

BOOK REVIEW

Selected Speeches and Papers

John Sackar and Thomas Prince (eds.) (2018) The Hon J D Heydon. ISBN 9781760021764. Hardback, 800 pages.

I am not a disinterested reviewer. I pointed this out to the learned editor but he assured me that would be no objection. ‘Take a couple of thousand words’, he said. ‘Give us some background’!

To assess the worth of any book review, a matter of fundamental (but often neglected) importance is the relationship between the reviewer and the author whose work is being reviewed.

I must thus make known immediately my own partiality.

I A DISCLOSURE

I have known Dyson Heydon for nigh on 40 years. I first met him when I was a student at ANU. He came valiantly to assist in teaching the then new course on the *Trade Practices Act* at the urgent request of the Dean. For a number of weeks, my class had been entertained by Professor Jack Richardson — he took us through each conceivable placitum which might sustain the powers conferred by the Act — I think we had reached pl 51(v). It might have been a useful review of s 51 but it was increasingly apparent that we would touch only lightly on more important substantive elements of the new legislation, to wit, Parts 4 and 5. Fortunately, the government in its wisdom translated Jack to a higher sphere as Ombudsman. This left a yawning teaching chasm.

And help was to hand. Each Thursday evening, a younger Dyson Heydon, then in his early thirties, would fly in from Sydney to deliver a detailed two-hour lecture, interrupted only occasionally by the sound of the ring-pull of a concealed beer can being removed in the back of the classroom. He did not let this distract him.

Throughout his career, and exemplified in all his writing, is a gargantuan appetite for work. He has always had, as Churchill said of F E Smith, *l’abilite de fixer les objets distants longtemps*. No doubt he heard the call of ANU in distress and responded with his usual paedagogical charity. He provided a masterful overview of the new Act and the way in which the jurisprudence was likely to develop. (The fruits of that labour, with respect to Trade Practices, may be seen in the standard works on the subject which he has written — all listed at p 738).

Later, he left Sydney Law School (where he had been its youngest ever Dean) and started at the Sydney Bar. I was a callow Associate at Freehills. A large and complex piece of transnational litigation in which he was briefed with A M Gleeson QC required attention. For many happy months we would meet in his Chambers on the Eighth Floor of Selborne at 5:30am and work our way through a vast number of requests for particulars, and answers to interrogatories. In those happier, more innocent times, a question could be asked and then the ‘usual’ particulars sought — when, where and how was the document prepared? Who prepared it? If it was signed, was it signed under authority? What was the nature of the authority? On and on — a few hours of this before dawn would usually leave me lying half asleep on the floor of my dogbox on Level 32 of the MLC Centre when I returned from the conference. Dyson, on the other hand, would turn from this early morning canter to the real work of the day, advising and appearing in some controversial and complex court case. That is another feature of his professional life — his seemingly inexhaustible energy.

Later I went to the Bar myself; I had the good fortune to have as a client a smallish telco which was constantly embroiled in disputes with the Trade Practices Commission. What better combination than the two of us to assist? In those days on any question of trade practices the signature of J D Heydon QC at the bottom of an Opinion on some pretended illegality was highly persuasive in favour of the alleged wrongdoer. Since that time I have had the pleasure of his company and conversation over lunch on many, many occasions.

Turning to this book, let me make it plain that even the least partial reader will be overwhelmed by the sheer weight and exuberance of the writing contained in this volume. Dyson has a magical turn of phrase, even when being slightly unkind about his subject matter.

II WHAT OF THE BOOK?

There is something in this book for every legal reader. There are lighter touches and there are large and likely long-lasting thoughts about judges and judging. There are detailed discussions of the law of evidence and fiduciaries. On both these last topics he is the leading Australian writer.

Production standards as ever with the Federation Press are immaculate — a close reading did not reveal any spelling or other errors. Of great use is the listing of all of Dyson's speeches and publications. The editors have done a wonderful job both in selecting the appropriate articles (from a huge mass of possible contenders) and in ensuring the accuracy of the critical apparatus.

