

Poetry and Public Law

New South Wales Bar

Constitutional & Administrative Law Branch Annual Dinner

Chief Justice Robert French AC

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Tonight being a dinner event, and tomorrow being a special leave day, none of our interests would be served by a scholarly discussion of the Court's most recent offerings on the role of rationality in administrative law, proportionality in the application of the implied freedom of political communication, or even the scope of jurisdictional error. Instead of those things, I thought it might be good to talk about poetry and to forge the necessary linkage to your interests by entitling this presentation 'Poetry and Public Law'.

The inspiration for this topic was, in part, the life and work of the late John Bray, former Chief Justice of South Australia, in whose honour I delivered an oration in Adelaide a fortnight ago. He was both judge and poet, although as he once lamented:

Poetry lacks social cachet.¹

Bray's poetic talents reflected a literary skill which, without having to resort to verse, he deployed in his judgments. Michael Kirby said of him:

Some people have the power to express themselves in vivid word pictures. Not all of them are poets. Only a small proportion of them are lawyers. But when to discontent

¹ John Bray, 'The History of Poetry in South Australia'; in Barbara Wall and Douglas Muecke (eds) *The Emperor's Doorkeeper: Occasional Addresses 1955-1987 John Bray* (The University of Adelaide Foundation, 1988), 3, 3.

with verbal formulae alone is added a very considerable power in the use of language, you have a judicial writer of rare talent. Such was Bray.²

The judge who is a poet is one thing. The judge who deploys other peoples poetry, or his or her own in judgments, is quite another. Such deployment can be a high risk exercise. I found as much a year or so after having delivered an interlocutory judgment in Perth in 1989 which concerned the Burswood Resort Complex. I referred to it, borrowing from Samuel Taylor Coleridge's 'Kubla Khan', as Perth's own 'pleasure-dome', situated not on Alph, the sacred river, but on the foreshore of the Swan.³ This harmless attempt at lifting the "quotidian" tedium of the judicial task and, perhaps that of my very small number of readers of the judgment, engendered a dismissive review from the author of a piece in the *Adelaide Law Review* entitled 'The Good, The Bad and The Ugly: Judicial Literacy and Australian Cultural Cringe'.⁴ Having referred to the Burswood judgment and another by Justice Legoe,⁵ formerly of the South Australian Supreme Court on beekeeping, in which his Honour quoted from Virgil's *Georgics*, our critic said:

Allusion of this kind, marginally relevant but of sound aesthetic provenance, lightly inserted but suggesting vast allusive reserves, certainly enhances the texture of judicial prose, and may even contribute in useful ways to sustaining a learned and authoritative judicial tone.⁶

The 'but' that followed suggested that such 'mere decoration' was frivolous and that the important use of literary allusion was to provide 'essential social, legal and lexicographical information'.⁷ An example of a useful application was the judgment of Justice Neasey in the Supreme Court of Tasmania in *Doyle v Maypole Bakery Pty Ltd*.⁸ The judge had to determine whether a dead blowfly resting on an indentation on the surface of an iced cake could be said to be 'contained' in the cake within the meaning of s 63(1)(ba) of the *Public*

² Michael Kirby, 'Bray's impact on Australian jurisprudence' in Wilfrid Prest (ed) *A Portrait of John Bray: Law, Letters, Life* (Wakefield Press, 1997) 93, 108.

³ *Famel Pty Ltd v Burswood Management Ltd* (1989) 15 ACLR 572, 573.

⁴ M Meehan, 'The Good, The Bad and the Ugly: Judicial Literacy and Australian Cultural Cringe' (1989–1990) 12 *Adelaide Law Review* 431.

⁵ *Stormer v Ingram* (1978) 21 SASR 93, 93.

⁶ M Meehan, above n4, 431..

⁷ *Ibid.*

⁸ (1981) Tas R 376.

Health Act 1962 (Tas). The section provided that an article of food is adulterated when it contains a foreign substance. He resorted to Alexander Pope's poetic *Essay on Criticism* in which the line appears:

Knights, Squires and Steeds, must enter on the Stage.
So vast a Throng the Stage can n'er contain
Then build a New, or act it in a Plain.⁹

So the word 'contain' was apposite to something resting upon a surface. So the blowfly was contained by the cake and the cake was 'adulterated' within the meaning of the Act.

