# THREE CHEERS FOR ENGINEERS

75TH ANNIVERSARY OF THE ENGINEERS CASE

AUSTRALIAN NATIONAL UNIVERSITY, CANBERRA

31 AUGUST 1995 **The Hon. Sir Gerard Brennan, AC KBE**

Chief Justice of Australia

The celebration of a case, or a commemoration of the occasion of the delivery of a judgment, is justified by two considerations. The first is that the case marks the dawning of legal light by the adoption of a proposition that was theretofore shrouded in darkness. The second is that, having regard to subsequent experience, the proposition has been found to be in accordance with the needs or aspirations of the community. Of course, it is only if the needs or aspirations of the community are met that the proposition adopted in the case will be characterized as luminous.

If the proposition were previously shrouded in darkness, there must have been some intellect which pierced the darkness in order to admit the light. And thus, whenever there is a case to celebrate, there is a kind of legal champion to praise. I suppose Lord Atkin in *Donoghue v. Stevenson* [1] is the most noteworthy. Now, in Engineers , is the hero Menzies or Starke or Isaacs? Or others as well? The first contender for the accolade must be Menzies.

On 24 May 1920 in Melbourne, Menzies dutifully advanced the argument that the Government sawmills in Western Australia were trading rather than Government enterprises and, on that account, disentitled to the protection of a State instrumentality. Menzies' version of what happened starts with Starke J's intervention: "That argument is nonsense." Menzies describes what happened next [2] :

"I, in what I later realized to be an inspired moment, replied: 'Sir, I quite agree.' 'Well', intervened the Chief Justice, Chief Justice Knox, never the most genial of interrogators, 'why are you putting an argument which you admit is nonsense?' 'Because' ... 'I am compelled by the earlier decisions of this Court. If your Honours will permit me to question all or any of these earlier decisions, I will undertake to advance a sensible argument.' I waited for the heavens to fall. Instead, the Chief Justice said: 'The Court will retire for a few minutes.' And when they came back, he said, 'This case will be adjourned for argument at Sydney. Each government will be notified so that it may apply to intervene. Counsel will be at liberty to challenge any earlier decision of this Court!'"

Now that version may be correct. But the suggestion that the attack on the doctrine of the earlier cases was not made until the Sydney hearing does not accord with the entries in the notebooks of Sir Adrian Knox and Sir Isaac Isaacs. Sir Adrian Knox noted an argument by Menzies designed to distinguish the *Railway Servants' Case* , but then he noted a further argument:

"Section 51(xxxv) power is quite unlimited on the face of it and capable of being exercised to bind State governments ... Nothing in Constitution which gives a State operation any protection - any protection must be based on implication - *D'Emden v. Pedder* . There is no reciprocal doctrine to protect a State corresponding with rule in *D'Emden v. Pedder* . *Municipalities Case* 26 CLR at p.532."

At that page in the joint judgment of Isaacs and Rich JJ., the decision in *D'Emden v. Pedder* is founded "on the principle of supremacy, and on nothing else". Their Honours attributed that principle to s.109 and Covering Clause 5. They said [3] :

"As soon as it is perceived that the principle of the decision is 'supremacy,' it is manifest that there can be no reciprocity. ... If the power exists, *D'Emden v. Pedder* annihilates the opposing enactment; if the power does not exist, the case is inapplicable. The position is simply stated."

Isaacs and Rich JJ. then discussed the notion of the unity of the Crown.

After Menzies referred to the *Municipalities Case* , he put a further argument based on a distinction between governmental and non-governmental functions. That elicited a further mention of the *Railway Servants' Case* [4] by Higgins J.

