1-1-2003

Toast to the Honourable Roddy Meagher QC

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By Dr Paul Gerber, 2003

Judge-bashing has become fashionable ever since Roddy published his famous book – *Portraits on Yellow Pages*. High Court judges, who previously rarely featured on the front pages of newspapers, are suddenly photographed gazing rapturously at tapestries in Medici palaces, sightseeing in Florence, shopping along the Ponto Vecchio, and learning such essential Italian phrases as part of their tax deductible professional education as: "*Wine list*", "*A table for two*", "*Do you take credit cards*?" and "*Vorri sapere se hai il libro mostrato su pagine gialeo, par Signor Roderigo Meeager*?", being the Italian title of Roddy's famous book

In all, the jaunt to Florence, being the biennial Australian Bar Association conference, involving the whole of eleven hours of seminars over four days, is, according to Justice McHugh in his opening address, immeasurably "*increasing public confidence in the integrity and capacity of the Australian judiciary.*" Oddly enough, only 17 of the 271 Australian delegates seeking to upgrade their professional education came from countries other than Australia, one, a black judge from Zimbabwe, delivered a stirring paper on *Human Rights*, and an American attorney from the Cayman Islands gave a stimulating paper on the subject of "*Leasing off-shore public utilities and associated corporate tax losses*".

Since there are now several thousand judges, magistrates, Law Reform Commissioners, barristers, solicitors and, dare I say it, Law Professors all over Australia, all seeking to upgrade their education abroad, the time has surely come to review the jurisprudence of the decision of the High Court in *Ronpibon Tin*, which held that "*it is not for the Court or the Commissioner to determine how much a taxpayer <u>ought</u> to spend in obtaining his income, but only how much he has spent*". The potential losses in revenue as a result of *Ronpibon Tin* rivals that of that esteemed entrepreneur – Alan Bond – the founding father of this university. I should know; I sat on all of his successful tax appeals.

Ronpibon Tin was a doubtful decision at the time, a review of it would not be out of place. I would willingly accept an invitation from Jim Corkery to contribute an article on the subject for the next issue of Bond's inestimable *Revenue Law Journal*.

Since the ABA's four previous venues selected for professional education having taken place in Paris, New York, London and Dublin, Florence was a natural choice for this latest venue. As Ian Harrison SC, President both of the ABA and the New South Wales Bar Association noted: "*When there is discussion with practitioners in overseas locations, almost invariably it produces insights and suggestions that are digested, taken home and applied.*"

Since the High Court invariably splits 4:3 on all important social, economic and constitutional issues, one must wonder how much their Honours absorbed in Paris before handing down their split decisions in *MABO*, containing 100s of pages of waffle about

terra nullius, a concept previously unknown to British common law, or what they learnt in Dublin before concluding in *Cattanach v Melchior*, again by bare majority, and contrary to august precedent, that a gynaecologist was liable for the upkeep of an unwanted child, born as a result of a failed sterilisation. Roddy Meagher, on the other hand noted "*That a court of law should sanction such an action seems to me improper to the point of obscenity*". (*CES v Superclinics*)

Even when their Honours are, on rare occasions, unanimous, they helpfully provided us in *Perre v Appand* with seven different principles of law, when upholding for the first time an award of damages for pure economic loss, thereby creating a nightmare for law students trying to extract the *ratio decidendi* of the case.

But I digress! I am sure you all sympathise with Harrison's announcement to the Press: "*We are not here at the taxpayer's expense, lining our pockets in any way. You get information here you cannot get out of books. I'm sick to death of all this bloody lawyer-bashing agenda*." Clearly you can learn things in Dublin that you couldn't absorb in Dubbo.

How did this entire so-called "lawyer bashing" come about? Well, surprise, surprise, it's all due to tonight's guest of honour. It arose out of a simple misunderstanding.

You may recall that Justice Kirby thought he was asked to address some African Chiefs on the subject of breast-feeding, one of his special interests. It was only when he mounted the rostrum on which sat his principal hosts with their plumages unruffled and nose-bones polished, that he realised the subject he was supposed to speak on was not 'Breast Feeding', but 'Press Freedom'. Undaunted, his Honour gave his usual brilliant *ex tempore* speech on the subject.

The same kind of misunderstanding happened to Roddy when he was invited to deliver a lecture on *Heydon's case* to a group of students studying advanced jurisprudence at Sydney University. What the Dean of the Law School had intended was to expose his students to Roddy's views on Dyson Heydon's provocative article: *Judicial Activism's Threat to the Rule of Law*, recently published in *Quadrant*, raising considerable controversy amongst the judiciary. What Roddy thought he was asked to talk about was what lawyers generally refer to as the *Rule in Heydon's case*, reported in 1584 in 3 Coke's Reports.

