

**Opening of the Australian Bar Association  
Biennial International Conference**

**11 July 2019, Singapore**

***"Convergence - the Courts of Singapore and Australia"***

**The Hon Susan Kiefel AC  
Chief Justice of Australia**

The President of the Australian Bar Association Ms Jennifer Batrouney, His Excellency The High Commissioner to Singapore Bruce Gosper, Chief Justice Menon, other judicial colleagues past and present, members of the Australian Bar Association, ladies and gentlemen. My husband and I are pleased to be able to be here with you for this important Conference.

I congratulate the ABA for holding its biennial conference in the Asia Pacific region of which Australia is most definitely a part. In recent times Australia has sensibly taken a more active role in the region. Its relationships with its neighbours have clearly strengthened. So too have the relationships between Australian courts and courts in the region.

For some years now Australian Federal and State Supreme Courts have been involved in judicial education and training programmes in the region. In recent years members of the High Court have visited China, at the invitation of the President of the Supreme Court. They have attended the opening of the new premises of the Court of Final Appeal in Hong Kong. Its Chief Justices regularly attend the Conference of Chief Justices of Asia and the Pacific which is held at the same time as the Law Asia Conference. It was last held in Japan and this November I will be attending the conference in Hong Kong. In September I will be returning to Singapore to speak to the Singapore Academy of Law.

More recently, in May, two colleagues and I were in Singapore for the biennial Judicial Colloquium of the Asia Pacific region. For many years the regular participants of the Colloquium have been the final courts of appeal of Singapore, Hong Kong, Canada, New Zealand and Australia. The Colloquium was generously organised and hosted by Chief Justice Menon and the Supreme Court of Singapore. Discussions took place on a range of topics of common interest and concern. They were facilitated by papers prepared by participants which, as would be expected, were of very high standard. Our respective approaches to legal issues were compared and analysed for convergence and divergence. Such a process improves our understanding of the jurisprudence of other courts. It also provides a deeper understanding of our own.

It is to be expected that the courts of Singapore and Australia would be comfortable with engagements of this kind. We have much in common. We share a colonial past, although different in its origins and development.

In his chapter on the legal and constitutional history of Singapore, Professor Kevin Yew Tan Lee explains<sup>1</sup> that Sir Stamford Raffles, aware of the possibilities for trade in the region and conscious of the need to prevent the domination of the Dutch in the East, first entered into an agreement with the Sultanate of Johore in 1819 to establish a trading post on the lands which became Singapore. Although Raffles treated the lands as ceded to Britain, it was not until 1825 that a treaty ceding full sovereignty to the East

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<sup>1</sup> Tan, "A Short Legal and Constitutional History of Singapore" in Woon (ed), *The Singapore Legal System* (1989) 3 at 7-8.

India Company was ratified<sup>2</sup>. The Australian experience was not centred on trade. The catalyst for it was the need to find somewhere for a convict population.

Our first superior courts had more similar origins. The East India Company had been granted the First Charter of Justice by the British Government in 1807. It created a court of justice in Penang, from which appeals lay to the Privy Council<sup>3</sup>. The Second Charter of Justice, of 1826, abolished that court and created one which served Penang, Malacca and Singapore<sup>4</sup>. It was assumed that the English common law was to be applied<sup>5</sup>.

In Australia, provision for the Supreme Court of New South Wales was made in 1823 by the Third Charter of Justice for New South Wales<sup>6</sup>. The common law applied in that court and the courts of the colonies as they were established.

Our respective Constitutions and superior courts were established at somewhat different times. The Australian Constitution was established in 1901 and the first Bench of the High Court appointed in 1903. Upon becoming a self-governing state, a new Constitution of Singapore was

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<sup>2</sup> Tan, "A Short Legal and Constitutional History of Singapore" in Woon (ed), *The Singapore Legal System* (1989) 3 at 9.

<sup>3</sup> Chan, *An Introduction to the Singapore Legal System* (1986) at 4.

<sup>4</sup> Chan, *An Introduction to the Singapore Legal System* (1986) at 5.

<sup>5</sup> See also *Regina v Willans* (1858) 3 Kyshe 16 at 25-26.

