

JUSTICE HAYNE'S CONTRIBUTION TO PUBLIC LAW

OVERVIEW

To speak of Justice Kenneth Hayne's contribution to public law is a large undertaking. Each of this evening's speakers has therefore selected a particular area of his Honour's work for your consideration. My task, at once more superficial and at the same time more far-reaching, is to attempt to sketch the broad spread of his Honour's contribution to the area.

No doubt views about these things are likely to differ but, as it appears to me, there are at least five principal areas of public law in which Justice Hayne has proved profoundly influential.

First, and foremost, in the field of statutory interpretation, his Honour's rigorous insistence on the primacy of the words of the statute has been instrumental in leading the High Court, and of course other courts in this country, significantly away from the kind of purposive approach which once found favour with the Gibbs and Mason courts towards a new era of literalism with consequent disdain of extrinsic considerations.

Secondly, in the field of judicial review of executive action, Justice Hayne has been conspicuous in his preparedness to scrutinise executive action which has the capacity to affect fundamental rights and freedoms and, it might be thought, significantly responsible for leading other members of the Court to adopt a similar approach.

Thirdly, in relation to issues of federalism in its broadest sense, including the nature and incidents of federal jurisdiction and the approach to s 109 of the Constitution, his Honour has by and large proved himself an inveterate and influential centralist, of which arguably his judgment in *Work Choices*¹ is amongst the most striking examples.

Fourthly, in relation to the two latter-day constitutional constructs of the *Lange* implied freedom of political communication² and the *Kable* doctrine³ of what State courts can and cannot be required or empowered to do, Justice Hayne has been at the forefront in the refinement and consolidation of doctrine and the intellectual rigour required in the exercise of its application.

1 *New South Wales v Commonwealth* (2006) 229 CLR 1.

2 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

3 *Kable v Director of Public Prosecutions* (1996) 189 CLR 51.

Finally, in the criminal law, which may perhaps sound a little out of place in this forum, but which is surely the most important of all aspects of our public law, Justice Hayne has made a signal contribution to our understanding of the implications of the adversarial nature of the contest between Crown and subject and consequently the rights and obligations that attend it.

Time precludes significant elaboration but, in the brief time available, may I mention just a few examples of what I have in mind.

Statutory interpretation

Beginning with statutory interpretation, it was surely portentous when Justice Hayne, in only his second year on the Court, joined with Justices McHugh, Gummow and Kirby in *Project Blue Sky Inc v Australian Broadcasting Authority*⁴ in laying down the overarching principles of statutory interpretation that have ever since been regarded as the authoritative modern doctrine on the subject.

As you will recall, that judgement is replete with references to the significance of the words of the statute and the context in which they appear; which are the hallmarks of Justice Hayne's later judicial writing on the importance of text to the exclusion of near all else.

⁴ (1998) 194 CLR 355.

Thus, for example, the same insistence on the primacy of the text and the caution to be exercised in relation to extrinsic materials may be seen repeated in 2008 in the joint judgment of Justices Hayne and Heydon in *Shi v Migration Agents Registration Authority*.⁵

A year later in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*,⁶ in a judgment which has since been cited more than 400 times, Justice Hayne led the plurality constituted of himself and Justices Heydon, Crennan and Kiefel in proclaiming the fundamental importance of beginning the task of statutory construction with the text itself and in dictating that historical considerations and extrinsic materials cannot be relied upon to displace the clear meaning of the text.⁷

Then, one more year after that, in *Saeed v Minister for Immigration and Citizenship*,⁸ in a vivid insistence on the sanctity of the text, Justice Hayne with Chief Justice French and Justices Gummow, Crennan and Kiefel hearkened to the actual terms of s 51A of the *Migration Act* 1958 (Cth) as the basis for negating the very plainly expressed statements of intention in the Second Reading Speech and the Explanatory Memorandum: that s 51A was intended

⁵ (2008) 235 CLR 286.

⁶ (2009) 239 CLR 27.

⁷ (2009) 239 CLR 27 at 46-47 [47].

⁸ (2010) 241 CLR 252.

to overcome the Court's previous decision in *Ex parte Miah* and thereby exclude common law principles of procedural fairness in relation to the determination of applications by non-citizens for visas to enter into or remain in this country.

Now, finally, we have come to the point elucidated in Justice Hayne's recent article in the *Oxford University Commonwealth Law Journal*,⁹ and also in recent decisions of the Court¹⁰, where any notion of legislative intention as an objective collective mental state is to be conceived of as an anthropomorphic fiction which, it is said, serves no useful purpose, is apt to mislead, is calculated to lead to circular reasoning and is contrary to the rule of law. Be warned!

