



William Deane, Justice 1982–95

Deane, William Patrick (b 4 January 1931; Justice 1982–95) was a leading member of the Mason Court and staunch defender of human rights. His career has been an unpredictable mix of conservative and radical elements. While many described him as intensely private and reserved during his time on the Bench, his judgments blazed trails in the areas of human rights, tort law, and equity. They reflect a desire to reform archaic and unjust law, while using methods that remain consistent with past judicial approaches. This desire often led him to take bold new approaches—not always with the support of his colleagues.

Deane was born in Melbourne to a strictly Catholic family in 1931; the family moved to Canberra soon after. He attended St Christopher's Convent School before boarding with the Marist brothers at St Joseph's College in Sydney, and went to the University of Sydney where he obtained a BA and LLB. He then studied at Trinity College, Dublin and later at the Hague Academy of International Law, from which he graduated *summa cum laude*.

During the 1950s, Deane's anti-communism led him to join the Democratic Labour Party for a brief dalliance with party politics. However, the infighting he experienced during this period 'cured him of politics'.

Deane was admitted to the Bar in 1957 and practised mainly in equity, taxation, trade practices, and commercial law. He married Helen Russell in 1965 and they have one daughter (Mary) and one son (Patrick). He took silk in 1966.

In February 1977, he was appointed to the Equity Division of the Supreme Court of NSW. After less than two months in

that position, he accepted an appointment to the Federal Court to sit as President of the Australian Trade Practices Tribunal. He was appointed to the High Court by the Fraser government in 1982.

Soon after joining the Court, Deane almost single-handedly transformed the law of negligence by introducing the concept of **proximity**. At that time, the question of when to impose a duty of care in negligence had become a vexed and difficult issue, particularly in relation to claims for pure economic loss and psychiatric injury. Dissatisfaction with the concept of reasonable foreseeability in cases of pure economic loss led **Stephen** in *Caltex Oil v The Dredge 'Willemstad'* (1976) to call for 'some control mechanism based upon notions of proximity between tortious act and resultant detriment'. Deane, who had appeared as counsel in the *Caltex* case, attempted to develop this idea in *Jaensch v Coffey* (1984) through a new duty concept based on closeness of time, space, or relationship. According to Deane, a duty of care could be established in cases of physical proximity (closeness of space and time), circumstantial proximity (close or overriding relationships), or causal proximity (close or direct causal links between acts and injuries or losses).

In *Jaensch*, Deane stood alone in his formulation of proximity; but subsequent decisions saw growing acceptance of the concept (see *Sutherland Shire Council v Heyman* (1985); *San Sebastian v Minister* (1986); *Burnie Port Authority v General Jones* (1994); *Bryan v Maloney* (1995)). The concept was not without criticism from other Justices, especially **Brennan**, who favoured the incrementalist approach of finding a duty of care by reference to established categories.

As in other areas, the Court has since turned away from the trails that Deane blazed. 'Proximity' as the touchstone of a duty of care has now been discarded (see *Hill v Van Erp* (1997); *Pyrenees Shire Council v Day* (1998); *Perre v Apand* (1999)).

In *Hawkins v Clayton* (1988), Deane showed once again that he was willing to take a creative line of his own. The question concerned the concurrent liability in **contract and tort** of professional people such as solicitors. Traditionally, solicitors had been liable only in contract (*Groom v Crocker* (1938)), but the development of recovery of pure economic loss arising from negligent misstatement gave rise to the possibility of their being concurrently liable in contract and tort. This led to conflicting decisions. Would the principles of assessment of **damages** in contract and tort merge, so that the cause of action chosen did not dictate the result? Or would contract and tort principles remain separate, allowing the plaintiff to take the benefit of whichever remedy he or she found most advantageous?