<sup>6</sup> See, eg, Castles, *An Introduction to Australian Legal History* (1971) at 58-59; Martin, "From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales" (1986) 9 *University of New South Wales Law Journal* 111 at 114.

proclaimed in 1959. It received a new constitution as a State within the Federation of Malaysia, which was amended when it became an independent republic in 1965, with the Supreme Court of Singapore (of which the Court of Appeal is the highest court) re-established some four years later<sup>7</sup>.

More important than these differences of history are the common structural and substantive features of our Constitutions. The allocation of power between three branches of government is the same. Under our Constitution in Australia, legislative, executive and judicial power are contained in three separate Chapters. The separation of powers is also embodied in the Constitution of Singapore. Executive authority is vested in the President by Article 28; legislative power in the legislature, consisting of the President and the Parliament, by Article 38; and judicial power in the Supreme Court and such subordinate courts as may be provided by any written law, by Article 93. In the jurisprudence of the courts of Singapore the principle of the separation of powers is regarded as part of the basic structure of Singapore's Constitution<sup>8</sup>. The principle is likewise recognised and enforced by Australian courts.

In Australia and in Singapore, the independence of the judiciary is seen to flow from it. In a decision of the Court of Appeal of the Supreme Court of Singapore in 2015<sup>9</sup> it was said that the government does not and should not interfere with a judge's performance of the judicial function. Judicial

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<sup>7</sup> Tan, "A Short Legal and Constitutional History of Singapore" in Woon (ed), *The Singapore Legal System* (1989) 3 at 25-30.

<sup>8</sup> *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947; [2012] SGHC 163 at [11] and *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129; [2015] SGCA 11 at [68]-[69].

<sup>9</sup> *AHQ v Attorney-General & Anor* [2015] 4 SLR 760; [2015] SGCA 32 at [35].

independence is a fundamental tenet of the Constitution. The independence of the judiciary is one of the foundational pillars of Singapore's constitutional framework and must not be shaken.

It may be that the legislators of Singapore have a higher concern for the reputation and prestige of their judiciary. Recently in Australia, whilst the decision of a State appeal court was reserved on the question of sentencing of persons for terrorist-related offences, an article was published in a newspaper containing statements by some members of Parliament which were highly critical of the sentencing practices of the Court. The politicians and the newspaper were required to explain why they should not be dealt with for contempt of court.<sup>10</sup> An apology to the Court was only belatedly forthcoming from the Ministers.

The next step in the saga was the establishment of a Commonwealth Senate Committee to inquire into the law of contempt. Whether it would have sought to strengthen, rather than weaken, that law will never be known. The Committee ultimately reported that it had received so few submissions on its subject that it was not in a position to continue the inquiry<sup>11</sup>. I understand however that the Victorian Law Reform Commission has advanced to a consultation paper<sup>12</sup>.

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<sup>10</sup> *Director of Public Prosecutions (Cth) v Besim (No 2); Director of Public Prosecutions (Cth) v M H K (a Pseudonym) (No 2)* [2017] VSCA 165.

<sup>11</sup> Commonwealth of Australia, Senate, Legal and Constitutional Affairs Reference Committee, *Law of Contempt* (November 2017) at [1.14].

<sup>12</sup> Victorian Law Reform Commission, *Contempt of Court: Consultation Paper* (May 2019).

By contrast, in Singapore, discussion about the conduct of members of the judiciary may be undertaken in Parliament only on a substantive motion on notice<sup>13</sup>. Further, a statute passed in 2016<sup>14</sup> creates multiple statutory offences of contempt of court. In the Second Reading Speech with respect to that Bill, the Minister for Law<sup>15</sup> said that one of its purposes was to ensure “that the integrity of the Judiciary is pristine”.

The process for appointment of judges to our highest courts is similar. Appointments to our High Court are made by the Governor-General in Council<sup>16</sup>. The Chief Justice, the Judges of the Appeal and the Judges of the High Court (which make up the Judges of the Supreme Court of Singapore), are appointed by the President if he, or she, concurs with the advice of the Prime Minister<sup>17</sup>.

