

and the *puisne* Justices about the expectation that, with the Court's move to Canberra, the Justices would also move their homes there. Wilson became entangled in this when Cabinet decided to support Barwick at the end of 1979. The difficulty was soon resolved, and Wilson was able to retain his home in Perth, from which he travelled to sittings of the Court. He was assisted by the provision of chambers for him in the Perth Supreme Court building.

The operation of the Court during Wilson's time appears to have been free of voting blocs, although some Justices were more conservative than others, and Wilson was frequently in the minority on issues relating to the scope of Commonwealth legislative power. There also seems to have been a lack of tension in the Justices' personal relations after the issues surrounding the move to Canberra were resolved. There were many joint judgments, though the Justices who chose to participate in them varied greatly. Wilson was often a party to a joint judgment, including the unanimous judgment of *Cole v Whitfield* (1988), which has largely cured the long-running sore of section 92 of the Constitution as to freedom of interstate trade. He also participated in a large number of criminal appeals.

In addition to *Cole v Whitfield*, the Court dealt with a number of important constitutional cases during Wilson's term. In *Queensland Electricity Commission v Commonwealth* (1985), another unanimous decision, the Court struck down a Commonwealth law that discriminated against Queensland by singling out its electricity authorities for special treatment in relation to the settlement of industrial disputes (see *Intergovernmental Immunities*).

Both *Koowarta's Case* (1982) and the *Tasmanian Dam Case* (1983) raised a major issue for the future of federalism. They concerned the scope of the external affairs power.

Koowarta was the last High Court decision on this issue which, in the writer's view, had any semblance of restraint in its interpretation. The case concerned the application of sections 9 and 12 of the *Racial Discrimination Act 1975* (Cth) to actions occurring only in Australia. It was decided 4:3, with Stephen the only member of the majority who did not go so far as to hold that the existence of any treaty obligation gave rise to an external affair. Stephen rather held that the particular matter of racial discrimination was a matter of international concern. Wilson dissented, and relied on the forceful view of Dixon that federal legislation giving effect to a treaty must be based on some matter 'indisputably international in character' such as a convention on international civil aviation (*R v Burgess; Ex parte Henry* (1936)). Wilson wrote: 'In my opinion, the power in Section 51(xxix) does not extend to enable the Parliament to implement every obligation which Australia assumes in its international relations.'

The *Tasmanian Dam Case* put an end to the restrained view of the external affairs power. Again, the Court was divided 4:3, but this time the majority Justices all adopted the broadest view of the power, and again Wilson dissented. In doing so, he gave a strong warning that

an expansive reading of section 51(xxix) so as to bring the implementation of any treaty within Commonwealth legislative power poses a serious threat to the basic federal polity of the Constitution. Such an interpretation, if adopted, would result in

the Commonwealth Parliament acquiring power over practically the whole range of domestic concerns within Australia.

He then cited the many treaties that were ripe for the picking. His views have been prophetic.

One of Wilson's last cases was *Mabo (No 1)* (1988). It decided, again 4:3, that section 10 of the *Racial Discrimination Act* overrode a Queensland law purporting to extinguish native title rights being sought by the plaintiffs. Whether such rights actually existed was not determined until *Mabo* (1992). Nevertheless, the first decision has had great significance for the growth of native title. Wilson dissented. He did so on a more restricted interpretation of section 10 than that of the majority.

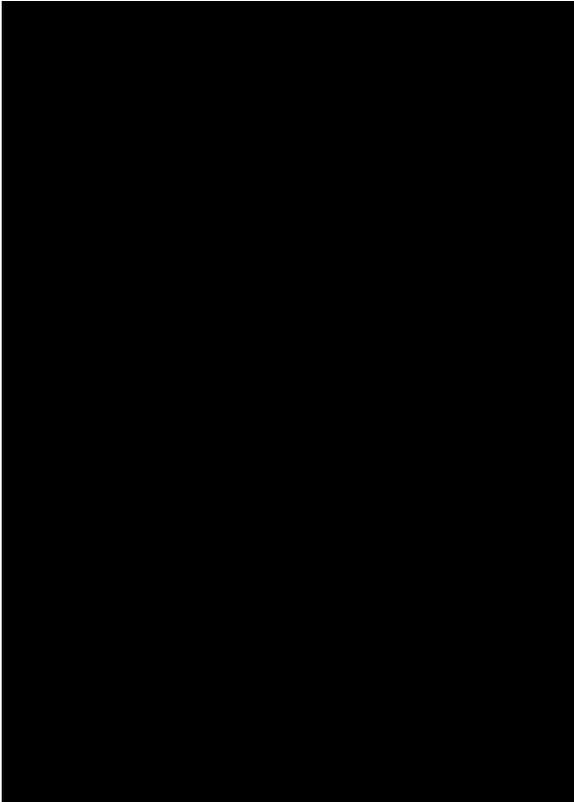
Wilson took part in a number of other important judgments, including *Todorovic v Waller* (1981) (damages); *R v O'Connor* (1980) (effect of intoxication on criminal intent); *Williams v The Queen* (1986) (arrest); the *Northern Land Council Case* (1981) (limit of Crown immunity); and *Actors Equity v Fontana Films* (1982) (corporations power). His judgments were well crafted, displaying in particular, unusually careful attention to the argument of counsel. This feature of his judicial style reflected not merely his conservatism but also his lack of affectation.

