

***Tradition and history,  
with a dash of humility***

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Warden, distinguished guests, ladies and gentlemen,

Standing in this room, wearing this gown, within a college which is the oldest in this not so young country, it seems natural to speak about tradition and history. In these surroundings, I cannot help but think of the superficial changes and continuity. It was exactly 25 years ago, in this room, at a dinner such as this, that I heard Justice John Lockhart speak – although I can remember now only that he was urbane and witty. That is partly by way of apology for the absence of urbanity and wit in what is to follow. I do remember seeing three men talking amongst themselves, and introduced myself to Roddy Meagher, Bill Gummow and John Lehane. I am delighted to see that Professor Gummow is with us this evening.

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When I was at college in the 1980s, there was emphatically not the evening serenity that I have noticed tonight. The Main Quadrangle had not been completed to keep out the outside world. The world wide web had not been invented to permit the outside world to come in. Mobile phones did not exist amongst undergraduates. Instead, the large body of freshers and sophomores enjoyed precisely two incoming telephone lines. Two freshers were required to be on duty standing by those phones in the vestibule between 7.30 and 10 each night from Sunday until Thursday, and when a call was received, to walk north or south into the middle of the appropriate quadrangle and shout "JONES, TELEPHONE". I seem to remember envying the regularity of one Pauline's callers (I shall preserve his anonymity), a disproportionate number of whom seemed to be young and female. One consequence was that there was a moral obligation of the highest calibre for those whose windows faced the quadrangle to transmit any such message to men whose rooms were on the other side of the corridor – especially if the caller was young and female.

That may seem bizarrely primitive and remote to present day undergraduates. Nevertheless, despite the architectural and technological change in these same quadrangles, I suspect that the same essential concerns motivate the current generation of Paulines today. I want to come back to this theme, because it is central to the remarks I wish to address, which I have titled "Tradition and history, with a dash of humility".

It took me until my third year of law studies to venture in any serious way into the Cannington Law Library. I then realised that the most satisfactory way, by far, to understand the discipline I had embarked upon was to read cases in their entirety,

not merely the paragraphs selected by the author of a casebook or in notes circulated by the faculty. If I were to be permitted to offer a single word of academic advice to those who are now studying law, it would be this: try to get into the habit, early in the course, of critically reading the whole of the important decisions and making notes on them. I find that that can only effectively be done by reading the decision in its physical form. Living on campus, close to the college and the faculty's library, really is a tremendous advantage. I think that only by reading the whole of the case can you get a deep understanding of the decision – not merely the principle of law for which it stands, but the underlying factual dispute the court was called upon to resolve, the competing arguments the court had to adjudicate, and the mode of reasoning the court employed. Law is emphatically *not* just a series of rules, such that the lawyer with greatest knowledge of them will achieve victory for his or her client. In an important sense, law is a mode of reasoning to resolve disputes.

A basal element of the common law system is that the law in 2014 mostly is as it is because some court said so years or decades or even a century or so ago. Law is inherently backward looking. Indeed, it is unashamedly backward-looking. Partly that is an essential aspect of certainty and predictability. Partly it is because the same problems recur, and there is great benefit in seeing how they have been resolved previously. (By the way, law is by no means unique in this respect. There is good reason why mathematicians in the 21<sup>st</sup> century read and re-read the papers of Euler and Gauss, and economists read the economic literature of a century ago. In the creative arts, novelists and composers study masterworks with care. In short, the notions of tradition and history I am touching on are by no means confined to the study and practice of law, but that is to stray well aside the scope of this address.)