In *Hawkins v Clayton*, Deane took a third path. He held that if a person was liable in tort for negligent misstatement, there was no need to imply a term into the contract requiring that reasonable care be taken. He thought that concurrent liability was better described as conflicting liability, and ought to be avoided where possible. In doing so, he would have preferred to remove professional liability from the individualist values of **contract law** into community values as expressed in tort law. This was a radical step because it ignored the long line of cases holding solicitors negligent in contract.

Deane's initiative in *Hawkins v Clayton* suffered the same fate as his proximity principle. The House of Lords rejected it in *Henderson v Merrett Syndicates* (1994), and then the Full High Court did the same. In *Astley v Austrust* (1999), the Court decided by a 4:1 majority that Deane was wrong to deny liability in contract, both in legal principle and as a matter of history. In the past, said the majority, professional people had been liable in contract, and the addition of tort liability should not affect that. Plaintiffs should be able to recover under whichever remedy was the more advantageous.

Particularly in his judgments in equity, Deane sought to forge new synergies and blaze new trails. Though not entirely alone in this, he was firm in his own path. In *Waltons Stores v Maher* (1988), he was an advocate of **estoppel** as an active doctrine in the absence of pre-existing legal relationships. With **Mason**, he sought to harmonise existing categories of estoppel through the merging of promissory and proprietary estoppel. More radically, he proposed a merger of **common law** and equitable estoppel—a development that orthodox legal scholars might consider heretical. These ideas are evident in *Foran v Wight* (1989) and *Commonwealth v Verwayen* (1990), in both of which the Court charted new territory in articulating a broader notion of estoppel.

Deane also broke new ground in the field of constructive trusts. In *Muschinski v Dodds* (1985), his judgment laid the foundation for a constructive trust, which could be imposed quite apart from the parties' intention, that was based upon the need for a remedy where one party's attempted retention of the other's contribution to a joint relationship was unconscionable. In *Baumgartner v Baumgartner* (1987), the Court (including Deane) took this approach further. The key element in the new constructive trust was **unconscionability**. The issue for the future is how far this idea can go: in particular, whether it can be used as a remedy, in the absence of statute, taking into account the whole range of contributions, financial and domestic, in relationships.

In **constitutional law**, Deane's arrival quickly established a new majority (Mason, **Murphy**, Brennan, and Deane, with **Gibbs**, **Wilson**, and **Dawson** dissenting), usually in favour of the Commonwealth—as in *Hematite Petroleum v Victoria* (1983) and *Gosford Meats v NSW* (1985) (**excise duties**); *Fencott v Muller* (1983) (trading corporations); and above all, the *Tasmanian Dam Case* (1983), where Deane's contribution was distinctive. On the one hand, his concurrence in the principal majority holding—that the legislative implementation of treaties under the **external affairs power** can extend to any treaty whatsoever, regardless of subject matter—was based on the doubtful contention that *R v Burgess; Ex parte Henry* (1936) had already established that proposition (see *Ratio decidendi*). On the other hand, he joined Gibbs, Wilson, and Dawson in finding that the Commonwealth's initial attempt to prevent construction of the dam by regulations was invalid—for Deane, because (as he alone held) the assertion of Commonwealth power over Tasmanian bushlands entailed an **acquisition of property** with no adequate compensation scheme. Moreover, he joined Brennan in holding that most of the relevant statutory provisions were also invalid, as insufficiently tailored to the purpose of protecting this particular river. The idea that legislation implementing a treaty must be suitably tailored to its purpose had

been present in all the earlier cases; but Deane gave it a novel formulation and focus, absorbing it into a conception of **proportionality** that was to reverberate with growing significance through the Court's constitutional work.