The book is divided into six discrete parts. The first addresses Lawyers. Next come articles on Outsiders and Dissenters. Part III is devoted to Judicial Technique upon which he is highly qualified to write, and on which topic he continues daily to feed the flames of controversy. Then follow Constitutional Law, Evidence and Criminal Law, and Equity and Contracts. Each section makes a distinguished contribution to the legal literature on the topic discussed. Each article demonstrates immense research.

The editors explain (p ix) that several articles which addressed, urged, and resulted in substantive change to the law have been omitted. But the sheer range of topics discussed tells the reader immediately that he or she is dealing with a writer of extraordinary range, and versatility. He is also, of course, something of a controversialist. He does not hesitate to 'call out' failings in the legal system, the workings of the judiciary, and the law itself.

A Part I — Lawyers

Dyson is a master of the occasional address and the book contains wonderful examples of his style in delivering one.

First, and foremost, what shines through is his great love of the personalities of the Sydney Bar. He has an unerring eye for the telling anecdote — the *ben trovato* tale which encapsulates the subject in a sentence. (This is not surprising for he has a high talent for mimicry and impersonation when in a relaxed mood).

Who would not rejoice in a retelling of Bill Gummow's Russian antecedents (pp 2–4)? And in Dyson's recollection, *ipsissima verba*, of that great jurist after his ascension to the High Court, one which sums Gummow up in sentence: 'After hearing a criminal appeal, he was encountered in the library collecting the latest authorities. He said: "I haven't had reason to look up these recent High Court criminal cases until today. But, do you know, I believe they've messed up that area too"' (p 5).

Others memorialised are the late-lamented John Leane ('his characteristic half-chuckle, half-laugh') (p 8), the 'urbane ferocity' of Francis Douglas QC (p 11), the wit of Roddy Meagher which 'depended on teasing the gullible in words delivered in a throaty, earnest and confidential manner but experienced observers could always detect the techniques by examining the slight bulging and glistening of his eyes' (p 65).

Peter Hely as advocate and jurist is elegantly recalled to life: 'He was old-fashioned in approach. Evidentiary objections were ruled on at once; no argument was invited, no reasons were given' (p 47). The approach of Gleeson CJ is summed up in a single sentence: 'Thus at meetings of the justices, on finding himself in a minority of one, [he] would bleakly say: "I see we are deadlocked"' (p 53).

There are also fine examples of Dyson's great contribution to judicial prosopography. As he notes with regret, 'there are three great gaps in our legal literature. One is an absence of memoirs by, and about, judges and practitioners. That has led to another great gap — a shortage of judicial biographies' (p 13). Chapter 4, which contains 'Outstanding Australian Judges' (pp 13–41), goes some way to repairing that deficiency by looking at the careers and characters of Sir Victor Windeyer, H H Glass, and Andrew Wells. His discussion of the legal approach of Wells J (who was a master of the law of evidence, as is Dyson) to issues of duty, negligence and evidence (pp 37–40) is particularly interesting. It concludes mordantly, and in general terms, with the observation that 'a slide from greatness to decadence is apparent within a single generation'. Similarly remembered are Justice Kearney (a long term member of 8 Selborne), Lord Hoffmann and Sir Ninian Stephen.

Particularly interesting are Dyson's thoughts on legal writing which he explores in a discussion of Professor A W B Simpson (pp 75–83). Aptly memorable is his comment that 'one very striking feature of the modern English [and Australian] judiciary is its capitulation to, or at least glowing acceptance of, particular schools of sometimes evanescent academic thought'! (p 80). How true that comment is.

B *Outsiders and Dissenters*

It may be odd to think of Sir Harry Gibbs as an 'outsider' but in attempting to maintain the status of the States against the constant encroachment of the central government (of whatever political hue) he remained resolute to the end (pp 98–106).

An important contribution on the rule of law (in particular the operation of retroactive law) is the very detailed analysis of the Tokyo Japanese War Crimes Trials and the work of Mr Justice Pal (Chapter 16). As Dyson notes (at p 141), the war crimes tribunal 'was not really international, was not really military, and was not really a tribunal'. He then explores in detail the position taken by Mr Justice Pal and the reasoning he deployed in addressing the matters before the Tribunal, and the idea of a 'crime against peace' (pp 150–165).

