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A reflection on public law: From Federation to the Twenty-first century[♠]

1 When the Commonwealth of Australia came into being on 1 January 1901, its first law officer was Alfred Deakin who held the portfolio of Attorney General from Federation until 24 September 1903, when he became Prime Minister. As Attorney General, Deakin was succeeded by James Drake and then Sir Isaacs Isaacs.

2 Deakin might be thought to have been a humble man. He was the only Prime Minister to reject the title "*Right Honourable*", to refuse honorary degrees from Oxford and Cambridge Universities and reject membership of the Privy Council. He was otherwise known as "*Affable Alfred*".

3 However, it is his period as Attorney General and, more particularly, the advices he and his immediate successor gave to the Government of the day that I want to talk to you about today. You may ask, why? And understandably so. My purpose in doing so stems largely from an interest in history, so to that extent, I am being a little self-indulgent. But I also thought it would be interesting to consider the issues that arose in the first years of the Australian Federation and to briefly contrast them with the issues that have arisen in the first few years of the twenty first century.

4 I have chosen to do so for three reasons.

(1) First, I consider that the last decade and a half has seen Constitutional and public law issues come to the forefront of Australian jurisprudence. Although not every government lawyer practices in these areas, the current jurisprudential centrality of these issues provides the context in which government legal

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practice resides, both at the Federal, State and Local government level.

(2) Secondly, I am conscious that you have a full program of substantive legal topics ahead of you anyway.

(3) Thirdly, we all know that you are model lawyers, so you don't need another lecture on it.

5 According to the online database of legal opinions given by Attorneys-General of the Commonwealth of Australia, Solicitors-General and the Attorney-General's Department between 1901–45, Deakin gave just over 150 opinions during his 30 months as Attorney General: see Australian Government Solicitor, "Legal Opinions: Selected Opinions of Attorneys-General of the Commonwealth of Australia with Opinions of Solicitors-General and the Attorney-General's Department, 1901–45" http://legalopinions.ags.gov.au/ accessed 1 September 2013. The topics upon which he was required to advise ranged widely and make for fascinating reading over a hundred years later. His very first opinion, given on 15 March 1901, involved the question whether the Collector of Customs was required to pay into the Commonwealth Treasury fees collected by the New South Wales Department of Customs & Excise, the power of the Commonwealth and the States to levy customs and excise duties being governed by Chapter IV of the Constitution. Deakin's second opinion related to the position of the Commonwealth and the States in relation to treaties. His last opinion related to absentee voting, which he advised was permissible under the *Electoral Ac*t.

6 There would undoubtedly be many views in this room as to what were the most important advices Deakin gave. Likewise, there will be various opinions as to what are the seminal decisions of the High Court so far this century. It would be difficult to suggest that any particular viewpoint was more valid than another and I don't pretend that my choices would be

better than others. I have chosen, however, four issues that have remained topical, albeit in vastly different contexts. Those topics relate to Indigenous Australians, Tobacco, Immigration, and Chapter III courts.

7 These topics are obviously highly selective and time constraints require that within that selection the advices and decisions to which I refer be narrowly focussed. I trust, however, that this brief excursus will heighten your natural thirst for Australian legal history, of which you are an integral part.

Indigenous Australians

8 The first topic is the relationship between the newly formed Commonwealth and Indigenous Australians. This arose in Deakin's ninth opinion, given on 21 August 1901. Deakin had already given advices relating to Pacific Islanders and Chinese workers, all involving questions of trade: see Opinions No. 5 and 6. Likewise, the ninth opinion raised commercial issues and, in particular, questions of excises and bounties. The questions for opinion were:

> "1. Whether an excise duty may differentiate between sugar grown by black labour and sugar grown by white labour?
>
> 2. Whether a bounty may be given on the production of white-grown sugar only?"

9 The answers were "No" and "Yes" respectively.

10 The questions arose in a context where climatic conditions dictated where most sugar was grown, namely, in far North Queensland. Demographics, on the other hand, dictated the nature of the workforce, which in turn determined the cost of production. Adopting the language of the opinion, black labour was cheaper than white labour. There was thus a social imperative, and, almost undoubtedly, a political imperative, given that Indigenous Australians did not have the vote, to encourage employment

for the white population. An excise would increase the cost of production, and therefore, arguably, increase barriers to white employment, unless a lower and therefore discriminatory rate of excise applied in respect of sugar grown where labour was predominantly white. On the other hand, the payment of a bounty was a means of alleviating the cost of production, thus providing incentives for employment.