Deane's analysis of the *Tasmanian Dam* regulations as an acquisition of property was an early indication of his concern for constitutional rights. Thereafter, this took many forms. In *Evda Nominees v Victoria* (1984), he dissented from the Court's new rule that any argument for the **overruling** of an earlier High Court decision required the prior leave of the Court, protesting that counsel should be free to advance any argument at any time. In *University of Wollongong v Metwally* (1984), he joined Gibbs, Brennan, and Murphy in holding that amendments to the *Racial Discrimination Act 1975* (Cth), designed to rescue state anti-discrimination legislation from **inconsistency** with Commonwealth law, could not apply retrospectively. That the state Act had been rendered inoperative by inconsistency (see *Viskauskas v Niland* (1983)) was for Deane a 'fact of history' that no legislative power could undo. The decision did little to advance Mohamed Metwally's right to freedom from **discrimination**; but Deane saw it as protecting a more basic constitutional right of every Australian. The inconsistency provision in section 109 of the Constitution is not, he wrote, a mere device for adjusting competitive assertions of power by state and federal parliaments, but protects the individual from 'the injustice' of being expected to obey contradictory Commonwealth and state legislation simultaneously. For Deane, this was a right of **citizenship**, linked with ideas of **nationhood** and popular **sovereignty**. The Australian federation 'was and is a union of people'; and all constitutional provisions should be understood 'as ultimately concerned with the governance and protection of the people from whom the artificial entities called Commonwealth and States derive their authority'.

In *Kirmani v Captain Cook Cruises* (1985), Deane analysed the Commonwealth's ability to repeal British legislation still in force in the states by relying, like Mason and Brennan, on what he called the 'traditional legal theory' that Australia's constituent instruments derive their authority from enactment by the Imperial Parliament. Deane added, however, that if ever that theory needed to be examined more closely, the true underlying basis of Australia's independent sovereignty might be found in the external affairs power (enabling the Commonwealth to exclude legal interference by any other country, including the UK), and in the power of the Australian people to amend their own Constitution—so that 'ultimate authority in this country lies with the Australian people'.

In *Breavington v Godleman* (1988), Deane (supported by Wilson and Gaudron) reinterpreted section 118 of the Constitution (requiring recognition of state laws 'throughout the Commonwealth') as a substantive assurance of **national unity** and 'a unitary national system of law'. Though Deane's approach was rejected in *McKain v Miller* (1991) and *Stevens v Head* (1993), his continued dissents (and Gaudron's) were ultimately vindicated in *John Pfeiffer v Rogerson* (2000).

Especially where separate state regimes might fragment legal uniformity, Deane read **Commonwealth legislative powers** expansively—for example (in **joint judgments** with Mason) the **marriage** power in *Re F; Ex parte F* (1986) and *Fisher v Fisher* (1986), and (in sole dissent) the **corporations**

power in the *Incorporation Case* (1990). But when the Court upheld a Commonwealth–state cooperative scheme in *R v Duncan; Ex parte Australian Iron & Steel* (1983), Deane stressed that this was, in part, an affirmation of the continuing legislative power of the states, freed from ‘outmoded doctrines appropriate to times that are gone’. When *Street v Queensland Bar Association* (1989) breathed new life into section 117 of the Constitution, which prohibits state discrimination against residents of other states, Deane emphasised that this fostered both national unity and individual rights. Yet his was the broadest concession that sometimes, consistently with section 117, a state might validly confine the provision of benefits to its own residents.

In *Kingswell v The Queen* (1985), Deane’s powerful dissenting judgment was alone in calling for reinterpretation of the guarantee of jury trial in section 80 of the Constitution. Brennan dissented on more technical grounds; but Deane endorsed the dissenting view of Dixon and Evatt in *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938), interpreting section 80 as an effective guarantee of trial by jury for serious offences. Unlike Dixon and Evatt, he declined to adopt a mechanical definition of ‘serious offences’, holding rather that whether an offence is serious ‘in the sense that it is not capable of appropriately being dealt with summarily by justices or magistrates is, ultimately, a question of law to be determined by the courts’. While later cases such as *Cheng v The Queen* (2000) have anxiously re-examined Brennan’s dissent in *Kingswell*, Deane’s more radical challenge remains unanswered.

