and abiding' principles of the common law as a distinctive system of law that in some ways differs from international law, including with respect to human rights He stressed the need for legitimacy in the importation of human rights principles, referring to the methodology of the common law and its character as effectively a fact-bound legal system Further, Sir Brennan cautioned against starting legal analysis with 'open-textured rights', lest that approach produce anomalous or discordant results in the exposition of Australian law Nevertheless, he concluded that, as international human rights law continues to expand, we could expect its influence to be felt increasingly in Australian law. In part, this would happen by the incorporation of treaties into domestic law, as the *Refugees Convention* is incorporated in the *Migration Act 1958* (Cth) However, that also left open the legitimate part to be played by judges in solving particular cases by reference to international law, in the manner mentioned in *Mabo*.

The second paper in this session, by Professor Hilary Charlesworth (Australian National University) built on this foundation Professor Charlesworth referred to the narrow and scattered rights provisions in

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32 See eg, Sir Anthony Mason the Scope of Judicial Review in H Manson and D Pearce (eds), Australian Institute of Administrative Law Forum, November 2001, 21ff; Sir Anthony Mason, The Tension between Legislative Supremacy and Judicial Review (2003) 77 *Australian Law Journal* 803 809-810

33 (1992) 175 CLR 1 42

the Australian Constitution and the generally 'diffident' view of the High Court of Australia in relation to such provisions. She acknowledged that, in the past, many Australian judges and lawyers viewed international law as 'vague' and 'open-ended', with the result that the High Court's use of this source of law was 'threadbare' and 'meagre'. Nonetheless, she listed a number of decisions in more recent times where the international law of human rights had been invoked in judicial decisions. She suggested that it was likely that the impact would grow, just as it had in other countries.[34] By reference to decisions of the Supreme Court of Canada, Professor Charlesworth said that the influence of international law would lie in the persuasiveness and utility of its principles and jurisprudence for particular cases. It demanded intellectual respect, not blind adherence or outright rejection.

The final substantive session of the conference addressed the law of equity and restitution. The first paper in this session was given by Dr Joachim Dietrich (Australian National University). By reference to case law,[35] he illustrated the High Court's approach to implied contract and to the more recent developments of the law of restitution. Somewhat courageously, Dr Dietrich embarked on the debate concerning the potential of equity law in Australia to adapt to changing social realities - a dialogue that occasionally inflames more traditionalist equity lawyers.[36] However, before coming too close to the rocks of the fusion fallacy, and perhaps concerned by the frowns of some current members of the High Court, Dr Dietrich retreated to what he described as the 'narrow doctrinal approach' of High Court decisions concerning equity principle[37] - and he left it at that.

The last paper of the conference was given by Dr Simon Evans (University of Melbourne). He also sought to describe the decisions of the High Court in the field of equity. Dr Evans did this by reference to a number of central themes in the case law. These included the function of equity in upholding the obligations of conscience;[38] the use of equitable principle in developing remedies; and the special vigilance of the High Court, over its first century, in protecting and upholding fiduciary obligations.

At the end of the conference, participants repaired to the shores of Lake Burley Griffin. Judges from overseas and from Australia mixed freely

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34 See now *Al-Kateb v Godwin* (2004) 78 ALJR 1099, 1112 [62], 1128 [152]

35 See, eg *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2002) 208 CLR 516

36 *Breen v Williams* (1996) 186 CLR 71, 112-113, 129-134

37 Compare Gino Evan Dal Pont and Donald Chalmers, *Equity and Trusts in Australia* (3rd ed Sydney: Thomson Lawbook Co, 2004) v-vii

38 See, eg, *Maguire v Makaronis* (1997) 188 CLR 449; *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395; *Bridgewater v Leahy* (1998) 194 CLR 457

with practitioners and students Chief Justice Gleeson bade the participants farewell in a witty speech delivered on behalf of the Court The last word was offered by Mr Glenn Martin SC, President of the Bar Association of Queensland His was also a humorous address which, at one stage, attempted to predict where the current Justices of the High Court would be in a decade's time This reviewer was placed in high office in an intergalactic court Whilst the other-worldly elevation was greatly welcomed, he has something rather more down to earth in mind

IV EVALUATION

The wealth and variety of the presentations at the centenary conference of the High Court illustrated the variety and importance of the work of the Court and its contributions to so many areas of the law during its first century

As a general court of law, it has a wider remit than many national constitutional courts As the ultimate appellate court for State as well as federal courts, it has a wider jurisdiction than the Supreme Court of the United States.[39] Inevitably, its functions as a general court of law have influenced profoundly the performance of its 'political' roles in the field of public and constitutional law In all likelihood, this aspect of the character of the Court has diminished its interest in international and comparative law, although these *stimuli* are perhaps now having a larger impact than in the past The High Court of Australia, like all other final national courts, now lives and works in a global environment of shared ideas and influential transnational intellectual movements It is impossible, and would be undesirable, for it to ignore these