The use of poetry by the advocate is at least as uncertain in its reception as its use by a judge. In 1980, in *WA Pines Pty Ltd v Bannerman*¹⁰ the Full Court of the Federal Court heard an appeal relating to a proposed exercise of the coercive examination power conferred upon the Chairman of the Trade Practices Commission by s 155 of the *Trade Practices Act 1974* (Cth). The appellant was the corporate promoter of an early version of a managed investment scheme and had attracted the unwelcome attentions of the Commission. It was subjected to a lengthy list of intrusive interrogatories by the Chairman, the late and respected Ron Bannerman. He had recited, as the basis of his inquisitorial power, that he had reason to believe the appellant was capable of furnishing information and providing documents relating to matters that constitute or may constitute contraventions of the Act. The complaint on behalf of the appellant was that the Chairman's disjunctive recital disclosed two inconsistent states of mind, indicating a failure to consider the necessary condition of his power. Sir Gerard Brennan, who sat on the Full Court with Sir Nigel Bowen and Justice John Lockhart, described the argument as one imputing to the Chairman a 'schizophrenia in credence'.¹¹ That elegant and courteous characterisation did not save our action from dismissal. Nor did my poetic introduction to the appellant's submissions with a quote from Robert Frost's — 'The Secret Sits':

⁹ A Pope, *An Essay on Criticism* (1711), Part II.

¹⁰ (1980) 30 ALR 559.

¹¹ *Ibid* 565.

We dance round in a ring and suppose,
 But the Secret sits in the middle and knows.¹²

That quotation did however elicit an inquiry from Sir Gerard, which was along the lines — 'Yes, but is reality the centre of the circle or the centre of the circle as we perceive it?' A short but intense discussion of a philosophical character followed before we settled down to the more mundane consideration of such prosaic works on the state of the official mind as *Lloyd v Wallach*,¹³ *Moreau v Federal Commissioner of Taxation*,¹⁴ *Liversidge v Anderson*,¹⁵ *Nakkuda Ali v Jayaratne*¹⁶ and many others.

The invocation of the great New England poet may have leavened the discourse, but it did not yield a positive outcome. Nor, in an immigration case involving a question of residential status, did the haunting lines from Frost's poem — 'The Death of a Hired Man':

Home is the place where, when you have to go there
 They have to take you in.¹⁷

— lines which in today's world remind us of how elusive 'home' is for so much of humanity.

Reverting to judicial usages, the minor slight to literary pride in the relegation of my allusion to Coleridge to a category of mere decoration, was as nothing compared with the faintness of the praise heaped upon my distinguished predecessor Sir Samuel Griffith who undertook a translation of the Divine Comedy. The translation expressly set out to be literal

¹² Robert Frost, *A Witness Tree* (H Holt and Company, 1942).

¹³ (1915) 20 CLR 299.

¹⁴ (1926) 39 CLR 65.

¹⁵ [1942] AC 206.

¹⁶ [1951] AC 66.

¹⁷ Robert Frost, *North of Boston* (H Holt and Company, 1914).

and to reproduce the original meter of Dante.¹⁸ Sir Samuel placed on his title page what one critic called his translator's slogan:

A translation should present a true photograph of the original.¹⁹

The photograph yielded some awkward images.

In the *English Review*, published in London in 1912, the anonymous reviewer began by saying:

Sir Samuel Walker (sic), who has found leisure from his labours as Chief Justice of the High Court of Australia to complete such an exacting task as the translation of the *Divina Commedia*, speaks so modestly of his work in the preface that it seems almost ungracious to criticise it.²⁰

To borrow a metaphor favoured by my colleague, Justice Hayne, such an introduction is a napkin containing a large knife. And so it was — the reviewer continued:

He has given a very faithful and not unpoetic translation. At the same time, we cannot pretend to think that the effect produced is at all comparable to that of Dante's magical cadence.²¹

Some unfortunate lines from the translation were reproduced in the review:

¹⁸ Samuel Griffith, *The Divina Commedia of Dante Alighieri* (Oxford University Press, 1911).
¹⁹ Comment 'The Divina Commedia of Dante Alighieri: translated by Sir Samuel Griffith' (1912) *The Bookfellow* 76–77, 76. Griffith above n 18.
²⁰ Austin Harrison, Comment 'The Divina Commedia of Dante Alighieri (1912) *The English Review*, 740–41, 740.
²¹ Ibid.

But when that I the foot of a hill had come to.²²

Was described as:

a line in which no poet could take pleasure.²³

The line 'Yon mount delectable why not ascendst?' was described as 'equally distressing'.²⁴

The reviewer observed:

These, indeed, are extreme cases, but they show whither rigid principles of translation lead. Surely the best translation of a poet is by a poet, even if the metre is changed, and paraphrase is often used.²⁵

Another critic writing in *The Bookfellow*, an Australasian review published in 1912, suggested that Dante's poetry had escaped almost entirely from Sir Samuel Griffith's 'industrious fingers'.²⁶ Nevertheless, at the end of the review the critic wrote:

Though we cannot give this work critical praise, the completion of a task so arduous in a manner not discreditable is at least an occasion of personal congratulation to a distinguished Australian citizen.²⁷

In fairness to Sir Samuel, his approach to translation is said to have reflected a dominant view in late 19th century England of what was involved in that task namely, '... to produce a literal

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Above n 19, 77.