The conception of judicial power in Chapter III of the Constitution was, for Deane, a further protection of liberty. In the *War Crimes Act Case* (1991), he held that a retrospective criminal law would be unconstitutional, since ‘it is basic to our penal jurisprudence’ that conviction depends on a judicial finding of failure to obey a law applicable ‘at the time the act was done’. In *Re Tracey; Ex parte Ryan* (1989), *Re Nolan; Ex parte Young* (1991), and *Re Tyler; Ex parte Foley* (1994), he insisted that the system of military justice must deal only with ‘exclusively disciplinary offences’ and must not ‘supplant the jurisdiction or function of the ordinary courts’. In *Re Bolton; Ex parte Beane* (1987), he proclaimed that judicial safeguards such as habeas corpus are ‘the very fabric of the freedom under the law which is the prima facie right of every citizen and alien in this land’.

His willingness to find implied constitutional rights was not limited to rights of due process. In *Leeth v Commonwealth* (1992), he and Toohey proposed that constitutional interpretation should assume that the framers of the Constitution chose systematically ‘to incorporate underlying doctrines or principles by implication’—including a ‘general doctrine of legal equality’ importing not merely the formal idea of ‘equality before the law’, but substantive protection against any legislative infringement of the inherent equality of all ‘people of the Commonwealth’. In *Kruger v Commonwealth* (1997), most Justices rejected that notion; but in *Nationwide News v Wills* (1992) and *Australian Capital Television v Commonwealth* (1992), a majority of the Court discerned an implied constitutional freedom of political communication (see *Free Speech Cases*). Deane and Toohey grounded this freedom in a ‘doctrine of representative gov-

ernment’, which they saw (along with federalism and separation of powers) as one of ‘three main general doctrines of government’ pervading the Constitution. They interpreted this doctrine as a powerful version of popular sovereignty, in which all the powers of government—‘legislative, executive or judicial’—are ‘ultimately derived from the people themselves’, to be exercised in a representative capacity on the people’s behalf.

Deane was appointed Governor-General in 1995; his initial five-year term was extended until mid-2001. Despite the quality and impact of his work on the Bench, he is arguably better known and more popular for his role as Governor-General, in which he proved to be an uncharacteristically outspoken commentator on social issues.

Deane’s role as Governor-General has not been without controversy. His advocacy of the rights of indigenous peoples is consistent with his judgment with Gaudron in *Mabo* (1992), where the dispossession of Aboriginal peoples was identified as ‘the darkest aspect of the history of this nation’. His defences of multiculturalism, the reconciliation process, native title, and social justice have attracted criticism. However, in the main, his social commentary has served only to increase his popularity. During the period of republican speculation, he was touted by many as a suitable candidate for appointment as Australia’s first president.

Deane has a love of horse racing and has bred racehorses, including the relatively successful Man about Town, for more than three decades—not without the criticism of Lady Deane, who calls his horses ‘slow’. He is also known to love tennis, and to follow Essendon in the AFL and Parramatta in the Rugby League. However, his greatest love may be Rugby Union—a game that led to the loss of the sight of his right eye in a match in Canberra after he had graduated from Sydney University.

Deane will be remembered by those who know him personally, and by Australians generally, with great affection. There is a reason for his popularity. He is an enormously talented, yet humble, man of great convictions and integrity. His career serves to remind us that, in the words of Donald McNicol, ‘idealism is not the prerogative of the young or of the recently learned’.

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Decision-making process. The making of a judicial decision cannot be delegated or transferred. Each Justice must make a decision in his or her own way. A tentative view can be, and often is, formed on reading the court papers. The reasons for a judgment that is under appeal, or the reasons for a decision that is under review, will usually identify and discuss the issue to be decided by the Court. A Justice’s tentative view can be, and often is, modified when written submissions are furnished by the parties, by interveners or by *amici curiae*, but no final view is formed until after the oral argument is concluded.

The practice of the Court has been to rely heavily on oral argument. The dialectic of advocacy and exchanges between Bench and Bar illuminate the issues for decision and usually