Review of Executive Action

I shall be briefer in what I say about Justice Hayne's contribution to the law regarding the review of executive action; not because it is any less or less significant but because time is short and because it is necessary to keep in mind that it is late on Friday afternoon.

9 The Hon Justice Kenneth Hayne AC, "Statutes, Intentions and the Courts: What Place Does the Notion of Intention (Legislative or Parliamentary) Have in Statutory Construction?" (2014) 13 *Oxford University Commonwealth Law Journal* 271.

10 See, eg, *Momcilovic v The Queen* (2011) 245 CLR 1 at 133-135 [314]-[321] per Hayne J, see also at 175 [441] per Heydon J.

Essentially, however, Justice Hayne's judgments in the area of the review of executive action are remarkable for their concern for the protection of individual rights and freedoms, regardless of whether they be the rights and freedoms of citizens of this country or of non-citizens, or aliens or even illegal immigrants. Three cases may suffice to make the point.

The first, and to many minds most important of the three cases, is *Plaintiff S157/2002 v The Commonwealth*¹¹ where in a joint judgment with Justices Gaudron, McHugh, Gummow, and Kirby (that plainly owes much to the groundwork distinction between jurisdictional and non-jurisdictional error which Justice Hayne had laid earlier laid in *Re Refugee Review Tribunal; Ex parte Aala*¹²) Justice Hayne held that a privative clause which purported to exclude rights of review applied only to error within jurisdiction, since to construe it more broadly would be inconsistent with s 75(v) of the Constitution.

The second is *Plaintiff S4/2014 v Minister for Immigration and Border Protection*,¹³ in which Justice Hayne (in a joint judgment with Chief Justice French and Justices Crennan, Kiefel and Keane) determined that, where an unlawful non-citizen had been lawfully

¹¹ (2003) 211 CLR 476.

¹² (2000) 204 CLR 82.

¹³ (2014) 253 CLR 219.

placed in detention for one purpose, namely, to enable the Minister to determine whether the plaintiff would be permitted to submit a valid application for a protection visa, the Minister was bound to make that determination before determining whether to grant a different form of visa which the plaintiff regarded as less beneficial.

The third is *CPCF v Minister for Immigration and Border Protection*¹⁴ in which Justice Hayne (albeit in a dissenting judgment in which he was joined by Justice Bell) held that, although immigration officers had acted pursuant to s 72 of the *Migration Act* 1958 when detaining a passenger on a boat intercepted in the contiguous zone surrounding Christmas Island, and thereafter held that passenger with the intention of taking him to India, the detention was unlawful because, at the beginning of the period of detention, it was not clear whether India would take the passenger.

Remarkably, his Honour rejected the Commonwealth's reliance on the executive power as an alternative basis of authority; reasoning that, because the Commonwealth may not without statutory authority detain an alien within Australia, it must follow that the Commonwealth may not do so outside Australia.

¹⁴ (2015) 89 ALJR 207.

Federalism

Moving on to federalism, I have already referred to *Work Choices*, but may I mention another case which it seems to me is arguably even more demonstrative of his Honour's centralist disposition.

No doubt as time passes, it is getting harder for those of who were around at the time to recall the intensity of feeling which attended the decision in *Re Wakim; Ex parte McNally*.¹⁵ But may I remind you, now, how in that case (in a leading joint judgment with Justice Gummow) Justice Hayne brought a jolting and, for many, a surprising halt to the then widely held aspiration of creating by means of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) what would have been, in effect, a unified Australian judicial system.

Noting that a federal structure of government involves a demarcation of powers and that it is the responsibility of the Court to uphold the demarcation, their Honours forcefully repudiated any idea of considerations of convenience leading to a blurring of the line. And so of course it remains.

¹⁵ (1999) 198 CLR 511.

Implied freedoms

Coming then to the *Lange* implied freedom of political communication, there is, if I may respectfully say so, something of a contrast between the parsimony of his Honour's engagement with the doctrine in its earlier stages of development and the relative exuberance of his Honour's apparent enthusiasm for it evident in more recent times.

Reference to four judgments may serve to illustrate the point. The first is his Honour's judgment in *APLA Ltd v Legal Services Commissioner (NSW)*,¹⁶ which contained a provisional analysis of the textual and structural aspects which underpin the implications to be drawn from ss 7 and 24 of the Constitution (and related provisions), and of the difficulties attending the premises which underpinned the plaintiff's submissions.