²⁷ Ibid.

rendition', although his translation has also been described as taking the dominant view to an extreme.²⁸

In this context, and having regard to the particular interests of this audience, I should pause to say something about constitutional interpretation. For if the past is a foreign country as the English novelist LP Hartley observed, then the interpretation of a document written well over a century ago, has elements of translation about it. A primitive originalist would perhaps apply to interpretation the motto that stood at the threshold of Sir Samuel Griffith's rendering of Dante. On that approach, however, something would be lost in translation.

Although the text of the Constitution itself has little to offer in the way of poetry, it is useful to remember that some of its key progenitors were poets of one kind or another. None more so than the *primum mobile*, Sir Henry Parkes, whose proclivity for purple prose and purple verse emerged early in the federation movement. At a dinner for delegates to the 1890 Australasian Federal Convention in Melbourne, he referred to '[t]he crimson thread of kinship [which] runs through us all.'²⁹ This was a metaphor adapted from a speech he made when opening the Sydney/Brisbane railway in which he spoke of 'the crimson fluid of kinship pulsing through all iron veins'.³⁰

In a very lengthy speech at the Australasian Federal Convention Debate in February 1890 he sought to rebut the provocative suggestion by the Hon Thomas Playford MP of South Australia, that he was not particularly sentimental about Britain. He said:

It may be — because the greatest events are often sent on their sliding-plane of operation by the most trivial circumstances — that the Australian people may not

²⁸ RP Cooper, 'Sir Samuel Griffith, Dante and the Italian Presence in 19th Century Australian Literary Culture', 14(2) *Australian Literary Studies* 199–215, 212.

²⁹ H Parkes, *Australasian Federation Conference*, Melbourne, 6 February 1890.

³⁰ R Sharwood, 'The Australian Federal Conference of 1890' in Greg Craven (ed), *The Convention Debates — Commentaries, Indices and Guide*, vol 6, 55 citing F Crowley, *Colonial Australia 1875–1900* (Nelson, 1980) 290–91.

always live under the English flag. I pray God they may. I believe they can have no higher destiny. A religious poet says —

*Prayer is the soul's sincere desire,
Uttered or unexpressed,
The motion of a hidden live,
That trembles in the breast.*³¹

He added:

My whole being trembles with an unuttered prayer of that kind, that the whole of the British possessions may remain for ever forming parts of one beneficent empire such as the world has never seen.³²

Andrew Inglis Clark's book, *Studies in Australian Constitutional Law*, written in 1901, reveals the presence of a poetic imagination particularly that famous passage in which, writing of the interpretation of the Constitution, he said:

[I]t must be read and construed not as containing a declaration of the will and intentions of men long since dead, and who cannot have anticipated the problems that would arise for solution by future generations, but as declaring the will and intentions of the present inheritors and possessors of sovereign power, who maintain the Constitution and have the power to alter it, and who are in the immediate presence of the problems to be solved. It is they who enforce the provisions of the constitution and make a living force of that which would otherwise be a silent and lifeless document.³³

It is perhaps not surprising to find that metaphor in that passage, for Inglis Clark was also a poet. Dr Richard Ely from the University of Melbourne, who has written about his poetry, said of him:

³¹ *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, Melbourne, 13 February 1890, 228.

³² *Ibid.*

³³ Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Legal Books, 1901) 21.

In any 'genuine democracy', he declared, three factors must be found. First, an elected legislature representative of all opinions; second, recognition that the composition of all majorities be transitory; and third, that fundamental laws protect the natural rights of the individual from the majority of the hour. In the poems which read as if intended to be shared with friends, a closely similar set of values is expressed.³⁴

A poem of Clark's setting out his vision is reproduced in Ely's article:

A vision of a people set free
From the bonds and the toys of the past
Never bending the head or the knee
To the shadows of the rank and caste.

A people whose flag shall be void
Of all traces of sceptre or crown
The flag of a people too proud.

Australia one and undivided
Let that vision seen afar
Mark with light the path provided
By it as thy guiding star.³⁵

The opponents of federation, particularly those who contributed to the radical journal, *Tocsin*, used verse as a weapon. Three verses from a poem called 'The Federal Plot' published on 5 May 1898, give a flavour of their poetic polemics. In conspiratorial speech attributed to the proponents of federation the versifier wrote:

You've made them choose our minions
To mutilate their rights;
Surrender all they fled for
In Armageddon fights.

In new vice-regal velvet you've wrapped a Caesar's paw
You've perched upon their future

³⁴ Richard Ely, 'The Poetry of Inglis Clark' in R Ely, M Haward & J Warden (eds) *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth*, (Hobart, Centre of Tasmanian Historical Studies, 2001) 185–207, 204.

³⁵ Ibid 199.

The vultures of the law.