C *Judicial Technique*

Perhaps the most important part of the book (because Dyson's prior experience fits him perfectly to discuss it) is the one containing the articles on judicial technique. Central to Heydon's view is the importance of adherence to precedent, and the lurking dangers of judicial activism as operated by the 'oligarchy which comprises the modern activist judiciary' (p 228). No doubt part of this flows from his own innate conservatism. Ian Jackman SC, speaking at Dyson's Fifteen Bobber (the informal Sydney Bar gathering to welcome a newly appointed judge), noted that in Dyson's Chambers on 8 Selborne a large bust of the First Duke of Wellington 'stood

comfortably to the left of where Heydon himself was positioned. In the full spectrum of political views, that probably placed his Honour somewhere between Prince Metternich and Evelyn Waugh'.¹

A similar theme runs through Chapter 20 with its detailed analysis of 'Limits to the Powers of Ultimate Appellate Courts'. Here, Heydon explores the seven 'related dangers' to which an ultimate appellate court is exposed. The court must examine in detail and set out precisely what the present state of the law is (and here Dyson hearkens back to the views of Wells J (p 245); then, the court must make sure to keep the purview of the judgment within strict bounds — Lord Lyndhurst is the historical example of a judge who did so. Far too frequently there are judges of the Lord Cottenham stripe (to follow Bagehot) (p 246) who seize a 'glorious opportunity' to resolve a matter 'on which he has brooded for years'. The court must also guard against being seduced by 'rhetoric' — broadly put, the seductive dangers of language in which general propositions might be felicitously expressed (pp 247–248) counterpointing Lord Reid and Mr Justice Walsh in *The Wagon Mound (No 2)*. Further large dangers exist in altering the existing law *nem con* or doing so when the opposition is weak. There is a similar danger in deciding only the 'crucial' point without allowing counsel the chance of addressing it (pp 250–251).

The difficulties which may confront the intermediate appellate court are addressed in detail in Chapter 21 while Chapters 22 and 23 look at judicial method generally. A particularly acute observation is that the gradual demise of the jury trial has had a large if unnoticed impact on the style and delivery of judgments because of the gradual disappearance of the skills which they required. Chapter 23 looks at the 'enemy within'. Here, he parts company with those who follow the modern consensus for a caucus/conference to be followed by a joint judgment (pp 327–331) and sets out very clearly the dangers in too much agreement.

D Evidence

Dyson is Australia's (indeed the Commonwealth's) leading writer on the law of evidence (see the successive editions of leading works listed at p 737). Two related chapters (Chapters 34, 35 and 36) deal with the Indian Evidence Act and the role of Sir James Fitzjames Stephen. Chapter 37 looks closely at the interworkings of the common law and the criminal codes in Australia. Once again Sir James Stephen features prominently (p 643).

Then comes one of the volume's more rebarbative pieces (Chapter 38), entitled 'Four Great Australian Legal Disasters'. A particular 'disaster' is the introduction of the *Uniform Evidence Act 1995* (Cth) — its NSW counterpart was once aptly described by Justice Bryson as a late work of the committee that designed the camel. In short order Dyson notes that the Acts are not uniform, do not deal with all the law, are highly complex in structure, and encourage rather than suppress arguments about admissibility of evidence. Chapter 39 looks at the vital technical issue of how the 'weight' of evidence affects its 'admissibility'.

Part 6 deals with questions of equity and contracts. On the last topic Dyson is shortly to publish a detailed work, to add to his other contributions to Australian jurisprudence. Is the 'modern fiduciary' the 'sick man of equity'? (Chapter 41). What is a 'remedial constructive trust'? (Chapter 43). Each of these chapters repays a close reading.

¹ *Bar News: The Journal of the NSW Bar Association* (Spring, 2000) 25.

Dyson Heydon's learning is dodecahedral in the Daubian sense. He is Posner-like in the range and scope of his writing, both judicial and extra-judicial. This collection is a worthy tribute to his thinking and writing to date.

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