Wilson retired in February 1989, shortly after he became the National President of the Uniting Church of Australia for a three-year term. He was Chancellor of Murdoch University from 1980 to 1995. In 1990, he became President of the Human Rights and Equal Opportunity Commission (HREOC) for a term of seven years. He was Deputy Chairman of the Council for Aboriginal Reconciliation (1991–94), and President of the Australian Branch of the World Conference on Religion and Peace (1991–95). In 1997, he was elected President of the Australian Council for Overseas Aid. His report for HREOC on the stolen generation of Aboriginal children, *Bringing Them Home*, was a profoundly moving experience both for him and for many members of the community. Freed of the constraints of judicial office, Wilson has displayed a passion and commitment far removed from the conservatism of his judicial opinions.

He has been married to Leila since 1950. They have five children and nine grandchildren. He has received a number of honorary degrees and honours (CMG, KBE, and AC) for his extensive services to the law and the community.

PETER DURACK

Windeyer, (William John) Victor (b 28 July 1900; d 23 November 1987; Justice 1958–72). Of Australian families which boast a strong tradition in the law, one outstanding family is the Windeyers. Of Swiss origin (the first Windeyer going to England in about 1735), Charles Windeyer (1780–1855) arrived in Australia in 1828. He had been a London law reporter—the first recognised reporter of the House of Lords—and in NSW became Senior Police Magistrate and the first Mayor of Sydney. Each generation since has served the community in the law and other fields. Richard Windeyer (1806–47), the son of Charles, had been admitted to the English Bar before he migrated; he became a leading barrister in Sydney and a Member of the NSW Legislative Council. His son William Charles Windeyer (1834–97) was a



Victor Windeyer, Justice 1958–72

judge of the Supreme Court of NSW from 1879 to 1896; William's eldest son Richard was a leading barrister who frequently appeared before the High Court (see **Counsel, notable**), while another son, William Archibald (the Justice's father), was a prominent Sydney solicitor who later became Mayor of Hunters Hill.

It was there that Windeyer was born. His mother, Ruby, was a sister of John LeGay Brereton who, in 1921, became Professor of English Literature at the University of Sydney. This **background** plainly equipped Windeyer with an interest in the law, legal **history**, and literature. He had two brothers, also lawyers.

After attending Sydney Grammar School, Windeyer entered the University of Sydney in 1919 where he graduated BA and LLB, obtaining in 1922 the University Medal for History. Later, he obtained an MA. University of Sydney later awarded him an honorary LLD.

In 1918, he left school to enlist in the first AIF, but the war finished before he could be sent overseas. Then, in 1919, Windeyer began a distinguished career as a soldier. Liable for military service under the military training scheme introduced during **World War I**, he joined the Sydney University Regiment. In February 1922, he was commissioned with the rank of Lieutenant. On 1 July 1937, he was appointed commanding officer of the regiment with the rank of Lieutenant Colonel.

During **World War II**, he served with great distinction in the Ninth Australian Division of the AIF. Having enlisted as

a Major three months earlier, he rapidly regained his peacetime rank, and on 9 August 1940 he took command of the 2/48 Infantry Battalion, which consisted predominantly of South Australians and was the most decorated battalion of the second AIF. It was not usual for an infantry commanding officer to be brought in from another state, but Windeyer quickly won the confidence and affection of the South Australians. Windeyer commanded his battalion during the siege at Tobruk. In January 1942, he was promoted to the rank of Brigadier, taking command of the Twentieth Brigade and leading it through the rest of the war in campaigns in North Africa, New Guinea, and Borneo, notably at El Alamein and at the capture of Finschhafen in New Guinea. Described as a versatile and outstanding commander, he was three times mentioned in dispatches, awarded the DSO and Bar in 1942, and appointed CBE in 1944.