11 Having advised the Prime Minister that an unequal excise would be unconstitutional, but that bounties could be paid discriminately in respect of different aspects of production, the government introduced the *Excise Tariff Act* 1902 (Cth) which provided for a rebate (that is, a bounty) to sugar cane producers who employed white labour only. This issue remained topical. In Opinion No 57, dated 4 April 1902, Deakin was asked by the Minister for Trade and Customs:

> "1. Will the employment of aborigines of Australia by any grower of cane prevent his claim for rebate being allowed?
>
> 2. Will the employment of persons of mixed blood (half-castes, quadroons, etc.) have the same effect?
>
> 3. Would the employment of (say) one person only (coloured) operate in the same way?
>
> 4. What is to be understood as being embraced by the restriction? Would a coloured person employing white labour only, being the owner of a plantation, be entitled to the rebate?"

12 Deakin's answers reflected the social and political thinking of the times. The answers were:

> "1. Yes. Aboriginal labour cannot be considered white labour.
>
> 2. As to persons of mixed race, quadroons may reasonably be considered as white labour; persons in whom the blood of a coloured race predominates should not. Half-castes are on the borderline; but in view of the affirmative and restrictive language of the provision, I think that half-castes should be excluded.
>
> 3. Yes.

> 4. Yes. The provision applies only to the labour employed, not to the employer of labour."

13 In Opinion No 13, dated 29 August 1901, Deakin was asked whether half-castes should be included in the census. The question was directed to s 127 of the Constitution which provided that "[*i*]*n reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted*". Deakin advised that the relevant rule of statutory construction of such a provision, which was not remedial, was that the provision should be construed strictly. Accordingly, half-castes were not aboriginal natives within the meaning of the section and thus should be included in the census.

14 This approach to construction was applied by Robert Garran, the great Constitutional lawyer who was appointed the first Secretary of the Attorney General's Department in 1901, in relation to the *Maternity Allowance Act* 1912 (Cth). In Opinion No 485, dated 3 January 1913, Garran was asked whether maternity allowances could be paid in certain circumstances in light of s 6 of that Act which excluded "*women who are Asiatic*" from those entitled to be paid a maternity allowance. Garran advised that a person of wholly Asiatic blood was disqualified. However, as the legislation was beneficial legislation, a woman would otherwise be considered of Asiatic race depending upon whether Asiatic blood predominated. Accordingly, a woman who was half Asiatic would be entitled to the allowance.

15 The constitutional status of Indigenous Australians has changed significantly over the past 113 years. Section 127 of the Constitution was repealed in 1967. The 1967 constitutional referendum also led to the omission of the reference to "*the aboriginal race*" in s 51(xxvi). In 1975, the Commonwealth enacted the *Racial Discrimination Act*, s 10, which guaranteed that persons of a particular race, colour or national or ethnic origin enjoy the same rights as persons of other races, colour or national or ethnic origin.

16 Nonetheless, the constitutional status of Indigenous Australians remains of contemporary relevance. The race power remains in s 51(xxvi) of the Constitution. Additionally, s 25 of the Constitution provides that where a State law provides for all people of a particular race to be disenfranchised at the State level, people of that race shall not be counted in reckoning the number of members for each State for the purposes of lower house representation in the Commonwealth Parliament.

17 These remnants of a past era have come under recent consideration with the publication in 2012 of the report prepared by the Expert Panel on Constitutional Recognition of Indigenous Australians. That Panel recommended the repeal of ss 25 and 51(xxvi), and the insertion of three new sections into the Constitution. These sections variously recognise Aboriginal and Torres Strait peoples, prohibit racial discrimination and recognise Aboriginal and Torres Strait Islander languages as the original Australian languages. One trusts that the recognition of Indigenous Australians in our founding document will enhance their wellbeing and the nation's social cohesion.

18 There was, of course, the tectonic shift in the recognition of Indigenous rights in *Mabo v Queensland (No 2)* [1992] HCA 23; 175 CLR 1. But, just as an answer was given on the questions of excises and bounties in the 1900's, other issues arose (I think this should be known as the "*Lawyers spawning syndrom*e") and so it was with the recognition of native title. Numerous issues have arisen subsequent to *Mabo*. Most recently, in *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33; 87 ALJR 916, the High Court allowed an appeal, in part, from a Full Federal Court decision that had allowed an appeal from Finn J. At first instance, Finn J had found a native title right of access to marine territories "*to access resources and to take for any purpose resources in the native title areas*", a right that was to be exercised in accordance with the traditional laws and customs of the native

title holders, the laws of the State of Queensland and the Commonwealth of Australia and the common law: see *Akiba v Queensland (No 2)* [2010] FCA 643; 204 FCR 1.