Roddy, not having read the case for a while, and in any case being a little unsure about the common law as distinct from equity, wondered what conceivable interest students could have in this ancient case. He remembered Jim Corkery's editorial in the last issue of Bond University's *Revenue Law Journal*, which commenced with Sir Edward Coke's stirring words: "*Interpret an Act according to the intent of them that made it*." Well, Roddy had always adopted that maxim in his judgments, so, still wondering what there was to talk about, he consulted Pierce's textbook on Statutory Interpretation, where he discovered that *Heydon's case* was also referred to as the "*Mischief Rule*". Light dawned. He put pen to paper and delivered his now famous lecture to loud acclaim, correctly

interpreting *Heydon's case* by revealing the deficiencies for which the common law did not provide, his celebrated lecture being subsequently published under the title: "*Portraits on Yellow Pages"*.

But I digress! This is, after all, a celebration of the memory of the late Sir Owen Dixon. I therefore propose to turn briefly to the real Heydon's case, the lecture Roddy was supposed to give.

While this may not be the occasion to discuss talk about constitutional law, suffice it to merely note that Heydon's case (sorry Roddy about the split infinitive) – to merely note that the real Heydon – mused somewhat nostalgically on the strict and complete legalism that governed the Dixon court.

The Rule of Law, according to Dyson Heydon, is intended to operate as a control against the abuse of the discretionary powers of an over-zealous executive. It does so by introducing a third factor – the independent judiciary – to protect the citizen from any attempt by Parliament to render the acts of the executive immune from judicial scrutiny. It was Heydon's thesis that this third factor – the independent arbiter – has itself become corrupted by what he called *judicial activism*, where judges usurp their discretionary power to defeat the Rule of Law through the back-door.

The thrust of Heydon's controversial views were to the effect, and I quote:

> "Many modern judges think that they can not only right every social wrong, but achieve some form of immortality in doing so. The common law is freely questioned and changed. Legislation is not uncommonly rewritten to conform to the judicial worldview. Judgments tend to cite all the efforts of their author's colleagues, of other State courts, and American courts and Canadian courts and anything else that comes to hand. Often NO cases are followed, though ALL are referred to. They do not limit themselves to reported cases, but use computers to obtain access to unreported cases. They use huge footnotes, which appear to be regarded as a mark of erudition, containing copious references to articles in Australian and overseas university and professional law reviews."

Heydon added provocatively, that all these citations, far from demonstrating judicial wisdom, are merely computer-generated garbage, designed by their authors to create the illusion of judicial immortality, deserving of the label "hero judges" who think like an editorial in the *Guardian*.

However, I submit to you tonight, that in reality it is our judges who believe that the problem is the other way around; that it is Parliament that is sterilising the judiciary by introducing privative clauses, stopping at the gate judicial review of executive excesses, and turning our judges into castratos, singing their disquiet in falsetto voices, an octave higher than before.

Listen to the soprano aria of that great civil libertarian, Federal Court Justice Graham Hill, sung on the occasion of Sydney University making him an honorary Doctor of Laws.

> "When I became a judge I took an oath that I would do justice. Yet, the result of the *Migration Act* to prevent asylum seekers applying to any Court to have judicial review of decisions of the Minister or the Migration Review Tribunal, is that I cannot do justice at all. In one case, for example, I had to listen to a barrister, paid by the Government, say that the Tribunal has made a decision which is clearly wrong in law. The Tribunal member appeared not to have read the section under which he was supposed to be acting. He completely addressed the wrong question. The barrister then, no doubt instructed by the Government, told me that this question, wrong in law though it was, must stand, and neither I nor any other Judge in any other Court could do anything about it. That is not justice. And it is a dangerous precedent. This time it is a refugee decision that, while wrong, cannot be challenged. Next time it might be some other decision that could personally affect you and your rights".

Stirring stuff! The trouble is that it's all bullshit. His Honour has obviously never read our Constitution, or studied legal history. *Certiorari* has been used by the courts to invalidate ouster clauses since the 16th century. Parliament cannot oust judicial review by privative clauses, no matter how widely drawn. Our Founding Fathers, in sec 75 of the Constitution, wisely imposed limits on Parliament's powers to circumvent judicial review, by conferring original jurisdiction on the High Court to quash decisions wrong in law, be it by way of mandamus, prohibition or injunction. As Chief Justice Gleeson noted in a recent case, citing Lord Denning:

> "If tribunals were to be at liberty to exceed their jurisdiction without any checks by the courts, the rule of law would be at an end."

How could Justice Hill get it so wrong on so public an occasion?