Isaacs' note is much briefer than the Chief Justice's but it accords with it: "s.51(31) - quite unlimited - 26/532" (the *Municipalities Case* reference). And thus it appears that it was at the initial hearing in Melbourne that Menzies first advanced his attack on the *Railways Servants* ' notion of reciprocal supremacy. After Isaacs' note of that argument he penned, in shorthand, his suggestion for the course then to be followed. The note is not easily deciphered but it seems to read as follows:

We think that counsel should have the opportunity of raising the question whether the Rail Servants case as far as it concerns this case is correctly decided and upon that argument it will be open to counsel to question any case relevant to the decision of this case. That will give counsel a perfectly free hand on the argument.

We think that notices in this case and the question to be raised should be given to each counsel and every State except Western Australia. They will use their own judgment and this case will be taken on Monday, 26 July in Sydney

And, perhaps after a brief adjournment, it was so ordered.

When the matter came on for argument in Sydney, the available Justices' notebooks are fairly sparse in their recording of the arguments of any of the counsel. In Isaacs' notebook, the recording of Menzies' arguments is limited to the citation of 12 cases including, however, 25 pages of the *Municipalities Case* . He referred also to the *Steel Rails Case* [5] . The notes run on, briefly, from day to day until Leverrier K.C. rose on behalf of the Commonwealth. Isaacs J. then recorded what is practically verbatim the opening passage of Leverrier's argument as reported in 28 Commonwealth Law Reports at p.139. He wrote:

"We contend that supremacy in *D'Emden v. Pedder* [6] and the rule in *D'Emden v. Pedder* merely a branch of supremacy, is a valid rule of law based on the Constitution itself. We say that what is called the reciprocal doctrine in *Railway Servants' Case* [7] is not only not derivable from the Constitution but is inconsistent with it. The powers of the Commonwealth must be ascertained externally by the ordinary rules of construction applied to the Constitution as a Constitution. Ordinary rules of construction include surrounding circumstances. Compact with States etc. Supremacy from express words. We rely (1) on sec. V. (Covering) (2) sec. 106 to 109. Sec. 106 standing alone would be sufficient".

It seems quite clear that Menzies lit the fuse in Melbourne, though the main charge for exploding the notion of reciprocal supremacy seems to have been prepared by Isaacs and Rich JJ. in the *Municipalities Case* . Yet it was Leverrier's, rather than Menzies' advocacy which seems to have had the greatest impact on the putative author of the majority judgment.

What was the proposition adopted by the *Engineers Case* ? Sir Owen Dixon said [8] that, "stripped of embellishment and reduced to the form of a legal proposition", the proposition established by *Engineers* was simply "that a power to legislate with respect to a given subject enables the Parliament to make laws which, upon that subject, affect the operations of the States and their agencies".

Did the decision in 1920, and has it since, satisfied the needs and aspirations of the Australian people? Sir Owen Dixon noted that [9] , as the result of the conditions produced by the First World War, the States had been reduced in stature and the Court itself had been accustomed to the exercise of an all-pervading power by the Commonwealth. He commented:

"The substance of the decision has been hardly impugned, but its result was to reduce still further the power of the State and its importance in the eyes of the community. At the same time the authority of the Court suffered. A tendency grew among the States to look to the Judicial Committee of the Privy Council. Moreover the legal profession for a time appeared to feel that a more stable development of our constitutional law might come from that body. It was a vain hope."

But the legal profession was not the Australian people. Professor Brian Galligan [10] points out that, by adopting a legalist interpretation of the Constitution, the Court both accommodated an expansion of federal powers and maintained the integrity and independence of the Court in an atmosphere of extreme political partisanship. Windeyer J. in the *Payroll Tax Case* said [11] :

"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 and that national

laws might meet national needs."

And on his retirement [12] , Sir Garfield Barwick warned us "to be very wary that the triumph of the *Engineers Case* is never tarnished". So it seems that judicial opinion at least would give three cheers for *Engineers* .

