

## ALEX CASTLES, AUSTRALIAN LEGAL HISTORY AND THE COURTS\*

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### I ALEX CASTLES REMEMBERED

In the eye of history, it is but yesterday that I took part in the inauguration of this lecture series.<sup>1</sup> My role could not have been more modest. Essentially, it was to play the foil (as I had on many earlier occasions) to Alex Castles. He was to give the first lecture named for him. I was to warm up the crowd.

In so short a time, Alex Castles has died. It now falls to me, as his friend, to continue the series. But first I must talk of the man. History prepares us for mortality, for mortality provides history's ultimate solution to the contributions of saints and tyrants alike. Yet Alex Castles was always such a lively spirit, brimming over with new ideas and plans (not always fulfilled) that his own end had ever seemed a long way off. He was not a person sliding gracefully into old age. To the last moment he was bubbly, excitable, slightly disorganised but intensely interested in the discipline he had made his own: Australian legal history.

In her essay 'Australian Legal Histories in Context', Dean Rosemary Hunter of the Griffith University Law School declared, before Alex Castles' death:<sup>2</sup>

Australian history has only emerged as a field of scholarship in its own right in the last twenty years. Prior to that, Australian legal history tended to be written<sup>3</sup> and taught as a footnote to the great sweep of English legal history – the history of the King's Courts, the common law and equity, and major nineteenth century statutory

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\* Alex Castles Lecture on Legal History, 2004, delivered at the State Library of South Australia, Adelaide on 11 August 2004.

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<sup>1</sup> A C Castles, 'Working with our Legal History: A Revolution is Just Beginning' (2003) 7(1) *Australian Journal of Legal History* 5 (Speech originally delivered as the first 'Alex Castles Lecture on Legal History', Flinders University, School of Law, Adelaide, 12 August 1999). See also M D Kirby, 'Living with Legal History in the Courts' (2003) 7(1) *Australian Journal of Legal History* 17 (Address for Flinders University of South Australia, at the inauguration of the Alex Castles Lectures on Legal History).

<sup>2</sup> R Hunter, 'Australian Legal Histories in Context' (2003) 21 *Law and History Review* 607.

<sup>3</sup> Eg, W J V Windeyer, *Lectures on Legal History* (2nd ed, 1957).

reforms, with a chapter at the end about the classification of the Australian colonies as ‘settled’ colonies, and the consequent reception of English law. This year [2002] sees the twentieth anniversary of Alex Castles’ ground-breaking work *An Australian Legal History*,<sup>4</sup> the first book to take Australian laws and legal institutions as its entire subject matter. It is also the twentieth anniversary of the first Australian law and history conference. The years since 1982 have seen the advent of the Australian and New Zealand Law and History Society, increasing attendances at its annual conferences, the establishment of the Australian Journal of Legal History, the completion of a number of PhD theses in the field, and the publication of further influential texts and edited collections ... .

In all that follows, Alex Castles will be acknowledged as the Founder. His timing was impeccable. He happened to be on the scene when Australian law and governmental institutions shook off the last vestiges of direct imperial rule. The appeals to the Privy Council were at last finished<sup>5</sup> and, in a remarkable combination of statutes - United Kingdom, federal and State, the tiny residuum of Imperial intrusion into our Australian legal independence was finally concluded.<sup>6</sup> It was done, symbolically enough, by the Queen herself at Parliament House, Canberra commanding the proclamation that brought into force the signing into law of the federal *Australia Act*.<sup>7</sup>

I will not pause to ask (once again) what business it was of the United Kingdom Parliament in 1986 to be enacting a law with respect to independent Australia, without any consent or request of the people of this long, free nation. More than once I have referred to this doubt in my judicial reasons.<sup>8</sup> Perhaps this last bemused British intrusion into direct Australian lawmaking should be seen as the stuff of legal fairytales – an act to be evaluated as a final wave of an Imperial wand and not to be examined more closely for the law or the *Realpolitik* of the gesture involved.

The tribute by Rosemary Hunter is an appropriate text with which to begin a lecture to honour Alex Castles. In the future, it must be expected, that lecturers will ascend the podium who have not known him as a person, a lively colleague and a creative

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<sup>4</sup> Ibid 198.

<sup>5</sup> Following the *Privy Council (Limitation of Appeals) Act* 1968 (Cth), *Privy Council (Appeals from the High Court) Act* 1975 (Cth) and *Kirmani v Captain Cook Cruises Pty Ltd [No 2]; Ex parte Attorney-General (Qld)* (1985) 159 CLR 461.