To be eligible for appointment to the Supreme Court a person must be qualified under the *Legal Profession Act* or a member of the Singapore Legal Service (or both) for an aggregate of not less than 10 years<sup>18</sup>. The majority of appointments are, as in Australia, drawn from the Bar. It has been observed that in Singapore the general public perception is that appointments

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<sup>13</sup> *Constitution of the Republic of Singapore*, art 99.

<sup>14</sup> *Administration of Justice (Protection) Act 2016*.

<sup>15</sup> *Singapore Parliamentary Debates* (Parliament No 13, Session No 1, Vol 94, Sitting No 22, 15 August 2016) accessed at <<https://sprs.parl.gov.sg/search/sprs3topic?reportid=bill-212>>.

<sup>16</sup> *Constitution* (Cth), s 72.

<sup>17</sup> *Constitution of the Republic of Singapore*, art 95.

<sup>18</sup> *Constitution of the Republic of Singapore*, art 96.

to the Bench are made primarily on merit<sup>19</sup>. I would think that would also be the view in Australia.

The oath or affirmation taken by judges of the Supreme Court of Singapore and the High Court of Australia when they are sworn in is to similar effect. It is to do right by all manner of people according to our respective laws without fear or favour, affection or ill-will<sup>20</sup>. Judges of both courts have constitutionally mandated ages for retirement, although in Singapore it is a more youthful 65 years, subject to a discretion for further appointment. Judges of each of our superior courts can only be removed from office on the ground of misbehaviour, inability or incapacity<sup>21</sup>.

In Australia our Constitution<sup>22</sup> provides that Justices of the High Court, and other members of the federal judiciary, cannot have their remuneration diminished during their term of office. Similarly the Constitution of the Republic of Singapore<sup>23</sup> provides that a person holding office as a Judge of the Supreme Court is entitled to have their remuneration and other terms of office not altered to his (or her) disadvantage after appointment.

Both Singapore and Australia have abolished appeals to the Privy Council. In Australia, appeals from the High Court to the Privy Council were abolished by legislation enacted in 1968 and 1975, with the remaining

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<sup>19</sup> Tan, "As Efficient as the Best Businesses: Singapore's Judicial System" in Yeh and Chang (eds), *Asian Courts in Context* (2015) 228 at 234.

<sup>20</sup> *High Court of Australia Act 1979* (Cth), s 11 and Sch; *Constitution of the Republic of Singapore*, art 97 and First Schedule.

<sup>21</sup> *Constitution of the Republic of Singapore*, art 98; *Constitution* (Cth), s 72.

<sup>22</sup> *Constitution* (Cth), s 72.

<sup>23</sup> *Constitution of the Republic of Singapore*, art 98(8).

jurisdiction over appeals from State courts being removed in 1986.

Singapore abolished Privy Council Appeals in 1994<sup>24</sup>. The *Application of English Law Act* provides that "[t]he common law of England (including the principles and rules of equity), so far as it was part of the law of Singapore before 12th November 1993, shall continue to be part of the law of Singapore". Nevertheless it recognises that the common law continues to be in force in Singapore only "so far as it is applicable to the circumstances of Singapore and its inhabitants and subject to such modifications as those circumstances may require"<sup>25</sup>.

In developing the common law consistently with the requirements of our respective societies the courts of Singapore and Australia have looked to the decisions of each other in a number of areas of the law.

One of these areas is statutory interpretation. This is explicable in part because our Interpretation Acts contain similar provisions. The Interpretation Act of Singapore<sup>26</sup>, like its Australian counterpart<sup>27</sup>, contains a provision by which an interpretation which promotes the purpose or object of an Act is to be preferred. And it contains provisions respecting extrinsic materials in almost identical terms to ours<sup>28</sup>. This might suggest as possible an increasing reference to the case law of our respective courts on statutory construction.

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<sup>24</sup> Supreme Court of Singapore, "Structure of the Courts" (7 June 2019) accessed at <<https://www.supremecourt.gov.sg/about-us/the-supreme-court/structure-of-the-courts>> .

<sup>25</sup> *Application of English Law Act* (Cap 7A), s 3.