19 The majority of the full Federal Court had allowed an appeal from Finn J's decision on the basis that the successive fisheries legislation enacted by colonial and State legislatures in Queensland and by the Commonwealth Parliament, which conditioned the right to engage in commercial fishing on the possession of a licence, had extinguished any native title right to take fish and other aquatic life for commercial purposes: see *Commonwealth v Akiba* [2012] FCAFC 25; 204 FCR 260. The Full Federal Court amended Finn J's orders and added the specification to the native title right that "[*t*]*his right does not, however, extend to taking fish and other aquatic life* ***for sale or trade***" (emphasis added).

20 The High Court allowed the appeal, finding that the rights of the Indigenous group claiming title had not been extinguished. The Court set aside the order of the Federal Court and in its place ordered that the appeal to that Court be dismissed. Hayne, Kiefel and Bell JJ observed, at [52], that "*inconsistency of rights lies at the heart of any question of extinguishment*": see also French CJ and Crennan J, at [59]. Following *Yanner v Eaton* [1999] HCA 53; 201 CLR 351, their Honours stated, at [75], that:

> "… telling the native title holders in this case, 'You may not fish for the purpose of sale or trade without a licence', did not, and does not, sever their connection with the waters concerned and it did not, and does not, deny the continued exercise of the rights and interests possessed by them under the traditional laws acknowledged, and traditional customs observed, by them. The repeated statutory injunction, 'no commercial fishing without a licence', was not, and is not, inconsistent with the continued existence of the relevant native title rights and interests."

Tobacco

21 Recent history has seen the privatisation of many public enterprises, such as telephone and telegraphic services (now Telstra) and Qantas. In 1904 nationalisation was in the spotlight in respect of the tobacco industry. In Opinion No 171, dated 17 March 1904, James Drake was asked by Senator Playford whether the Commonwealth had the "*power to establish the manufacture of tobacco, cigars and cigarettes, close all present establishments, and prevent private persons in future manufacturing such articles?*"

22 Drake expressed agreement with an earlier opinion by Deakin on a proposal for the Commonwealth to manufacture iron: see Opinion No 73. In that earlier opinion, Deakin expressed the view that there was no express or implied source of power in s 51 of the Constitution that would allow the Commonwealth to manufacture iron, except to the extent that the Commonwealth was manufacturing iron for its own purposes. Expressing agreement with this opinion, Drake observed that it was "*not easy to conceive how the manufacture of tobacco, cigars and cigarettes can be incidental to the execution of any of the express legislative powers of the Commonwealth*".

23 Tobacco, again, was recently the centre of constitutional debate. Tobacco companies challenged the constitutional validity of the Commonwealth's *Tobacco Plain Packaging Act* 2011 (Cth) which the Commonwealth enacted pursuant to the external affairs power (see the Convention on Tobacco Control) as well as the corporations, trade and commerce and the territories' powers.

24 Whilst in 1904 the Constitution did not provide the Commonwealth with the answer it hoped for, it was the tobacco companies who were the recipients of the bad news in 2012: see *JT International SA v Commonwealth; British American Tobacco Australasia Ltd v Commonwealth* [2012] HCA 43; 86 ALJR 1297. The appellants had alleged that the plain packaging legislation introduced by the Government in 2011 constituted the

acquisition of their intellectual property rights. The Commonwealth had thereby infringed s 51(xxxi) of the Constitution, which gives the Commonwealth the power to acquire property but only on "just terms".

25 The High Court rejected the argument on the basis that the Commonwealth had not acquired an interest or benefit of a proprietary nature under the regulatory 'plain packaging' scheme, which was held to be necessary for there to be an "acquisition of property" for the purposes of the Constitution.

Immigration

26 Immigration was another issue that concerned the early legal advisers to the Commonwealth. Questions ranged from whether deserters from British ships could be treated as "*prohibited immigrants*" under the *Immigration Restriction Act* 1901 through to the meaning of "*descent*" in the phrase persons "*of European race or descent*": see Opinions No 51 and No 81. There has been a significant change in the nature and scope of questions that confront the Federal Court and High Court of Australia, with those Courts now being asked to answer questions such as:

(1) whether the detention of a stateless person was authorised and required by the *Migration Act* 1958 (Cth) even though their removal from Australia was not reasonably practicable in the foreseeable future: see *Al-Kateb v Godwin* [2004] HCA 37; 219 CLR 562;

(2) whether the "*Malaysian solution*" is valid under the *Migration Act* 1958 (Cth): see *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32, 244 CLR 144.

27 The answer to the first question, by majority, was "*Yes*", although in that case I have always considered the dissenting decision of the Gleeson CJ to be a powerful and insightful statement of what is permitted and what is required by way of basic human rights. Gleeson CJ commented, at [19] and [20], that:

> "Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. …
>
> A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament."

28 I commend his Honour's decision to you. It is not the answer to the debate on whether there should be a Charter of Rights, which is a discrete topic. However, his Honour's judgment did reinforce that there are certain basic human rights which in turn impacted upon the question of statutory construction involved in that case.