<sup>6</sup> *Australia Act* 1986 (UK and Aust).

<sup>7</sup> *The Australia Act* 1986 (UK) received the Royal Assent in the United Kingdom on 17 February 1986. The UK Act was brought into force (with effect from 3 March 1986) by a statutory instrument dated 24 February 1986 signed by the Principal Secretary of State for Foreign and Commonwealth Affairs (SI 1986/319). The *Australia Act* 1986 (Cth) was assented to by the then Governor General on 4 December 1985. The Queen signed a proclamation in Australia on 3 March 1986 which brought the federal Act into force. It has been suggested that Her Majesty signed the proclamation in Australia to make it clear that she signed it in her capacity as Queen of Australia: T Blackshield and G Williams, *Australian Constitutional Law & Theory: Commentary and Materials* (3<sup>rd</sup> ed, 2002) 167-168; cf *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 78 ALJR 203, 223 [107]-[109].

<sup>8</sup> Most recently in *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105, [202]-[208].

intellect. But at this time his memory is vivid. We do well after his passing to reflect once again on the main events of his life.

Alex Castles was born in March 1933. He was raised in Melbourne and attended the famous Scotch College and the University of Melbourne. He then took his JD degree at the University of Chicago. There followed intervals in Melbourne and North America before, in 1958, he accepted appointment to the Faculty of Law at the University of Adelaide. It was there that he did his most important scholarly work, including on legal history. In addition to the book in 1982 which is seen as laying the foundation-stone, he had heralded that publication a decade earlier in his *Introduction to Australian Legal History* and in the publication of a source book in 1979. He served on countless community bodies connected with the United Nations Organisation, the International Commission of Jurists, the Australian Institute of International Affairs, the inquiry into the Australian Broadcasting Commission and he was a long-time member of the Council of the University of Adelaide. He was a joiner and a doer.

Alex Castles became a noted media commentator and a great public talker. When we came together for the last lecture in this series he held a post of Visiting Professor at the Flinders University. I lament to say that his signal contributions to Australian legal scholarship, and specifically our country's legal history, were not honoured appropriately with civic honours or degrees *honours causa*, such as he deserved. Perhaps it was because we are neglectful of such things in Australia. Perhaps it was because we did not expect his death at age 70. Perhaps we thought that we could wait till he was greyer and more stooped. We should honour leading scholars in their lifetimes. Words of praise in their absence, after death, seem strangely hollow.

I came to know Alex Castles when we served together as foundation Members of the Australian Law Reform Commission (ALRC) set up in 1975. Lionel Murphy, Attorney-General in the Whitlam Government, piloted the statute to create the Commission through a restless Federal Parliament, but he won the support of all parties.<sup>9</sup> I was appointed the first Chairman. Alex Castles was one of the first part-time Commissioners. We took on ourselves the presumption of finding premises, establishing a library, appointing staff, embarking on the first projects of the Commission, consulting the nation, raising awareness and putting the ALRC on the map where it remains to this day. Other such Commissions have been abolished. But the ALRC has proved itself useful to successive governments of different legal and philosophical inclinations. That is how it should be. Fortunate have been those who have served on or with the Commission. Fortunate was the Commission to have people such as the first part-time members. Fortunate was Australia that Alex Castles was one of them.

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<sup>9</sup> *Law Reform Commission Act 1973* (Cth).

I have on the wall of my judicial chambers in Sydney, the city in which the ALRC was first established in 1975, the photograph of that small, determined band. They look down on me every day of my working life. By an uncanny coincidence, another of the Foundation Commissioners, Associate Professor Gordon Hawkins of the Sydney Law School, died within a few weeks of Alex Castles.<sup>10</sup> The other three who made up the complement were Mr F G Brennan QC (later Chief Justice of Australia), Mr John Cain (later Premier of Victoria) and Mr Gareth Evans (later federal Attorney-General and Foreign Minister, now the head of an influential agency concerned with international dispute resolution).<sup>11</sup> It was, you will agree, a happy combination of personalities and intellect. Alex Castles held his own and made distinct contributions to all of the projects that he worked on.

As I look at the photograph, I can see the character of those first Commissioners in their faces, now sadly reduced by two deaths. Alex Castles, alone of the photographic subjects, presents himself standing, in effect, side-on. At that instant, when our images were caught by the exposure of film to light it was as if he was symbolising a desire to stand apart. On his face is a slightly querulous look – as if complaining about being lined up and photographed – or standing still, or standing at all, whilst others younger (like me) were sitting. Alex was first, and always, the scholar. He was a questioner; because that is what history had taught him to do. He did not necessarily go along with the approaches of us, his colleagues. Often he was listening to a different drum. The drum of history.