The presentation of such an intensive series of detailed papers, laboured over with loving care for so long by the authors, created difficulties of absorption.[40] Nonetheless, the organisers and the paper-writers deserve thanks for their thorough and balanced works The collection of papers has now been printed It should be an important source book on the doctrines of the High Court of Australia in its first century It will need a good index to enhance its utility Several sessions merged into each other, as for example, those respectively on commercial law and equity and on constitutional law and judicial review For ease of comprehension, lawyers divide their discipline into categories The events of life that present problems to the law and to courts are not always so neatly packaged

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39 Michael Kirby, The High Court of Australia and the Supreme Court of the United States -A Centenary Reflection (2003) 31 *University of Western Australian Law Review* 131

40 Compare, Peter Young, High Court Centenary Conference (2003) 77 *Australian Law Journal* 783; Geoffrey Lindsay The High Court s Centenary Conference (2003) 24 *Australian Bar Review* 110

As with any conference, there were a few defects and aspects of the arrangements that could have been improved. It was a pity to have so many distinguished visitors from the judiciaries of other lands sitting in total silence during hours of descriptive material, without an opportunity, even for a short time, to describe similarities and divergences of doctrine in their own countries. It would have been interesting to hear from the Premier President of the *Cour de Cassation* of France, or from the Deputy Chief Justice the Constitutional Court of South Africa, or the Chief Justice of Hong Kong. Perhaps there could have even been a few intriguing words from the Chief Justice of Thailand, on the moves towards a new supreme court for that country. There were judges present from the People's Republic of China, Fiji, Japan, Northern Ireland, Papua New Guinea, Scotland, the United States and other lands. Perhaps the distinguished overseas judges, or some of them, might have been invited to chair some working sessions and encouraged, from the chair, to offer a few comments of their own.

In saying this, I am in no way being critical of the Australian chairmen, chosen from the Chief Justices and senior judges of the nation. Without exception, they piloted the conference through to its conclusion with intelligence, grace and efficiency. However, as Australia becomes less insular, including in its law, it can learn from other countries. Description of the past is instructive for it explains where we have come from and where we are. However, to view the future, we also need the stimulus of ideas, including from legal cultures different from our own. In the law, the arrogance of Empire has given way, generally, to greater attention to legal concepts outside the common law than at any time in our legal history.

There were no intervals for questioning the speakers; nor any opportunity to comment upon, or add to, their remarks. All of the sessions ran to time. There were no spare moments for intervention or dialogue. In this respect, the centenary conference was somewhat old-fashioned in its organisation, perhaps like the High Court itself in some respects. This was basically top down instruction. There was no real interchange, except in the privacy of one's own mind or during the noisy intervals over tea. This is a pity because every session provoked lively thoughts. Future such conferences should provide for the prior distribution of papers, a shorter time for presentations and more opportunity for audience interaction. Not only is this more engaging; it helps in the absorption of a large mass of information in a relatively short period of time.

There were, of course, topics that were omitted from the conference. Thus, there was no session on family law, although this is undoubtedly one of the most important aspects of the law from the view-point of the Australian people. It cannot be said that it is an area of law neglected by the High

Court since the *Family Law Act 1975* (Cth) was adopted [41] The area of industrial law was also omitted, a gap that would have astonished the Justices of the High Court for most of the past century for whom industrial law became a major playground for the development of constitutional doctrine. Here too, there have recently been many important cases, as this part of the law stretches back to the first year of the High Court.

There was no session on evidence law although, necessarily, that important field of the High Court's work arose for consideration in the session on criminal law. Recent, and not so recent, cases suggest that there was ample material for a session on private international law (conflicts of laws)[43] whose tortuous course in the High Court seems only now to be shaking out to a truly coherent national body of legal principle. An interesting session could have been composed on the High Court's decisions relative to women and the law;[44] or poverty law;[45] or the Court's contribution to legal history. A session on discrimination law could have begun with some of the early cases relevant to the White Australia policy[46] and finished with recent cases on gender,[47] disability,[48] age[49] and sexuality discrimination.[50] Thus, the latter would have been more than enough for a challenging and beneficial examination.

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41 See, eg, *Del v Director-General NSW Department of Community Services* (1996) 187 CLR 640; *Northern Territory v GPAO* (1999) 196 CLR 553; CDJ v VAJ (1998) 197 CLR 172; *AMS v AIF* (1999) 199 CLR 160; *DJL v Central Authority* (2000) 201 CLR 226; *Allesch v Maunz* (2000) 203 CLR 172; U v U (2002) 211 CLR 238

42 *Victoria v The Commonwealth* (1996) 187 CLR 416 (*Industrial Relations Act Case*); *Attorney-General (Q) v Riordan* (1997) 192 CLR 1; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1; *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2000) 203 CLR 645; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194; *Attorney-General (Q) v Australian Industrial Relations Commission* (2002) 76 ALJR 1502; 192 ALR 129; *Re the Maritime Union of Australia; Ex parte CSI Pacific Shipping Inc* (2003) 214 CLR 397.