The second and third are his Honour's dissenting judgments in *Roach v Electoral Commissioner*¹⁷ and *Rowe v Electoral Commissioner*,¹⁸ concerning prisoners' voting rights and the closing of the electoral rolls, respectively. Like *APLA*, each contains a incisive analysis of the textual and structural aspects of the doctrine,

¹⁶ (2005) 224 CLR 322.

¹⁷ (2007) 233 CLR 322.

¹⁸ (2010) 243 CLR 1.

and an apparently unanswerable and unanswered identification of the fundamental flaw in the plaintiffs' arguments: which was that they assumed that the constitutional conception of representative government necessarily requires a particular content with respect to the qualification or enrolment of electors.

Rightly, one might have supposed, Justice Hayne cautioned against supplying content to constitutional doctrines by reference to popular sentiment; although, as we now know, he did not have the numbers with him on the day.

The fourth case is *Monis v The Queen*,¹⁹ in which the Court was equally divided – and thus the decision of the New South Wales Court of Criminal Appeal continues to stand – in which Justice Hayne would have held that, by prohibiting the sending through the post of content which a reasonable person would in all the circumstances regard as menacing, harassing or offensive, s 471.12 of the *Criminal Code* (Cth) infringed the constitutionally implied freedom of political communication. As an aside, though, what then of s 18C of the *Racial Discrimination Act* 1975 (Cth)?

Ironically, or perhaps it is more accurate to say inevitably, it is apparent from his Honour's reasons in *Monis* that the concern for protection of the integrity of the judicial function and accepted

¹⁹ (2013) 249 CLR 92.

methods of legal reasoning which drove his conclusion in favour of *Monis* was the exactly the same concern as had driven his Honour's earlier two decisions against the prisoner in *Roach* and the would-be voters *Rowe* and against the Plaintiff Lawyers' Association in *APLA*.

Kable

So far as the *Kable* doctrine is concerned, forbid that I should be thought disrespectful, but may I say that, while his Honour's approach to the subject has been conspicuously constant throughout, it is apparent that its appeal to other members of the Court has rather waxed and waned: from humble beginnings in *Thomas v Mowbray*,²⁰ where his Honour in dissent would have invalidated provisions of the Commonwealth Criminal Code which authorised the Federal Magistrates' Court to issue interim control orders (as the conferral of non-judicial power on a federal court); to his leading role in the High Court's judgment in *South Australia v Totani*,²¹ that the South Australian "bikie" legislation offended the *Kable* doctrine by conferring power on a State court to make orders limiting the freedom of those whom the executive determined to represent a risk to public safety and order; to once again a reversal of fortunes and thus to his Honour's dissent, in *Kuczborski v*

²⁰ (2007) 233 CLR 307.

²¹ (2010) 242 CLR 1.

Queensland,²² against the majority's decision to uphold the Queensland anti-bikie legislation creating offences that applied to certain conduct only by members of declared "criminal organisations".

Crime

Finally, and still more briefly as to crime, for any of you who might be interested, may I commend to you for consideration five cases which, in my respectful opinion, ought be regarded as amongst his Honour's finest contribution to public law. The first three comprise a sequence in which he with other members of the Court conceived and advanced the now settled notion that the burden of proof is always so much upon the Crown that any idea of drawing inferences from an accused's absence from the witness box is anathema. They are *RPS v The Queen*;²³ *Azzopardi v The Queen*²⁴ and their culmination in *Dyers v The Queen*.²⁵

The fourth and fifth cases, and thus the last which I shall mention, are recent and still more powerful developments of the same theme, albeit in a much different application, with particular

²² (2014) 89 ALJR 59.

²³ (2000) 199 CLR 620.

²⁴ (2001) 205 CLR 50.

²⁵ (2002) 210 CLR 285.

concentration on the fundamental principle that it lies upon the Crown to prove guilt beyond reasonable doubt, and its companion rule that the accused shall therefore not be required to aid in proof of his guilt. Those cases are *X7 v Australian Crime Commission*²⁶ and *Lee v The Queen* ("Lee No 2").²⁷

To conclude, ladies and gentlemen: in brief summary, in my submission, Justice Hayne's contribution to the development of public law in this county is by any standard a very large one indeed. Few if any other members of the High Court in living memory have contributed more in more aspects of public law than he has done, and with a degree of scholarship and rigour which is likely to prove a lasting and powerful influence on decisions of the Court for -years to come.

Thank you, and now to the first of our speakers.

²⁶ (2013) 248 CLR 92.

²⁷ (2014) 88 ALJR 656; 308 ALR 252.