May I give you two real life examples, both set in Sydney in the first decade of the twentieth century, to explain what I mean about the recurring nature of legal controversies? You may think both are presently topical. The first is royal commissions into the activities of nominated trade unions. One hundred and ten years ago, in February 1904, the New South Wales Governor appointed a royal commission for a “diligent and full inquiry into the formation, constitution and working of the Machine Shearers and Shed Employés Union, Industrial Union of Employés”. The background was that the union had been successful in the newly established Arbitration Court, to the annoyance of graziers, who were prominent in the Legislative Council. The secretary of the union was summoned to appear before the Commission. He refused to be sworn or to give evidence. For that he was prosecuted. Among other things, he challenged the validity of the exercise of prerogative power by the Governor to create the Commission. He said that the issue of letters patent was “an unconstitutional and illegal exercise of the prerogative of the Crown when affecting individual rights”. He succeeded in the Full Court of the Supreme Court of New South Wales, which found that the Commission was “unlawful and illegal”.<sup>1</sup> Something of the flavour of the decision may be seen by what Darley CJ said:

“Here we have a thrice defeated litigant first obtaining a select committee of the Legislative Assembly, of which committee he is the chairman, to enquire into the subject-matter of the litigation, followed by the appointment of a Royal Commission, of which at first he is made president and the members he had selected for the select committee of the House made members. Common decency at last prevailed, and led to the alteration of this, and after having been made a member of the Royal Commission, he is finally excluded, his nominees, however, remaining as members, a District Court Judge being nominated president.”

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<sup>1</sup> *Ex parte Leahy* (1904) 4 SR (NSW) 402.

That decision was overturned by the High Court.<sup>2</sup> I want only to focus upon one point. Neither the Supreme nor the High Court had any difficulty in asserting a jurisdiction to exercise judicial review of the Governor's decision. Those courts reached different conclusions because, as Griffith CJ put it, it was not for the courts to rule on the propriety of executive action, but merely its lawfulness. It is a reminder of the boldness of courts in the Australian legal system in the first decade of the last century. That boldness was noted by, among others, Professor Harrison Moore in an article in the *Columbia Law Review*.<sup>3</sup>

Let me give you another example of how the fact that law looks backwards does not mean that it is isolated from events of current concern. Earlier this year, the High Court, sitting as the Court of Disputed Returns, ordered a new half-Senate election for Western Australia, following the loss of some ballot papers.

The half Senate election of three senators for *South Australia* in 1906 was challenged in the Court of Disputed Returns (constituted by former Prime Minister Barton J) and it was declared that the election of the third senator, Mr Joseph Vardon, was "absolutely void". That came about in this way. The result declared by the returning officer was Josiah Symon, 33,597; William Russell, 31,796; Joseph Vardon, 31,489; Dugald Augustus Crosby, 31,455; Reginald Pole Blundell, 31,366.<sup>4</sup> Thus second, third, fourth and fifth were separated by only 430 votes. Despite his coming a very close fourth, Crosby was *not* the petitioner. He had in fact been placed third after the first count, but had died before a recount had been completed.

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<sup>2</sup> *Clough v Leahy* (1905) 2 CLR 139.

<sup>3</sup> "Executive Commissions of Inquiry" 13 *Columbia Law Review* 500 (1913).

<sup>4</sup> See *Blundell v Vardon* (1907) 4 CLR 1463 at 1464.

Barton J was confronted by a series of alleged irregularities, and a large threshold problem, which is familiar to this audience in 2014. *All* of the ballot-papers for the Division of Angas – over 9,000 votes – had been accidentally destroyed. Did that prevent a recount of the remainder? Barton J held that the “remarkable occurrence” did not stand in the way of a statutory recount of the votes cast in the other six South Australian Divisions, with the Angas votes being accepted as they stood on the return.

His Honour then ruled progressively on a series of challenges to 828 votes of doubtful formality (some had been initialled on the front instead of on the back, some had not been initialled at all, some had not been marked in the squares on the left hand side of the paper, but on the right hand side of the paper opposite the names, or with crosses in squares, or with diagonal lines – any of you involved in elections within the College or the University may find that the guidebooks given to scrutineers and electoral officials are based, in part, upon the principles formulated in the case). The result at that stage was that the third South Australian Senate seat fell to be decided between Vardon with 31,640 votes and Crosby with 31,638 (Blundell had 31,560 votes).