Heed not the ghosts of 'Judas'
That dog you while you live,
For coroneted women and judge-ship fair we give.

However much or little might be thought of the poetic effusions of the founding fathers and their opponents, there is evidence, beyond such writings, of a largeness of imagination and vision and a sense of the uncertainties of the distant future.

Sir John Downer QC, speaking at the 1898 session of the Australasian Federal Convention in Melbourne, said of the judiciary of the future:

With them rests the obligation of finding out principles which are in the minds of this Convention in framing this Bill and applying them to cases which had never occurred before, and which are very little thought of by any of us.³⁶

That largeness of vision connects with what some call the spirit of common law. Writing in the *Payroll Tax Case*,³⁷ Sir Victor Windeyer, in a frequently cited passage, said:

In any country where the spirit of the common law holds sway the enunciation by courts of constitutional principles based on the interpretation of a written constitution may vary and develop in response to changing circumstances. This does not mean that courts have transgressed lawful boundaries: or that they may do so.³⁸

What all this tells us is that the judicial interpreter of the Constitution must be faithful to the text of the Constitution, but be cautious about approaches to interpretation, the translation of words from the foreign country of the past, that do not connect with the metre

³⁶ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 275.

³⁷ *Victoria v Commonwealth* (1971) 122 CLR 353.

³⁸ *Ibid* 396–97.

and rhythm of the present. There may be those who think this is controversial. If it is, then it is controversy which was engendered by leading figures in the Australasian Federal Conventions of the 1890s. Those views of course do not define some comprehensive theory of constitutional interpretation. Like Gummow J, I would eschew 'all embracing and revelatory' theories as inadequate tools for dealing with the unimagined and unimaginable questions which future cases may throw up.³⁹

Despite the poetic inclinations of its founding fathers, Australia's legal culture has not been well disposed to poetic judges. There are, however, brief poetic and literary illusions sprinkled throughout the Commonwealth Law Reports. In *Ruhani v Director of Police*⁴⁰, the High Court held that it had jurisdiction to hear an appeal from the Supreme Court of Nauru. Kirby J said:

The respondent's arguments, in respect of the ambit of the appellate jurisdiction of this Court, represented an attempt to press upon Ch III of the *Australian Constitution* a view about its capacity to adapt to succeeding ages akin to AD Hope's ironic description of Australia:

*They call her a young country, but they lie:
She is the last of lands, the emptiest,
A woman beyond her change of life, a breast
Still tender but within the womb is dry.*⁴¹

Recently in a judgment in *Monis v The Queen*,⁴² Justice Heydon quoted from a poem written by a father mourning the loss of his son in the Battle of Loos in September 1915 during World War I. And in *Patel v The Queen*⁴³ he invoked Thomas Clough's 'The Latest Decalogue' and, in particular, the line:

³⁹ *SHG Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51, 75.

⁴⁰ (2005) 222 CLR 489.

⁴¹ Ibid 552 [203] citing 'Australia' (1939) reproduced in Ferguson et al (eds) *The Norton Anthology of Poetry*, 4th ed, (1996) 1373–1374.

⁴² (2013) 295 ALR 259, 319 [240]. See R Kipling, *The Collected Poems of Rudyard Kipling, My Boy Jack 1914-1918* (Wordsworth Editions Ltd, 1994) 228.

⁴³ (2012) 247 CLR 531, 602 [235].

Thou shalt not kill; but need'st not strive,
 Officiously to keep alive.⁴⁴

The United States judiciary, as many of you will know, has a far more relaxed approach to the use of poetry in judgments than does the Australian judiciary. Some of it rises little above the level of undignified doggerell. It would be unprofitable to recite examples at any length but there is one worth repeating. It is a judgment of the Michigan Court of Appeal affirming a decision of the Michigan Trial Court which ruled in favour of the driver of a motor vehicle which had damaged the plaintiff's oak tree. Although a private law judgment it has a quality that any lawyer would find riveting for its clarity, allusion, succinctness and the way it exemplifies the distinction which must be drawn between a Judge's personal preferences and the duty to administer justice according to law:

We thought that we would never see
 A suit to compensate a tree,
 A suit whose claim in tort is prest,
 Upon a mangled tree's behest;
 A tree whose battered trunk was prest
 Against a Chevy's crumpled crest;
 A tree that faces each new day
 With bark and limb in disarray;
 A tree that may forever bear
 A lasting need for tender care.
 Flora lovers though we three,
 We must uphold the court's decree
 Affirmed.⁴⁵

My closing advice to judges and to advocates in relation to that last judgment is a variant of a familiar caution — don't try that at home — don't try it in court.

⁴⁴ AH Clough, *Poems*, (Macmillan Publishers, 3rd ed, 1871) 142.
⁴⁵ *Fisher v Lowe* 122 Mich App 418, 419.