How was the revolution of the *Engineers Case* (as Sir Robert Garran described it [13] ) effected? The majority judgment contains rhetoric that has a modern ring to it [14] :

"The more the decisions are examined, and compared with each other and with the Constitution itself, the more evident it becomes that no clear principle can account for them. They are sometimes at variance with the natural meaning of the text of the Constitution; some are irreconcilable with others, and some are individually rested on reasons not founded on the words of the Constitution or on any recognized principle of the common law underlying the expressed terms of the Constitution, but on implication drawn from what is called the principle of 'necessity', that being itself referable to no more definite standard than the personal opinion of the Judge who declares it. The attempt to deduce any consistent rule from them has not only failed, but has disclosed an increasing entanglement and uncertainty, and a conflict both with the text of the Constitution and with distinct and clear declarations of law by the Privy Council."

This passage is similar in both tone and content to what was said in *Cole v. Whitfield* [15] . We can readily understand how, as a matter of judicial reasoning, the decision was arrived at in *Engineers* .

The Court did not then rank among its members the Justices who had formulated the doctrine of reciprocal supremacy. O'Connor J. had died in 1912, Griffith C.J. had left the Court in 1919. He died on 9 August 1920 between the hearing of *Engineers* and the delivery of judgment. Barton, who was disappointed not to have been Griffith's successor, died on 7 January 1920. The Court was then substantially under the influence of Isaacs [16] , the senior Justice and an advocate of Commonwealth power. Higgins, the next most senior Justice, was anxious to resist interventions by the High Court in the work of the Industrial Court [17] . Knox, the comparatively new Chief Justice, had been a leader of the New South Wales Bar. He, Rich and Starke JJ. were lawyers to whom the propounded method of constitutional interpretation was more attractive than a doctrine which owed much to the political history known to the departed members of the Court. Gavan Duffy J. dissented and Powers J., it seems, was on leave at the time and did not sit.

The approach in Engineers was not only legalist but literalist, seeming to deny the possibility of implications that might limit Commonwealth legislative power. It was left to Dixon J. in *West's Case* [18] and in later cases to restore the legitimacy of implications in construing the constitutional text. But I must stop at this point - not only because I have gone too long, but because the nature and scope of limiting implications is a topic of current controversy. Perhaps the third cheer for *Engineers* has been muffled or even silenced by implied limitations. Professor Galligan thinks so. He writes [19] :

"the court needs to jettison the legalistic methodology of *Engineers* , which is antithetical to Australia's federal Constitution. It is quite inappropriate to interpret the Commonwealth's enumerated heads of power in

a literal way irrespective of the broader federal architecture of the Constitution and regardless of the centralising effect that such a method produces."

I presume that has been a proposition fully discussed today. It should delay the festivities no longer.

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1 [1932] AC 562.

2 R.G. Menzies, *Central Power of the Australian Commonwealth* (1967), pp.38-39.

3 *Federated Municipal and Shire Council Employees' Union of Australia v. Melbourne Corporation* (1919) 26 CLR 508 at 533.

4 (1906) 4 CLR 488 at 539.

5 *Attorney-General of NSW v. Collector of Customs for NSW* (1908) 5 CLR 818.

6 (1904) 1 CLR 91.

7 (1904) 4 CLR 488.

8 *Melbourne Corporation v. The Commonwealth* (1947) 74 CLR 31 at 78.

9 *Jesting Pilate* , "Aspects of Australian Federalism" , pp.116-117.

10 *Politics of the High Court* (1987), p.97.

11 *Victoria v. Commonwealth* (1971) 122 CLR 353 at 396.

12 148 CLR, x.

13 *Prosper the Commonwealth* (1958), p.180.

14 (1920) 28 CLR 129 at 141.

15 (1988) 165 CLR 360 at 384-385.

16 Gordon, *Sir Isaac Isaacs* , (1963), p.128.

17 Richard, *The Rebel as Judge* , (1984), pp.276-281.

18 *West v. Commissioner of Taxation* (1937) 56 CLR 657 at 681-682.

19 *A Federal Republic* , (1995), p.188.