As I look at his photograph I can still hear his interventions in the Commission debates. Commonly, they came at the issue from side-on. What they lacked in the strict syllogistic reasoning of Gerard Brennan or the mobilised brilliance of Gareth Evans, the urbane experience of the world of Gordon Hawkins and the practical political realism of John Cain, they made up with a deep knowledge of the history of our nation. For Alex Castles, every law reform problem challenged his mind to see the issues in the context of history. He knew more than any of us the truth of Maitland's *dictum*.<sup>12</sup>

Nowadays we may see the office of historical research as that of explaining, and therefore lightening the pressure that the past must exercise upon the present, and the present upon the future. Today we may study the day before yesterday, in order that yesterday may not paralyse today, and today may not paralyse tomorrow.

Yet it is a mistake to portray Alex Castles as a parochial historian, interested only in the legal history of Australia. He knew that our legal history began as a derivative of one of the greatest and most influential streams of legal history in the world: that

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<sup>10</sup> G Wood, 'Gordon Hawkins' (2004) 15 *Current Issues in Criminal Justice* 272.

<sup>11</sup> The Hon J G Evans AO QC is the President and Chief Executive Officer of International Crisis Group based in Brussels.

<sup>12</sup> F W Maitland, *Three Collected Papers* 438 cited D Campbell, 'Lawyers' Uses of History' (1968) 6 *University of Queensland Law Journal* 1, 23.

of the British Isles. He had read, and doubtless been taught by reference to, Sir Victor Windeyer's book.<sup>13</sup> He knew as well as Windeyer:<sup>14</sup>

Law is a matter of present day rules. Yet the rules are the products of the past. Their origins, whether remote or recent, are there. It may be in some ancient statute, or old ruling of a court, or in the exposition by one of the old writers from Glanvil or Bracton to Coke, Hale or Blackstone. Or it may be in a statute or by-law made yesterday or in a decision of a court given yesterday. [As] Mr Fifoot [said half a century ago]:

Legal history as has often been said, is the history of ideas. But ideas are not self-sown. They are coloured by environment and conditioned by the climate of opinion; but they are, after all, the creatures of men's minds and to isolate them from the pressure of personality, even if it were desirable, is impossible.

The arrival of Alex Castles's insight into the integrity of Australian legal history must be understood in the context of the emergence of Australian history more generally from its earlier capture as a backwater of British imperial history. This change happened in harmony with political developments surrounding the gradual decline and fall of the British Empire and changes in the technology of transport and communications that made Australia less of a backwater.

In the 1930s Professor W K Hancock wrote his monograph *Australia*. His work reinforced Professor Ernest Scott's effort in *A Short History of Australia*, striking out on a new path. Mid century Brian Fitzpatrick, Ian Turner and Bob Gollan wrote on Australian legal history in a way that earned them the epithet of 'radical nationalists'. Their historical interests were often concerned with labour relations and this too placed them at odds with Robert Menzies's imperial perceptions of Australia. In 1958, Russel Ward wrote *The Australian Legend*, seeking to identify the features of Australia's story that were unique or special. Recent and contemporary Australian historians such as Manning Clark, Geoffrey Blainey, Geoffrey Bolton, Stuart Macintyre, Henry Reynolds, Marilyn Lake, Judy Brett and many others wrote of Australian history as a new and exciting subject of study. It is no accident that most of these historians first refined their early thinking in Melbourne, as Alex Castles also did.

In more recent times there has been a swing away from this nationalist focus. Now, once again, historians are rediscovering the global and regional aspects of Australia's history. But in legal history the new equilibrium will never return to the neglect of our own stories that marked the time before Alex Castles wrote his trailblazing works. Truly it can be said of him that, in legal history, he shifted the fulcrum.

We who celebrate Alex Castles's contribution to legal scholarship and writing, Australian legal history, law teaching, law reform and the legal process miss him as

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<sup>13</sup> Windeyer, above n 3.

<sup>14</sup> W J V Windeyer, 'History in Law and Law in History' (1973) 11 *Alberta Law Review* 123.

friend, colleague, gadfly, tangential thinker. The best way we can remember him is not only to speak sadly of his passing (as we do) but to continue the work that he began. We need to infuse an appreciation of legal history in all law courses. It is impossible to understand the common law system of law without a sound appreciation of legal history. We need to see and realise the peculiarities of Australian legal history and also to see it in its larger context: including today through the perspective of international law. As the years pass, it will seem increasingly odd to view the topic from our peculiar antipodean vantage point in any other way.