Windeyer continued his military service after the war, serving in the Citizen Military Forces. In 1950, he was promoted to the rank of Major-General, and from 1950 to 1953 sat on the Military Board. He commanded the Second Division until 1952. From 1956 to 1966, he was Honorary Colonel of the Sydney University Regiment. He was appointed CB in 1953.

Admitted as a barrister in NSW in 1925, he quickly established a wide-ranging practice which, in later years, was predominantly in **equity** and **commercial law**. As **junior counsel**, he appeared in two constitutional cases, *Moran's Case* (1939) and *R v Connare* (1939), in the latter for the NSW government whose lottery laws were held not to infringe section 92. He was appointed a KC in 1949. As silk, he appeared in a number of cases in the High Court and **Privy Council**, including the *Melbourne Corporation Case* (1947) (a forerunner to the *Bank Nationalisation Case* (1948)).

Probably the best known of Windeyer's cases was the controversial Royal Commission on Espionage in 1954, popularly called the Petrov Royal Commission. It was a forensic exercise quite removed from his usual practice. He was senior counsel assisting the Commission. His description of Exhibit J, one of the more notorious exhibits, as 'a farrago of fact, falsity and filth' has endured.

Windeyer's interests in the law were academic and historical, as well as professional. He was lecturer in legal history at the University of Sydney from 1929 to 1936 and lecturer in equity from 1937 to 1940. He wrote *The Law of Wagers, Gaming and Lotteries* (1929) and *Lectures on Legal History* (1938), the latter becoming a standard text well known to generations of law students. All of his writing, legal and historical, displays a careful if not painstaking erudition. His interest in and knowledge of history extended beyond legal history. His high reputation was acknowledged in his appointment as Vice-President of the Selden Society (London) and as Honorary Fellow of the Royal Australian Historical Society. He was also made an honorary member of the Society of Public Teachers of Law (UK).

His interest in education was not limited to lecturing and writing. From 1943 to 1970, he was a member of the Board of Trustees of Sydney Grammar School. He was a Fellow of the Senate of the University of Sydney (1949–59) and Deputy Chancellor (1955–58). From 1951 to 1955, he was a member of the Council for the Australian National University. He

was, for some time, Chairman of the Gowrie Scholarship Trust Fund.

He held directorships in the Colonial Sugar Refinery Company (1953–58) and in the Mutual Life and Citizens Assurance Company (1954–58). He also served on the Board of Royal Prince Alfred Hospital and was President of the NSW Boy Scouts Association. In 1949, after he had been appointed a KC, he made an unsuccessful bid for Senate pre-selection as a member of the Liberal Party. Later, he sat as a member of the Judicial Committee of the Privy Council.

On 10 July 1934, he married Margaret Vicars. They enjoyed 53 years of married life. Two of their sons are lawyers, their eldest son a judge of the Supreme Court of NSW. Two grandchildren are also lawyers.

Windeyer was appointed to the High Court to replace Williams. Noting the appointment, the *Australian Law Journal* referred to his 'personal qualities which command the respect of his colleagues in the law. He brings to the High Court bench not only legal knowledge but also wide experience and a cultivated mind'. Windeyer's detractors attributed his **appointment** to his role in the Petrov Commission. They overlooked his busy practice, his wide legal knowledge, his cultivated mind, and the broadness of his intellect.

Some may have judged Windeyer as a conservative. It is futile, if not misleading, to ascribe such epithets. In personal life and beliefs, he may have been conservative but as a Justice he was far less conservative and traditional than many of his colleagues. He was a member of a particularly strong Court.

As a legal historian, Windeyer was particularly conscious of the dynamism of the **common law** 'to grow and develop as the needs of men change'. He was concerned to link law with the development of society. After his **retirement**, he said, 'the law of a people is not an aggregate of abstract concepts, it governs their lives and reflects their history'—a view expressed some 40 years earlier in the early pages of his *Legal History*: 'Law is not, in essence, a body of technical rules, uncouth formulae and inexorable commands ... It is really a simpler and a grander thing. It is that which makes it possible for men to live together in communities, to lead a peaceful, organised, social life.'

As Henry Burmester has noted, this sounds like Oliver Wendell Holmes, reflecting the pragmatic approach of American jurisprudence in the early twentieth century. Not infrequently, he quoted Holmes. He did so in his preface to *Legal History*—'a page of history is worth a volume of logic'—Windeyer adding that a detailed knowledge of the history of a rule is necessary for an understanding of the living law.