But I digress! My brief tonight is to speak for seven minutes on my life in the law. Having spent some fifty years in the services of the law, I confess that kind of condensation is beyond me. I did have one great *success de scandal*. I have never told it to anyone before, and I don't particularly want to take it with me to the grave. Do you want to hear it tonight, or will I stop now?

Well, most of you will remember the constitutional crisis of 1975, with the sacking of Prime Minister Whitlam.

I was a minor bit player in that drama. Whilst all the brouhaha was going on with the Opposition denying the Government supply, a Mrs McKinley, an elector in this very Gold Coast electorate, had instituted High Court proceedings, challenging the validity of the Commonwealth *Electoral Act*. She claimed that the Act, in making any proposed distribution of a State into electoral divisions, must provide an equality of electors in

electoral divisions. “ONE VOTE, ONE VALUE” she shouted from the rooftops in her tiny electorate, relying on a US Supreme Court decision which had upheld a similar argument some years before.

Well, Pincus and I were briefed to represent her. I was retained as the so-called constitutional law expert, having frequently, on the ABC’s *News Commentary* program, attacked Labor’s attempts to obtain spurious foreign loans to circumvent the Opposition’s blocking of the Budget. I actually predicted, live, on the ABC’s *Monday Conference* on the 10th of November 1975, that Kerr would sack Whitlam within the next 24 hours, a prediction drowned out by the loud guffaws of the audience and all the other experts on the panel.

Turning to *McKinley*, I must confess that I was unenthusiastic about the one vote, one value argument. I was pretty sure the High Court wouldn’t buy the American judicial approach. But sitting in the bath one night, lightning struck. It suddenly occurred to me that the attack should not be on the *Electoral Act*, but the *Representation Act* of 1905, which had never previously been challenged. It dawned on me that sections 3, 4 and 12 of that Act could be impugned on the ground that they contravened sec 24 of the *Constitution*, which required that the number of members of the House of Representatives, chosen in the several States, shall be in proportion to the respective numbers of their people.

The trouble with that argument was that I had no standing to advance it. It had to be put by a State Attorney-General, and the only Attorney-General on the record was the A-G for South Australia. So I rang him, and explained the argument over the phone. I don’t think he understood its full implications, so he me asked to fly to Adelaide. After a series of conferences, I was duly asked to appear for South Australia.

Come the day, a Monday, when the Full High Court sat in Sydney. All the States had intervened. The noise of the traffic was drowned out by the rustle of silk. Ken Marks QC opened for Victoria, droning on and on about one vote one value. You could see their Honours were unimpressed.

When Ken Marks finally sat down just before lunch on the Wednesday, with all the States adopting his argument, I dropped my bombshell: Mrs McKinley would be relying on a different argument after lunch.

Well, when all the counsel sat down for lunch at a local café, I was suddenly approached by the South Australian Solicitor-General and told that my instructions had been withdrawn. I no longer represented South Australia. Why, I asked in disbelief. We have a perfectly good argument. Alas, in vain. It turned out that if the impugned sections of the *Representation Act* were found to be *ultra vires*, South Australia would lose two members. I was spewing with frustrated rage.

After lunch, I rose to my feet and announced that I had intended to impugn the validity of several sections of the *Representation Act*, but, my instructions to appear for South

Australia having been withdrawn, and appearing now only for an Mrs McKinley, a mere elector, I did not have the *locus standi* to advance the argument.

After Chief Justice Barwick briefly consulted his brethren, he announced that the issue was far too important to be sidelines on a point of standing: "*As far as I am concerned, Dr Gerber, you have standing*". Well, I put the argument and sat down. The High Court adjourned, announcing that it would be reserving its decision.

Meanwhile, there was pandemonium in Canberra. Kerr decided to consult Barwick on the legality of sacking a Prime Minister. Barwick, who, although aware that if *McKinley* "got up", there could be no election without an electoral redistribution, did not hesitate to advise Kerr that he could constitutionally sack Whitlam and demand an election. His Honour failed to mention that the validity of the *Representation Act* was currently under consideration by the High Court.

The rest is, as they say, history. An election was called on the old boundaries, and Fraser became Prime Minister. After the election, the High Court handed down its judgments in *McKinley*. The Court was unanimous in concluding that sections 3, 4 and 12 of the *Representation Act* were *ultra vires,* and "one vote, one value" was shot down 7 nil.

For a brief moment, I held the fate of a nation in my hand.

I propose a toast to out distinguished guest! Roddy, if one reads your judgments, it is impossible to determine in what century they were delivered. You could have been a contemporary of Lord Mansfield or any of the other great equity judges that followed him.

Transposing the song: *They don't make Yids like Jesus any more*; we can only lament that they don't make judges like Roddy any more. Please charge your glasses.