There were 200 voting papers which had been rejected because they had not been initialled, or had been incorrectly initialled and not folded, all of which was the fault of the presiding officer. The Act in the form it then took permitted Barton J to have regard to those votes with a view to determining whether, if they had been admitted, they would have affected the result. As some in this audience would know, the position is different today.<sup>5</sup> Barton J held that they were all “honest attempts to vote”,

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<sup>5</sup> Cf *Commonwealth Electoral Act 1918* (Cth), s 365.

and had they been counted, “Vardon’s majority of two over Crosby would have been converted to a minority of four”. The fact that Crosby had died made no difference; the Court declared on 1 June 1907 “the election of Vardon to have been absolutely void”.

The South Australian Parliament and the Governor formed the view that s 15 applied to the “vacancy” caused by Barton J’s decision. In accordance with the constitutional mechanism (in the form s 15 then took), there was a joint sitting in Adelaide for the purposes of electing a senator. Mr Vardon wrote to the Governor saying that s 15 had no operation in relation to a void election such as had been declared by Barton J. In case he was wrong about that, he also put his name forward to the chambers. Both the Governor and the chambers of Parliament rejected Mr Vardon’s approaches. On 11 July 1907, the two chambers elected Mr JV O’Loughlin to fill the vacancy.

On the following day, 12 July 1907, Barton J granted, on Vardon’s application, an order nisi for mandamus to the Governor to cause a writ to be issued for a new election, on the basis that s 15 did not apply. That is to say, the High Court (which had only existed for four years) ordered the Governor of a State to show cause why he should not be compelled to perform a duty imposed upon him under the Constitution. This was no small step. To put it in perspective, consider that State Governors were, in 1907, powerful representatives of the Crown in the Australian colonies with important law-making roles. You may recall that it is only twenty years ago that the House of Lords heard seven days of argument in *M v Home Office* and concluded that the courts were able to grant injunctions against the Crown.<sup>6</sup>

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<sup>6</sup> [1994] AC 377.

The matter came on rapidly, and was heard here in Sydney, over four days less than a month later, in the first week of August 1907. It is now known as the *Governor of South Australia* case.<sup>7</sup> No differently from today, the wheels of justice can move very rapidly in an appropriate case. The High Court accepted that there was a “vacancy” within the meaning of s 21 of the Constitution, which required notification to the Governor of the relevant State. The High Court was prepared to *assume* favourably to Vardon but without deciding, that there was a duty imposed upon the Governor to issue a writ, deriving from ss 7, 9, 11 and 12 of the Constitution (as will be seen, the assumption was in fact made out). That is to say, the Court *assumed* that Vardon was right and the joint sitting mechanism for a vacancy did not apply where, as here, the third senator had never been elected in the first place. Barton J then said for the Court:<sup>8</sup>

“The duty, therefore, is one of the duties which the Constitutional Head of a State owes to the State (and in the case of a Governor, but in a slightly different sense, to the Sovereign), and its performance must be enforced in the manner appropriate to the case of such duties. Instances of such duties – duties of imperfect obligation – are familiar to students of Constitutional Law.”

Curiously, the decision is perhaps best known for the proposition that a Governor of State is not an “officer of the Commonwealth” within the meaning of s 75(v) and the conferral of power to issue writs of mandamus by the *Judiciary Act* is controlled by the Constitution. This is ironic, since seemingly nothing turned on it; it was not necessary for jurisdiction. There is a surprising divergence between what I have said so far about the decision, which emerges from actually reading the pages of the Commonwealth Law Reports, and what is written about it in the secondary literature.

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<sup>7</sup> *R v The Governor of the State of South Australia* (1907) 4 CLR 1497.

<sup>8</sup> At 1511.

Barton J said that the duty was cast upon the Governor as Head of the State. He said that: “the same reasons which prevent a Court of law from ordering the Sovereign to perform a constitutional duty are applicable to a case where it is alleged that the Constitutional Head of a State has by his omission failed in the performance of a duty imposed on him as such Head of the State”.<sup>9</sup> The High Court refrained from expressing a view as to whether in the circumstances there was a “vacancy” within the meaning of s 15.

