

THE TENTH SIR HARRY GIBBS MEMORIAL ORATION

**THE HIGH COURT JUSTICES AND THE
WEIGHT OF WAR**

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My thanks to the Samuel Griffith Society for this opportunity to speak to you.

Sir Samuel Griffith was an advocate for a federal parliament having the power to legislate with respect to defence. At the Australasian Federation Conference in 1890 he said that the possibility of each of the States passing laws with respect to their defence was ‘obviously incompatible with the existence of anything like a combined and well-disciplined army’¹ and that for the purpose of defence there must be a central government in Australia. He noted that Sir Henry Parkes had pointed out ‘we may at any moment be in imminent danger of invasion, and we cannot under existing circumstances protect ourselves satisfactorily’.² The following year he was able to observe that ‘[w]e are all agreed that there must be one command’.³

The importance of considerations of defence as a catalyst for federation was noted by Quick and Garran. They explain that the military expenditure incurred by the Imperial Government in 1858 in its various colonies and dependencies amounted to

¹ *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, 10 February 1890, 10.

² *Ibid.*

³ *Official Report of the National Australasian Convention Debates*, 4 March 1891, 31.

nearly £4 million sterling. Gradually imperial troops were withdrawn and the largely self-governing colonies began undertaking the responsibility of their own military defence. At the Colonial Conference held in London in 1887 the representatives of the colonies expressed a desire that the Imperial Government should appoint a military officer of high standing to advise the Australian governments as to the best method of organising the local forces in order to secure their joint cooperation in time of need. The report of Major General Edwards, in 1889, pointed to there being no provision for united action in time of emergency. His recommendation, of a federation of the naval and military forces, Quick and Garran say, was 'one of the strongest arguments ever submitted in favour of the political federation of the Australian colonies'.⁴

The First World War, which occurred soon after Federation, would involve enormous casualties to the newly formed Australian armed forces; it would engender feelings in the population, including its judges, that Australia was involved in a great struggle; it would test the Justices of the new High Court in the approach that they would take to the use of the defence power to legislate for emergency powers; and it would weigh heavily with many of them personally.

The reality of the war was to be brought home to the Justices of the Court very soon. Legislation enacted in Australia in the First World War, as in the United Kingdom, conferred extraordinarily wide-ranging powers on the Executive Government and created new offences.

⁴ Sir John Quick and Sir Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 561–563.

One such statute, enacted in 1914, was the *Trading with the Enemy Act 1914* (Cth). *The King v Snow*⁵ involved a prosecution under that Act, where it was alleged that Francis Snow had tried to arrange the sale to a German company of 6,000 tons of copper from South Australia. The trial drew much publicity. He was acquitted and the Crown appealed to the High Court which commenced its hearing in Adelaide in May 1915. By majority, the Court refused special leave to appeal. Justice Isaacs would have granted special leave. He is well known for his use of rhetoric and this was especially so in times of war. He said:

For a British subject in the hour of his country's greatest need to attempt to get 6,000 tons of copper out of the control of the Empire is in itself, if proved, an unpardonable act; but when in addition, if the accusation is true, the attempt contemplates handing it over, in return for pecuniary reward, to our enemies to sow death and destruction in our ranks, and those of our Allies, words utterly fail to describe the atrocity of the crime. If the charge be true in fact, it was no sudden slip, but a deliberate and sustained and sordid disregard by the accused of the ties of allegiance to the Sovereign, and the most sacred bonds of honour and fidelity and natural sentiment towards his fellow subjects.⁶

The hearing of *The King v Snow* was marked by another event. A report in the Adelaide *Register* newspaper on 25 May 1915 describes the 'painful incident' that occurred at the start of the hearing the day before.⁷ The Chief Justice, Sir Samuel Griffith, Mr Justice Isaacs and Mr Justice Rich entered the

⁵ *The King v Snow* (1915) 20 CLR 315.

⁶ Ibid 330.

⁷ 'Mr Justice Rich: Son Killed at the Front', *Register*, 25 May 1915, 8.

courtroom and took their seats on the bench. The latter was seen to pick up a message and immediately leave the courtroom. He had been informed that his son had been killed in Flanders.

Other members of the Court were to feel this pain as 1916 was a particularly bad year. Both the eldest and the youngest sons of Justice O'Connor were killed. Justice Gavan Duffy's son was killed in France and Justice Higgins' only son was killed in Egypt. Sir Samuel Griffith's own son did not serve overseas during World War I, but the Chief Justice is reported to have said that he found it hard to do 'ordinary work in such anxious times'.⁸

Later in the same year that his son had been killed, Justice Rich agreed to undertake a Royal Commission into the state of a military training camp. This was unusual, for the members of the Court had agreed that it was not appropriate for them to serve Royal Commissions, a view with which many judges today would agree. Nevertheless he appears to have thought the circumstances exceptional.⁹ His report, which was scathing,¹⁰ was not well received and he was criticised, perhaps confirming that it had been an unwise decision to undertake the Commission.