<sup>26</sup> *Interpretation Act* (Cap 1), s 9A(1).

<sup>27</sup> *Acts Interpretation Act 1901* (Cth), s 15AA.

<sup>28</sup> *Interpretation Act* (Cap 1), s 9A(2)-(4). See *Acts Interpretation Act 1901* (Cth), s 15AB.

In a decision in 2015<sup>29</sup> the Court of Appeal, of which Chief Justice Menon was a member, referred to Chief Justice Spigelman's explanation of the Australian approach to the ascertainment of parliamentary intention<sup>30</sup>, by reference to *Project Blue Sky Inc v Australian Broadcasting Authority*<sup>31</sup>. I have little doubt that our courts will follow suit.

In the publication *Asian Courts in Context*<sup>32</sup>, it is said that the Singapore Court of Appeal treats the decisions of all common law courts as persuasive. Examples are not hard to find. In a case in 2018<sup>33</sup>, the Court of Appeal discussed the decisions of our High Court in *Nelson v Nelson*<sup>34</sup> and *Equuscorp Pty Ltd v Haxton*<sup>35</sup>. The Court observed that the provisions of the relevant Singapore statute dealing with money-laundering differed from those dealt with by our High Court in *Pavey & Matthews Pty Ltd v Paul*<sup>36</sup>. Nevertheless it expressed agreement with respect to statements in that case concerning the policy of the law underlying the prohibition on the enforcement of illegal money-laundering contracts<sup>37</sup>.

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<sup>29</sup> *ABU v Comptroller of Income Tax* [2015] 2 SLR 420; [2015] SGCA 4 at [74].

<sup>30</sup> *Attorney General of New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR 557; [2005] NSWCA 261 at [52]-[53].

<sup>31</sup> (1998) 194 CLR 355; [1998] HCA 28 at [91].

<sup>32</sup> Tan, "As Efficient as the Best Businesses: Singapore's Judicial System" in Yeh and Chang (eds), *Asian Courts in Context* (2015) 228 at 255.

<sup>33</sup> *Ochroid Trading Ltd & Anor v Chua Siok Lui (trading as VIE Import & Export) & Anor* [2018] 1 SLR 363; [2018] SGCA 5.

<sup>34</sup> (1995) 184 CLR 538; [1995] HCA 25.

<sup>35</sup> (2012) 246 CLR 498; [2012] HCA 7.

<sup>36</sup> (1987) 162 CLR 221; [1987] HCA 5.

<sup>37</sup> *Ochroid Trading Ltd & Anor v Chua Siok Lui (trading as VIE Import & Export) & Anor* [2018] 1 SLR 363 at [226]-[229].

Our High Court has looked to the decisions of the Court of Appeal of Singapore on a number of occasions: by way of example, in 2004 in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*<sup>38</sup> and in 2008 in *International Air Transport Association v Ansett Australia Holdings Ltd*<sup>39</sup>. It has taken account of proceedings conducted in the courts of Singapore. Last year, in *UBS AG v Tyne*<sup>40</sup>, a case involving abuse of the process of Australian courts, account was taken of the history of the litigation including proceedings which had been established in the High Court of the Supreme Court of Singapore.

I have little doubt that the interest in the jurisprudence of our respective courts will increase in the future. Here, as always, the legal profession can play its part. The need for closer co-operation between our courts and our legal professions is likely to be felt more strongly in the future given the challenges that commerce in the region is likely to provide. These are matters which I understand Chief Justice Menon will address.

I trust members of the ABA will have as stimulating and productive a conference as did the courts of Singapore and Australia recently in their Colloquium.

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<sup>38</sup> *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515; [2004] HCA 16 at [34] and [188], referring to *RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v Management Corporation Strata Title Plan No 1075* [1999] 2 SLR 449; [1999] SGCA 30.

<sup>39</sup> *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151; [2008] HCA 3 at [77], citing *Hitachi Plant Engineering & Construction Co Ltd v Eltraco International Pte Ltd* [2003] 4 SLR 384; [2003] SGCA 38.

<sup>40</sup> *UBS AG v Tyne* (2018) 92 ALJR 968; [2018] HCA 45.