29 The answer to the second question was "*No*". A majority of the High Court in *M70* held that an officer could not take an offshore entry person from Australia to Malaysia for the processing of their asylum claims. A majority of the Court, at [99], held that section "*198A* [of the *Migration Act 1958*] *is the only legislative source of power for the Minister to take 'persons seeking asylum' to another country for 'determination of their refugee status*'". A majority of the Court held that the Malaysia solution had not satisfied the requirements of that section.

State Courts

30 Another important issue that arose in the early opinions was the Federal jurisdiction of State courts. In Opinion No 20, dated 9 October 1901, Deakin was asked about the source and nature of the Federal jurisdiction of State courts in relation to the *Property for Public Purposes Acquisition*

Act 1901 (Cth). That Act provided that until the establishment of the High Court, all proceedings authorised to be taken in the High Court may be taken in the Supreme Court of a State, which would exercise all of the powers vested in the High Court.

31 The full constitutional ramifications of the Commonwealth's power under s 77(iii) of the Constitution to make laws investing any court of a State with federal jurisdiction (referred to as the "*autochthonous expedient*" in *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* [1956] HCA 10; 94 CLR 254 at 268), and implications from Chapter III generally, were not felt until a century later with the decision in *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; 189 CLR 51. The *Community Protection Act* 1994 (NSW) under consideration in *Kable* empowered the Supreme Court to order that a specified person be detained in prison for a specified period if it was satisfied, on reasonable grounds:

> "(a) that the person is more likely than not to commit a serious act of violence; and
>
> (b) that it is appropriate, for the protection of a particular person or persons or the community generally, that the person be held in custody."

Under the Act, although the maximum period of detention was six months, multiple applications could be made for the same person with the effect that a person could, in effect, be permanently detained.

32 The *Act* was held to be invalid by Toohey J, Gaudron J, McHugh J and Gummow J, because the Act conferred non-judicial functions on the Supreme Court that were repugnant to its exercise of Commonwealth judicial power. At the heart of that determination were the limitations imposed by Chapter III of the Constitution. Gaudron J for example, at 103, observed that:

> "Once the notion that the Constitution permits of different grades or qualities of justice is rejected, the consideration that State courts have a role and existence transcending their status as State courts directs the conclusion that Ch III requires that the Parliaments of the States not legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth."

33 In *Baker v The Queen* [2004] HCA 45, 223 CLR 513, McHugh, Gummow, Hayne and Heydon JJ observed, at [51], that:

> "The doctrine in *Kable* is expressed to be protective of the institutional integrity of the State courts as recipients and potential recipients of federal jurisdiction."

34 In *Forge v Australian Securities and Investments Commission* [2006] HCA 44; 228 CLR 45 Gummow, Hayne and Crennan JJ explained, at [63], that:

> "Because Ch III requires that there be a body fitting the description 'the Supreme Court of a State', it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description. One operation of that limitation on State legislative power was identified in *Kable*."

35 The High Court's jurisprudence on the protection provided to State Supreme Courts by Chapter III courts is further exemplified in *Kirk v Industrial Court of New South Wales* [2010] HCA 1; 239 CLR 531. One of the issues before the High Court in *Kirk* was the validity of a privative clause providing that a decision of the Industrial Court (NSW) "*is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal*". French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, at [99], observed that:

> "To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint. It would permit what Jaffe described as the development of 'distorted positions'. And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics." (citation omitted)

Conclusion

36 Can any conclusions be drawn from this necessarily brief and selective consideration of the issues that arose in the first years of the twentieth century and the first years of the twenty-first century? One could merely adopt the adage that history repeats itself: legal history, like all history, has a unique cloning facility. I would suggest, however, that there is greater importance both in the synergy between the issues in each century and the outcome.

37 I will mention three conclusions only, being those that obviously present themselves from the issues I have discussed. The first is an observation as to how 'commerce' has changed. What we will see in this country in the next decade is the increasing emphasis on intellectual property, as opposed to issues relating to tangible property. The Tobacco case is one example. The human genome case in the Federal Court is another: see *Cancer Voices Australia v Myriad Genetics Inc* [2013] FCA 65.

38 The second is the underlying current of human rights in some decisions of the High Court. Some may consider that observation heretical and the trend may be subliminal. However, I cite the Malaysian Solution case as one example and the entire underlying basis of the recognition of Indigenous issues, where there has been a recognition that the rights of the post-1788 population stand alongside those of Indigenous Australians, rather than Indigenous persons having to fit a construct that is essentially European.

39 Finally, I would suggest that the Chapter III jurisprudence has provided an enormous safeguard for the rights of all citizens.

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