The concept of the common law evolving to meet changed circumstances applied also in **constitutional law**, where he advocated the need for an appreciation that '**legalism** there demands rather than that kind of consistency that is the product of the application of a constant principle to contemporary needs in developing circumstances'.

Some instances of his brilliance in the elucidation of historical aspects include *Norman v FCT* (1963) on choses in action; *Olsson v Dyson* (1969) and *Coulls v Bagot's Executor & Trustee Co* (1967) on **contracts** for the benefit of third parties; *Randwick Municipal Council v Rutledge* (1959) on uses consistent with the exemption from rating of a public reserve, applied later by the High Court in *Storey v North*

Sydney Municipal Council (1970); *R v District Court; Ex parte White* (1966) on the law relating to conscientious objection to compulsory military service; *Crowe v Graham* (1968), a discussion of what constitutes obscene and indecent material; and *Brickworks v Warringah Shire Council* (1963) on **estoppel** and local authorities. Instances of his vision of a common law for Australian conditions pragmatically applying the inherited English common law are *Skelton v Collins* (1966) and *Gartner v Kidman* (1962). His pragmatism is evident in *Nominal Defendant v Clements* (1960) concerning prior consistent statements and *Jones v Dunkel* (1959) on the use to be made of an unexplained failure to call a witness. As a student, he had a particular interest in philosophy, later reflected in his discussion of **causation** in *National Insurance of New Zealand v Espagne* (1961).

In constitutional matters, he was usually in respectable company, either as part of the majority or in a sizeable dissenting minority. In *Dennis Hotels v Victoria* (1960), he wrote a dissent agreeing with Dixon—a view Barwick later expressed to be correct. When he wrote individual judgments, his reasoning was distinct from that of other Justices who, for the most part, were more traditional, relying on **precedent** and abstract principles. His judgments indicate a nationalist approach and a concern to ensure a single nation, united economically. They reflect the pragmatism identified earlier.

His constitutional judgments therefore offer an alternative to the legalism and narrow **positivism** often associated with the Dixon Court and perhaps reflected by Justices such as Kitto and Taylor. Thus, as Burmester has noted, he saw a need to accommodate law to changing facts, and so in the *Professional Engineers Case* (1959) rejected an approach to whether a matter was an industrial dispute by reference to a distinction between governmental and non-governmental functions. His willingness to accommodate constitutional principle with practical considerations is seen in the *Tasmanian Breweries Case* (1970) in his attitude to the **separation of powers** and the need to avoid extending needlessly the ambit of **judicial power**. Unlike Murphy and Deane, however, he did not seek to find in the Constitution safeguards of individual rights and liberties.

Windeyer did not interpret **Commonwealth legislative powers** with a narrow **literalism** (see *Worthing v Rowell & Muston* (1970); *R v Phillips* (1970)) but, in the *Marriage Act Case* (1962), while prepared to give the **marriage power** a broad interpretation, he dissented from the view that it extended to regulating legitimacy. Windeyer's conclusion in *Bonser v La Macchia* (1969) that it was appropriate for the Commonwealth to control all waters beyond the low water mark was later reflected in the majority judgments in the *Seas and Submerged Lands Case* (1975). He did not see section 92 as protecting individual rights but as a provision primarily designed to ensure a common market. So in cases such as *Chapman v Suttie* (1963), he held that laws that did not discriminate between interstate transactions and intrastate transactions did not infringe section 92—a view not shared by his colleagues, but later accepted in *Cole v Whitfield* (1988) (see also **Interstate trade and commerce**). In the *Payroll Tax Case* (1971), he saw the limits to Commonwealth legislative power as fixed by implications relating to the use of the powers, not to the inherent nature of the

subject matter of the law. A Commonwealth law could not, therefore, prevent the states from carrying out their functions as part of the Commonwealth.

He also took the opportunity to place the *Engineers Case* (1920) in the broader context of historical development. After observing that with the growth of Australian nationhood, the position of the Commonwealth had waxed and that of the states had waned, and that the *Engineers Case* had played a significant part in that process, he eloquently observed:

I have never thought it right to regard the discarding of the [pre-*Engineers* doctrines] as the correction of antecedent errors or as the uprooting of heresy. To return today to the discarded theories would indeed be an error and the adoption of a heresy. But that is because in 1920 the Constitution was read in a new light, a light reflected from events that had, over twenty years, led to a growing realization that Australians were now one people and Australia one country ... The *Engineers Case* looked at as an event in legal and constitutional history, was a consequence of developments that had occurred outside the law courts as well as a cause of further developments there.