## II ALEX CASTLES AND THE HIGH COURT

The high esteem in which Alex Castles came to be viewed by the High Court of Australia is witnessed by the many references to his writings that appear in the reasons of members of the Court.

One of the earliest that I could find was the reference by Justice Brennan to *An Australian Legal History* in his reasons in 1992 in *Mabo v Queensland [No 2]*.<sup>15</sup> That case, which concerned the reconsideration within Australia of the status of Aboriginal title to land, required all members of the High Court to consider issues of the history involving the interface between the indigenous people and the settlers and their successors. Justice Brennan invoked Castles in connection with the proposition that new territories could be claimed by occupation if particular land was uncultivated because, by the common law, European settlers conventionally had a right to bring lands into production if they were left uncultivated by the indigenous inhabitants of a newly settled colony.

A few years later, in *Cheattle v The Queen*,<sup>16</sup> the same text was cited by a unanimous Full Court as authority for the proposition that, at the time of Australian Federation, the common law institution of trial by jury had been adopted in all of the Australian colonies as the ordinary method of trial for serious criminal offences.

In 1995, in *Commissioner of Stamp v Telegraph Investment Ltd*,<sup>17</sup> Justices McHugh and Gummow quoted the text as the background to describe the extent to which particular statutes applied under common law principles concerning the reception of the law in settled colonies. This was a subject that particularly interested Alex Castles. He wrote clearly and lucidly on it.

In *Gould v Brown*,<sup>18</sup> the first and temporarily unsuccessful attempt to smash the scheme of cross-vesting of State jurisdiction in federal courts, Justice Toohey cited the text to explain how the Supreme Court of New South Wales, established by the *Charter of Justice*, exercised jurisdiction under laws enacted by the colonial

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<sup>15</sup> (1992) 175 CLR 1, 33.

<sup>16</sup> (1993) 177 CLR 541, 549.

<sup>17</sup> (1995) 184 CLR 453, 467.

<sup>18</sup> (1998) 193 CLR 346, 375.

legislature. Later, in *Brownlee v The Queen*,<sup>19</sup> Justice Callinan invoked Castles's text to explain a further point concerning the history of juries in the early colonial years of Australia. There are many further citations of this work by Justices of the Court. The foregoing is an indication of the widespread respect accorded to it as an accurate and authentic record of Australia's legal story.

With my own appointment to the High Court in 1996, the citations increased. For me, using and citing Alex Castles' work was not merely an intellectual activity but a mark of profound personal respect for his knowledge, learning and analysis. In *Mackenzie v The Queen*,<sup>20</sup> together with Justices Gaudron and Gummow, we invoked the 1982 text to make the point that juries, in our legal tradition, have long had a role in mollifying harsh laws and exhibiting humanity whatever the strict letter of the law might demand. This was a point Chief Justice King had made several times in criminal appeals in South Australia.<sup>21</sup> Juries acted in this way in England, during the years of British transportation, by their decisions concerning the value of objects stolen or misused – thereby sparing the accused the hangman's noose. Juries may still exercise that privilege. Alex Castles made the point that this mollification of the letter of the law is an indication that our discipline is not always coldly logical. Its concern, as O W Holmes Jr famously reminded us, is not with logic but with human experience.<sup>22</sup>

In many other cases I have drawn on Alex Castles' writing.<sup>23</sup> And I have not confined myself to the book of history for which he is justly most famous. In *Thorpe v The Commonwealth*,<sup>24</sup> a case concerned with the issue of justiciability, I called in aid his analysis of non-justiciable questions. Alex Castles was a legal historian. But he was also a fine analyst of difficult and technical legal problems.<sup>25</sup>

The use of his writings will continue in the High Court. His basic text of history will gain still greater fame in the years ahead. Now that there is a finite collection, never to be enlarged, new research and new knowledge will leave it to his successors to continue scholarly contributions to the understanding of legal issues and legal history in Australia's highest court. Yet at this time it is proper that I should acknowledge, on behalf of the High Court, the signal contribution that Alex Castles' work has made. It is a splendid contribution. Because its primary focus has been history, it will be less prone to the attrition of the years than is the case of virtually every other department of legal scholarship. Age will not weary nor the years condemn Alex Castles's scholarly insights. They will remain bright and true

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<sup>19</sup> (2001) 207 CLR 278, 339.

<sup>20</sup> (1997) 190 CLR 348, 367.