Vardon’s challenge having been dismissed, O’Loughlin tried to assume his seat in the Senate. His litigation having failed, Vardon petitioned the Senate for a declaration that O’Loughlin had not been duly elected. The Senate referred a question to the High Court, which on 20 December 1907 determined the question it had left unanswered in August 1907, holding that s 15 had no application where a third senator had never been elected. The purported appointment of O’Loughlin by the South Australian Legislature collided with the “dominant provision” of s 7, requiring senators to be directly chosen by the people of the State.<sup>10</sup> Once again, one sees a modern and familiar process of reconciling all the provisions of a statute, so as to determine which is the leading provision, and which is subordinate; the same argument would be as effective in 2014 as it was a century ago.<sup>11</sup>

In the aftermath, Vardon and O’Loughlin contested the new election. Vardon won and served until 1913. He died, suddenly, of a cerebral haemorrhage, shortly after the

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<sup>9</sup> At 1512-1513.

<sup>10</sup> *Vardon v O’Loughlin* (1907) 5 CLR 201.

<sup>11</sup> See *Institute of Patent Agents v Lockwood* [1894] AC 347 at 360; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70].

1913 election, and is described by the Australian Dictionary of Biography by an unlikely trio of adjectives: “plodding”, “broadminded” but yet “cosmopolitan”.

The reason for that rather long story is to suggest that there is a remarkable modernity about the facts and, more importantly, the reasoning and the decision. Put to one side the obvious factual similarity, which recalls the facts leading to the Western Australian Senate election last month. First, there will be seen the rule of law in action – with bitterly and urgently contested political disputes being resolved by courts in accordance with law. That does not occur in every country. Secondly, there was a keen appreciation by the High Court of its appropriate role. You will have seen that in both of my examples, the High Court found that it had authority to decide the dispute, but ultimately deferred to another arm of government – entirely, in the union case, and until the Senate asked for its assistance, in the Vardon litigation. Thirdly, there was no suggestion in either case that the fact that it was the *Governor* who had exercised the power took the matter outside judicial review, although it is customary to say (and those who teach you administrative law may have said) that this was only established in the early 1980s (by *FAI v Wineke*). The decisions in 1904 and 1907 turned on the nature of the power, not the identity of the person in whom the power was reposed. The High Court went straight to the particular function of relevance – in both cases, a highly political one – and concluded that the Court should not intervene.

As much had been anticipated prior to federation. Joseph Carruthers had said in 1897<sup>12</sup>:

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<sup>12</sup> *Convention Debates*, Adelaide, 1897, p 914.

“We do not want the Governor to have the power to do wrong; we want to have him limited by the terms of the Constitution Act, and kept to the straight paths by a Federal Judiciary”:

Joseph Carruthers was referring to the office now known as the Governor-General, and he was in terms dealing with the exercise of prerogative powers (following a careful account of those powers by Barton). His point remains sound. It reflects a strongly held view that the executive be accountable and subject to judicial review, irrespective of the source of the executive power exercised. As Owen Dixon said, “the thesis of *Marbury v Madison* was obvious” to the framers of the Australian Constitution.<sup>13</sup> An immunity on the part of the Governor was *not* something relied upon in the *Governor of South Australia Case*, yet it took many decades for that idea to be dispelled. In short, it is easy to under-appreciate the creativity of the early High Court.

Now the legal landscape in 1904 and 1907 was very different – in some ways, it was even more remote than St Paul’s College 25 years ago, with the quadrangle unenclosed, and devoid of telephones and ethernet cabling. Prior to 1910, Australia was no nation. It had essentially no treaty-making power or international sovereign status. The Imperial Parliament regularly enacted legislation to apply here<sup>14</sup> and occasionally withheld, or (with equal effect) intimated that it would withhold, consent to local laws.<sup>15</sup> In a very real sense, the vice-regal representatives in Australia were agents of an Imperial Crown with a powerful presence in the legal system. It is important when considering what was decided to have regard to that historical context. It was a large thing for Australian courts then, unlike their English

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<sup>13</sup> O Dixon, “Marshall and the Australian Constitution” (1955) 29 *ALJ* 420 at 425.