43 See, eg, *Henry v Henry* (1996) 185 *CLR 571; CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491

44 See eg, *Yerkey v Jones* (1939) 63 CLR 649; *Garcia v National Australia Bank* (1998) 194 CLR 395; U v U (2002) 211 CLR 238

45 *Pyramid Building Society (In liq) v Terry* (1997) 189 CLR 176; *Cummings v Claremont Petroleum NL* (1996) 185 CLR 124

46 *Young v Tockassie* (1904) 2 CLR 470; *Chia Gee v Martin* (1906) 3 CLR 649; *Potter v Minahan* (1908) 7 CLR 277; *Re Yates; Ex parte Walsh and Johnson* (1925) 37 CLR 36; *O'Keefe v Calwell* (1949) 77 CLR 261

47 See, eg, *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165

48 *Waters v Public Transport Corporation* (1991) 173 CLR 349; *IW v City of Perth* (1997) 191 CLR 1; *X v The Commonwealth* (1999) 200 CLR 177

49 *Qantas Airways Ltd v Christie* (1998) 193 CLR 280

50 *Croome v Tasmania* (1997) 191 CLR 119; Compare *Green v The Queen* (1997) 191 CLR 334; *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs, Appellant S396/2002 v Minister for Immigration and Multicultural Affairs* 78 ALJR 678; 205 ALR 487

The Court's role in professional discipline and legal ethics[51] would have made an interesting study. So too would its busy current functions in the field of immigration law which represents a counter-point to the early cases on the exclusion of non-European ('white') immigrants. Perhaps sessions were needed on the broad subjects of statutory and constitutional interpretation. These topics were mentioned in other sessions. However, they really lie at the heart of most of the Court's present work, as the common law increasingly circles in the orbit of statute.

A topic of the greatest practical importance (about which, there have been very many recent cases[52]) would have been the changing course of the High Court's approach to appellate review of fact-finding decisions of judge and jury.[53]

All in all, the topics chosen for inclusion in the conference were fairly orthodox, and some clearly important topics were not chosen. Perhaps they were topics upon which there might have been more constructive criticism of the Court and of its decisions.[54] Undeniably a centenary is a time for a healthy measure of adulation, but it is also an occasion for serious reflection and even a little soul-searching. Possibly an enterprising group of scholars will organise an alternative centenary conference on the High Court of Australia, if there is interest enough. This need not be disrespectful or destructive. However, there is only a small place for *hubris* in the examination of any contemporary Australian institution of government; including the highest court. All human institutions are improved by constructive criticism.

It would have been desirable to have had more non-lawyers contributing to the conference. The papers by Professors Galligan and Henningham, at the outset, were amongst the best. The trouble with judges and lawyers is that they live for the most part within the cocoon of the law. Whilst it is comforting to have a symphony of voices that echo within the cocoon, a centenary is an occasion for voices from outside: to help us all to see ourselves as others see us.

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51 *Ziems v Prothonotary* (1957) 97 CLR 279; *Clyne v NSW Bar Association* (1960) 104 CLR 186; *NSW Bar Association v Evatt* (1968) 117 CLR 177; *Walsh v Law Society* (NSW) (1999) 198 CLR 73.

52 *Fox v Percy* (2003) 214 CLR 118; *Shorey v PT Limited* (2003) 77 ALJR 1104; 197 ALR 410; *Joslyn v Berryman* (2003) 214 CLR 552; *Suvaal v Cessnock City Council* (2003) 77 ALJR 1449; 200 ALR 1; *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598; 200 ALR 447.

53 The cases to that time are collected in *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306; 160 ALR 588 which for some unaccountable reason was never published in the authorised reports.

54 See, eg Mirko Bagaric and James Mc Convill, The Australian Constitution: A Century of Irrelevance (2002) 21 *University of Tasmania Law Review* 89.

A session at the conference on science and technology and the High Court and on the future of the Court would have been fascinating, as would a session on youth and the High Court. One of the finest innovations of the conference was the invitation extended to law schools throughout Australia to send selected students to the conference. Their fares were paid and they will take away many memories of people and ideas. Perhaps it would have been healthy for the current office-holders to have listened to the view-points of the young, as one day, in a not far distant time, today's youth will inherit their responsibilities. Presumably, the organisers felt that it were safer to stick to sessions on the chosen key topics – and while the latter was interesting, I am left with a feeling that valuable opportunities were lost.

The only way more specialist topics could have been covered was by adopting a more modern format for the conference. Specialist workshops and meetings would have been required as a supplement to a smaller number of plenaries addressing the truly core topics of the law: constitutional and public law, criminal law, family law and the law of obligations.

These remarks aside, the centenary conference was a worthy enterprise. A great amount of work was devoted to it. In due time, I hope that the papers will not only be published in book form but available on the Internet so that judges, lawyers and students who did not attend the conference can have access to the ideas and reflect upon the strengths and problems of the High Court of Australia in its first century.

The Court, like the law, belongs to the future and not only to the past. A measure of its success will be seen in its attention to constructive criticism and suggestions for improvement as well as to the well-deserved hosannas of praise.