⁸ Roger Joyce, *Samuel Walker Griffith* (University of Queensland Press, 1984) 347.

⁹ Fiona Wheeler, "'Anomalous Occurrences in Unusual Circumstances'?: Towards a History of Extra-Judicial Activity by High Court Justices' (Lecture delivered at High Court of Australia, 30 November 2011) 8.

¹⁰ *Ibid* 7.

The Court was approached three times during World War I to undertake Royal Commissions or inquiries. The second request from Prime Minister Hughes was for a member of the Court to report on the recruitment levels that would be required to maintain the Australian Imperial Force following the second failed referendum on conscription. Sir Samuel undertook the task himself, approaching it 'like a mathematical problem' and reporting that about 5,400 new recruits per month were required.¹¹ The third request was declined by the Court. It was to inquire into the internment of members of the Irish Republican Brotherhood (which is to say Sinn Fein). The Chief Justice replied, in July 1918, that undertaking such an inquiry was 'liable ... to injure the prestige of the Judiciary'.¹²

Tragic events such as the death of their, and their colleagues' sons could only have served to reinforce in the Justices a recognition that these were exceptional times. This awareness may well have coloured the view that they took of wartime legislation and regulatory measures. The strict approach of the common law to detention by the executive, and of judges to the ordinary processes of constitutional and statutory interpretation do not appear to have been fully maintained.

Robert Gordon Menzies was a law student in 1918 when he wrote an article which looked back over the previous war years. He observed that the validity of the delegation of sweeping powers appeared to have been 'tacitly accepted as *intra vires* in Australia'. He said that constitutionalists appeared to have been reconciled to a 'temporary disturbance of the traditional

¹¹ Ibid 9.

¹² Joyce, above n 8, 355.

constitutional balance'.¹³ To similar effect in 1915, in *Lloyd v Wallach*, Justice Higgins observed that:

In all countries and in all ages, it has often been found necessary to suspend or modify temporarily constitutional practices, and to commit extraordinary powers to persons in authority, in the supreme ordeal and grave peril of national war.¹⁴

That case concerned section 4(1) of the *War Precautions Act 1914* (Cth) which permitted the Governor-General to make regulations for securing the safety of the public and the defence of the Commonwealth by reference to specific objectives. A regulation made under the Act¹⁵ provided that any naturalised person could be detained in military custody, on the order of the Minister, if the Minister 'has reason to believe' that the person is 'disaffected or disloyal'.

The Minister asserted such a belief about Franz Wallach, a German-born naturalised British subject who had immigrated to Australia in 1893. The High Court rejected an argument that the regulations, which could be made, were limited to the specific purposes stated in the Act. The majority held that there could be no challenge to the basis upon which the Minister formed his belief. Justice Isaacs said that the Minister 'is the sole judge of what circumstances are material and sufficient to base his mental conclusion upon' and he is presumed not to act capriciously or arbitrarily.¹⁶ Mr Wallach was not released until 1919.

¹³ Robert Gordon Menzies 'War Powers in the Constitution of the Commonwealth of Australia' (1918) 18 (1) *Columbia Law Review* 9.

¹⁴ *Lloyd v Wallach* (1915) 20 CLR 299, 310 ('Lloyd').

¹⁵ *War Precautions Regulations 1915* (Cth) reg 55(1).

¹⁶ See *Lloyd* (1915) 20 CLR 299, 308–9.

The House of Lords adopted a similar approach in 1917 in *R (Zadig) v Halliday*¹⁷ and in World War II in *Liversidge v Anderson*.¹⁸ In *Liversidge* the majority did not construe the requirement that the Home Secretary have ‘reasonable cause’ to believe strictly and did not require the Home Secretary to give a basis in fact for his belief. Lord Atkin’s dissent is well known, not the least for the statements he took from Alice in Wonderland in ridiculing the construction adopted by the majority of the regulation. It is not as if the majority in *Liversidge* could be said to be unconsciously mistaken in the approach they took. The speeches are peppered with wartime justifications and acknowledgements that the regulation might not be construed in the same way in peace time. It would of course not be until 1980, in the *Rossminster* case, that Lord Diplock would pronounce that Lord Atkin had been right and the majority had been ‘expediently and, at that time, perhaps, excusably wrong’.¹⁹ The same might be said of the approach in *Lloyd v Wallach*.

A most important decision during World War I was *Farey v Burvett*²⁰, when the scope of the defence power was first explained by the Court. The Court gave it a very broad reach, so much so that in 1929 the Royal Commission on the *Constitution* was able to state that ‘[i]n time of war the Commonwealth Parliament may pass any law, or may give the Executive authority to make any regulation, which it considers necessary

¹⁷ *R (Zadig) v Halliday* [1917] AC 260.