His contribution to law and legal literature is summarised by two colleagues. Mason has said:

His judgments ... have been acclaimed, not only in Australia but elsewhere in the common law world. He brought to his work in this Court a profound understanding of the law, stemming from his appreciation of its historical development. His sense of history and his knowledge of literature and the classics strengthened his capacity to articulate the law and explain its place in society.

Stephen has added that Windeyer's 'great scholarship and mastery of the written word have long turned law into literature ... while losing nothing in the process'.

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Further Reading

Henry Burmester, 'Justice Windeyer and the Constitution' (1987) 17 *FL Rev* 65

John Coates, *Bravery Above Blunder* (1999)

John Glenn, *Tobruk to Tarakan* (1960)

Barton Maughan, *Tobruk and El Alamein* (Australian War Memorial, *Australia in the War of 1939–1945*, series I, vol 3, 1966)

Victor Windeyer, *Lectures in Legal History* (2nd edn 1949)

Women. It is not without irony that a consideration of the construction of 'women' by the High Court must begin with some observations about the absence of women.

An arguably trite observation concerns the lack of women on the Court itself. Gaudron, appointed as the first woman Justice in 1987, remains the Court's only woman member. Kirby has lamented the relative absence of other women with 'speaking parts': even when women barristers do appear, it is usually only in a silent role as junior counsel (see **Women practitioners**).

A different kind of absence is characterised by *Dietrich v The Queen* (1992). Despite the devastating effect of this deci-

sion on women as participants in the formal legal system, women were completely absent from the case as parties (or even as **interveners**). In *Dietrich*, the Court decided that in cases involving serious criminal offences, the right to a fair trial may require the state to provide the accused with legal representation. The Court had heard an argument that this 'would impose an unsustainable financial burden on government', and concluded that it 'may require no more than a re-ordering of the priorities according to which legal aid funds are presently allocated'. No reference was made to the gendered distribution of legal aid funding—that is, to the well-documented fact that legal aid in criminal cases overwhelmingly goes to men, while women are more likely to seek legal aid in family or civil matters. Partly because of the *Dietrich* decision, the availability of aid in the latter categories continues to decline (see Attorney-General's Department, *Gender Bias in Litigation Legal Aid* (1994)).

When women do appear as parties in reported cases, they mostly appear in disputes about relationships. They are presented in **stereotype** roles as wives, or mothers, or carers of others. It is in such contexts, and by reference to such roles, that the Court's construction of women emerges.

Women's choices to be mothers. In *A-G (Qld); Ex rel Kerr v T* (1983), Gibbs refused to grant special leave to appeal to a man who, in the Supreme Court of Queensland, had failed in a relator action (see **Attorney-General**) against a woman with whom he had had sex; he had sought an injunction to prevent her from terminating a pregnancy. Gibbs found that 'a foetus has no right of its own until it is born and has a separate existence from its mother', and concluded: 'There are limits to the extent to which the law should intrude upon personal liberty and personal privacy in the pursuit of moral and religious aims. These limits would be overstepped if an injunction were to be granted in this case.' While this decision appears to support a woman's right to choose to terminate a pregnancy, it is only a decision of a single Justice on a special leave application. The Court as a whole has had no opportunity to consider the legality of abortion.

That opportunity nearly arose in the appeal against the NSW Court of Appeal decision in *CES v Superclinics* (1995). This case concerned a young woman suing a medical clinic for its negligent failure to detect her pregnancy, which was eventually diagnosed too late for her to consider the option of a termination. It would have been possible for the Court to confine its consideration of the appeal to the issues directly in dispute, without pronouncing on the legality or otherwise of what was a hypothetical abortion. There were, however, indications that the Court, or at least some Justices, may have been anxious to decide the broader question.

On the first day of the hearing, the Court was confronted with an application from the Catholic Bishops Conference and the Catholic Health Care Association for leave to intervene. Chief Justice Brennan revealed that he was personally acquainted with members of the Bishops Conference, but chose not to **disqualify** himself from hearing their application. The Court proceeded to consider whether the Conference should be allowed to intervene. Unlike courts in the USA and Canada, Australian courts have been reluctant to allow intervention by *amici curiae* or 'friends of the court' (see, for example, *Bropho v Tickner* (1993)); but in this