<sup>14</sup> For example, the *Official Secrets Act 1911*: see HD Hall, *Commonwealth: A History of the British Commonwealth of Nations* (Van Nostrand Reinhold, London 1971), p 61.

<sup>15</sup> See M Leeming, *Resolving Conflicts of Laws* (Federation Press 2011), p 40.

counterparts, to subject vice-regal power to judicial review, and yet they asserted their right to do so in the first years of federation. By looking at those decisions carefully, one sees the same concerns which animate political controversy today, and what you may find to be a surprising modernity.

For all the talk about abolishing Privy Council appeals in 1986, it is to be recalled that the High Court defied the Privy Council in *Baxter v Commissioners of Taxation (NSW)*,<sup>16</sup> two months prior to hearing the *Governor of South Australia* case, and that it was the High Court under Dixon CJ more than fifty years ago that declared it was not bound by decisions of the House of Lords.<sup>17</sup>

A sense of tradition and history is essential to the legal mode of thought. By that I mean a rigorous analysis of both the context and the why and how of legal decisions in the past, in order to answer the legal questions of the present. We see it most clearly in the decisions of the High Court, answering questions of great and mundane importance. Here are two easy examples; they could readily be multiplied. First, how and when can a financial institution impose a hefty fee for the late payment of a facility, such that it is not an unenforceable penalty? Lest there be any doubt about it, the High Court's answer in 2012 was made express: the joint judgment said "It will already be apparent that an understanding of the penalty doctrine requires more than a brief backward glance".<sup>18</sup> Secondly, when does the innocent recipient of money received following the mistaken payment have to repay it? In their reasons given last week, all members of the Court surveyed the decisions of the eighteenth, nineteenth and twentieth centuries. Gageler J made his reason for

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<sup>16</sup> (1907) 4 CLR 1087.

<sup>17</sup> In *Parker v The Queen* (1963) 111 CLR 610 at 632-633.

<sup>18</sup> *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30 at [14].

doing so explicit. He said “The point is not to look back to “an assumed golden age” but rather “to help us to see more clearly the shape of the law of today by seeing how it took shape”.<sup>19</sup> Gageler J was making an important point. The notions of tradition and history to which I have referred are not mere nostalgia, such as I indulged in at the commencement of these remarks. They are essential to the process of legal reasoning today.

I was once privileged to be appearing in the High Court when counsel in answer to a question of McHugh J pleaded ignorance to a question about some procedural rules in New South Wales prior to 1972. The judge said, with devastating effect to counsel (and very persuasively, I think, to his judicial colleagues), that “A lack of understanding of legal history is a misfortune, not a privilege”. The truth is that often, the answer to a problem today was one given a generation, or a century ago. Often, insight is gained by considering how those problems were addressed. Often, indeed, the problem is, on analysis, the same.

Finally, as well as being vitally important for the development of the law, a sense of history and tradition can also engender a measure of humility. That is no bad thing. It is perhaps desirable to remind lawyers – who are often found guilty of having overly developed egos – of Viscount Simond’s words in a famous case on trusts, echoing an even more famous passage, “It is even possible that we are not wiser than our ancestors”.<sup>20</sup> Humility is worth striving for, especially by those privileged enough to practise law, or be studying to practise law. That is the dash of humility I

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<sup>19</sup> *Australian Financial Services and Leasing Pty Limited v Hills Industries Ltd* [2014] HCA 14 at [107].

<sup>20</sup> *Chapman v Chapman* [1954] AC 429 at 444.

mentioned, and when one sees with clarity what earlier lawyers have done, and why and how they have done it, humility comes more easily.

I am most grateful for the College's hospitality, and your indulgence, this evening.