¹⁸ *Liversidge v Anderson* [1942] AC 206.

¹⁹ *R v Inland Revenue Commissioners; Ex parte Rossminster Ltd* [1980] AC 952 at 1011.

²⁰ *Farey v Burvett* (1916) 21 CLR 433 (*‘Farey’*).

for the safety of the country. The Commonwealth in time of war was, for practical purposes, a unified government'.²¹

Farey v Burvett concerned another provision of the *War Precautions Act* which provided for the making of regulations prescribing and regulating the conditions of the disposal or use of any property, goods or things as were thought desirable for the more effective prosecution of the war or the effective defence of the Commonwealth.²² The regulation in question fixed the maximum price at which bread could be sold. Mr Farey, a baker, was convicted of breaching that regulation. Later, in 1939, Prime Minister Menzies was to comment that some lawyers might have been surprised that a regulation of this kind fell within the defence power.²³

The test of whether the defence power was engaged was said by the Court to be whether the measure was 'capable' of aiding the defence of the Commonwealth;²⁴ or even that it 'may conceivably...even incidentally' aid the defence of the Commonwealth.²⁵ Justices Gavan Duffy and Rich, in dissent, considered that the defence power was limited to measures associated with the military and naval forces. Pre-empting the method employed by Lord Atkin, their Honours invoked one of Aesop's *Fables* in relation to the majority's broader

²¹ *Report of the Royal Commission on the Constitution* (Government Printer, 1929) 120.

²² *War Precautions Act 1914* (Cth) s 4(1A)(b).

²³ Australia, House of Representatives, *Parliamentary Debates* (Hansard) 7 September 1939, 164.

²⁴ See *Farey* (1916) 21 CLR 433, 449 (Barton J); see also 441 (Griffith CJ); 460 (Higgins J).

²⁵ See *Farey* (1916) 21 CLR 433, 455 (Isaacs J).

construction.²⁶ It was the construction adopted in *Farey v Burvett* which would mean that no wartime regulations were ever invalidated during World War I.²⁷

As his health began to fail Sir Samuel Griffith did not sit on subsequent cases on the scope of the defence powers, such as *Pankhurst v Kiernan*²⁸, *Ferrando v Pearce*²⁹ and *Sickerdick v Ashton*³⁰. He was however moved to make a statement in Court on 13 November 1918, following Armistice Day.³¹ I shall refer to part only of it. He commenced by saying:

I cannot let this day pass without a few words. We meet on an occasion without precedent in the recorded annals of the world. After being oppressed for more than four years by the most savage war, conducted with most unbridled outrage, we can look forward with confidence to a period comparatively free from anxiety. There have been many wars, but none in which the welfare of so large a portion of the human race was vitally at stake for so long a time, or from which such grave consequences were likely to follow.

Perhaps recalling the sons of his colleagues, he later added:

Australia may look with pride upon the part taken by her sons, whose valour will never be forgotten.

²⁶ See *Farey* (1916) 21 CLR 433, 465.

²⁷ K H Bailey, 'Fifty Years of the Australian Constitution (1951) 25 *Australian Law Journal* 314 at 319.

²⁸ *Pankhurst v Kiernan* (1917) 24 CLR 120.

²⁹ *Ferrando v Pearce* (1918) 25 CLR 241.

³⁰ *Sickerdick v Ashton* (1918) 25 CLR 506.

³¹ (1918) 25 CLR v–vi.

He then spoke of a happier future, now that ‘the chief danger appears to be past’. Of course a lasting peace was not to be. Personal loss was again to be felt in World War II by Chief Justice Latham, whose son was presumed dead after his plane failed to return from a flight over the Norwegian coast.³² And it would not be long before the Justices would be faced with the challenge of how to construe wartime legislation.

In 1918 the Court had applied *Farey v Burvett* in *Sickerdick v Ashton* to uphold a regulation which prohibited the publication of statements likely to prejudice recruitment in the war. In 1941 freedom of speech was again in issue in *Wishart v Fraser*.³³ The Court appeared to maintain the position it had taken in the First World War. It dismissed a challenge to a provision, which mirrored s 4 of the *War Precautions Act*,³⁴ under which an offence of ‘endeavouring to cause dissatisfaction’ among persons engaged in the service of the King or Commonwealth was created. Mr Wishart, a solicitor and member of the Communist League of Australia, had co-authored a document which suggested that members of the Australian Imperial Force were unfairly treated and encouraged them to elect soldiers committees.

But World War II also saw some controversial decisions which were regarded by some, including the government of the day, as indicative of a change in the direction of the Court in its interpretation of the defence power.³⁵

³² Stuart Macintyre, ‘Latham, Sir John Greig (1877–1964)’ in *Australian Dictionary of Biography*, vol 10 (1986) 2–6.

³³ *Wishart v Fraser* (1941) 64 CLR 470.

³⁴ *National Security Act 1939* (Cth) s 5.

³⁵ ‘Powers from States: Court Case Likely to be Cited’, *Sydney Morning Herald*, 30 November 1942, 4; *Record of Proceedings of the*

The regulation in the *Victorian Public Service Case*³⁶ purported to control the holidays and remuneration of Victorian public servants who were not engaged in work associated with the prosecution of the war. The Court declined to recognise it as a defence measure. It required there to be a 'real connection'³⁷ between the regulation and the power. The Court said the regulation had nothing to do with public safety and the defence of the Commonwealth.³⁸

The decision in *Adelaide Company of Jehovah's Witnesses v Commonwealth*,³⁹ which was decided in 1943, may be contrasted with *Lloyd v Wallach* and its acceptance of the opinions of the Executive. The regulations provided that the Governor-General could declare an association to be unlawful based upon his opinion that it was prejudicial to the efficient prosecution of the war. A declaration rendered property liable to forfeiture. Justices Williams and Rich said that the regulations 'exceed anything which could conceivably be required in order to aid, even incidentally, in the defence of the Commonwealth'.⁴⁰ Justice Starke described the regulations as

Convention of Representatives of the Commonwealth and State Parliaments on Proposed Alteration of the Commonwealth Constitution (Commonwealth Government Printer, 1942) 136.

³⁶ *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria* (1942) 66 CLR 488.

³⁷ Ibid 507 (Latham CJ).

³⁸ Ibid 515 (Starke J), 532–3 (Williams J).

³⁹ *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116.

⁴⁰ Ibid 166.

‘arbitrary, capricious and oppressive’.⁴¹ Once again political leaders expressed shock and dismay at the Court’s decision.⁴²

In *Stenhouse v Coleman*,⁴³ Justice Dixon expressed concern about the practice which might be maintained in peace time. He said⁴⁴ that measures, the ‘necessity or justification’ for which was conceded in time of emergency, may continue unrevoked when the emergency has passed. In 1949 the Court was to say that the effects of the war could continue for a long time.⁴⁵ If the defence power was able to justify at any time any legislation dealing with any matter that had been affected by the war, the Commonwealth Parliament would have a very general power.

These three decisions were decided some years into World War II, *Stenhouse v Coleman* in the latter part of the war. The Court, Justice Dixon in particular, may have had an eye to the post-war period which required changing conceptions of the defence power and of executive power. The decisions may also have presaged the decision in the *Communist Party Case*.⁴⁶

This is not to say that the Justices necessarily considered that at times of emergency a broader view of these powers might not be countenanced. In *Stenhouse v Coleman*, Justice Dixon referred to the defence power as ‘elastic’.⁴⁷ In the *Communist*

⁴¹ Ibid 154.

⁴² ‘Subversive Regulations Invalid: High Court Judgment’, *The Argus*, 15 June 1943, 9; ‘Jehovah’s Witnesses: High Court Rules Ban Was Invalid’, *The Canberra Times*, 15 June 1943, 3.

⁴³ *Stenhouse v Coleman* (1944) 69 CLR 457.

⁴⁴ Ibid 472.

⁴⁵ *R v Foster; Ex parte Rural Bank of New South Wales* (1949) 79 CLR 43, 83.

⁴⁶ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

⁴⁷ *Stenhouse v Coleman* (1944) 69 CLR 457, 472.

Party Case, Justice Kitto referred to it as ‘expanding and contracting’ in times of war and peace and said⁴⁸ that its ‘waxing and waning’ would have been evident in recent years. The judgments of Justices Dixon⁴⁹ and Fullagar⁵⁰ in the *Communist Party Case* suggest the possibility that the Court could revert to its former stance in times of heightened danger and emergency. Justice Dixon in particular does not appear to have excluded this possibility when he said,⁵¹ by reference to *Lloyd v Wallach*, that in such times the power might sustain the detention of persons whom a minister ‘believes to be disaffected or of hostile associations’. The point is, it might not do so in time of peace.

Judges of our time have not had to face difficult questions as to whether the existence of extreme danger or emergency may warrant a different approach to legislative and executive power. If such questions do arise it will likely be in a different context, involving different risks and the use of different kinds of powers.

Legislation may involve the courts more directly in relation to matters such as detention raising different issues for them. Nonetheless, the response of judges in earlier times, who have felt the weight of war, does not suggest that we should assume that a future response might be so much different. We cannot now know.

⁴⁸ *Communist Party Case* (1951) 83 CLR 1, 273.

⁴⁹ *Ibid* 194–5.

⁵⁰ *Ibid* 254–5.

⁵¹ *Ibid* 194–5.