<sup>21</sup> Eg in *R v Kirkman* (1987) 44 SASR 591, 593.

<sup>22</sup> O W Holmes, *The Common Law* (1881) (M De Wolfe Howe ed, 1968) 1; cf M D Kirby, *Judicial Activism – Authority, Principle and Policy in the Judicial Method* (2004) 15.

<sup>23</sup> See eg, *Wu v The Queen* (1999) 199 CLR 99, 112; *Brownlee* (2001) 207 CLR 278, 311.

<sup>24</sup> (1997) 144 ALR 677, 691.

<sup>25</sup> See eg, A C Castles, 'The Elusive Common Law and s 80 of the Judiciary Act 1903 (Cth)' (1989) 63 *Australian Law Journal* 490 cited in *Blunden v The Commonwealth* (2003) 78 ALJR 236, 253-254; 203 ALR 189, 213.

in the pages of the *Commonwealth Law Reports* and elsewhere, whenever they are cited.

### III THE HIGH COURT AS HISTORIAN

The *Commonwealth Law Reports* are full of cases in which the High Court of Australia has explored and decided contested issues of legal history to resolve cases before it. It happens all the time. One of the most curious cases in the High Court involving the use of history was *Giannorelli v Wraith*.<sup>26</sup> That was a case that concerned the immunity, claimed by legal practitioners in defence of a negligence suit brought against them by dissatisfied clients. Recently, the High Court was taken back to that case when a fresh assault was made upon the immunity following a decision of the House of Lords that held that the immunity was abolished, as a general rule, in England and Wales.<sup>27</sup> The decision in the new case in the High Court stands reserved.<sup>28</sup> Accordingly, I say nothing about it. However, it is relevant to refer to the earlier decision because it shows how judges, as historians, can sometimes disagree with each other and express their disagreements in terms of vehemence that would do credit to professional historians.

In his excellent analysis of 'The Use of History and Other Facts in the Reasoning of the High Court of Australia',<sup>29</sup> Justice Bradley Selway of the Federal Court of Australia quoted, in turn, an aphorism of another excellent Adelaide lawyer, Dr John Williams<sup>30</sup>

For the historian, 'history is a contested terrain. Interpretation, as well as the method of interpretation, is an ongoing debate in which historical "truths" are constantly revisited and revised'. For the Judge, however, history once used in legal reasoning, becomes part of the law – history becomes as fixed and unchangeable (or not) as is the law itself.

Justice Selway classified the differential use of history in judicial decision-making. Thus, he said, history may sometimes constitute a fact that is in issue between the parties to litigation, in much the same way as any other fact may be in issue. Sometimes, however, history will constitute a 'constitutional fact' so as to be relevant to the validity and operation of a law. Thirdly, history may be invoked in advancing legal reasoning to illuminate where the law has come from, where it is and where it is going, or should go.

<sup>26</sup> (1988) 165 CLR 543. The curiosity of the case is that, on one view, the *Legal Profession Practice Act* 1958 (Vic) s 10(2) froze the legal liability of contemporary barristers in Victoria by reference to the extent of the legal liability of a solicitor for negligence on 23 November 1891.

<sup>27</sup> *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 (HL).

<sup>28</sup> See now *D'Orta-Ekenaike v Victorian Legal Aid & Anor* (2005) 79 ALJR 755.

<sup>29</sup> (2001) 20 *University of Tasmania Law Review* 130, 153.

<sup>30</sup> J Williams, 'Constitutional Intention: The Limits of Originalism' in N Naffine, R Owens and J Williams (eds), *Intention in Law and Philosophy* (2001) 321, 333.

This is a helpful organisation of the uses of history by Australian courts, including the High Court. Doubtless there are other ways to classify the uses of history. In a sense, every judge of the common law tradition (perhaps of any legal tradition) lives with the legal past. The casebooks on our walls are nothing if they are not secondary histories of the contests and struggles that they memorialise.

A few years back, I became greatly interested in the trial of King Charles I of England. I gave a lecture on the subject at Gray's Inn in London and at Parliament House in Sydney.<sup>31</sup> The story itself is inherently fascinating. What I had not known, until I read the footnotes to C V Wedgwood's book on the subject,<sup>32</sup> was that the story of the King's trial – although before an *irregular* court, constituted by a law enacted without his Royal assent – is faithfully recorded in *Cobbett's State Trials*.<sup>33</sup> Hidden away in such law books are the records of trivial and eminently forgettable events of legal history and legal authority. But also the records of legal events of the greatest constitutional significance for Australia as of Britain. King Charles' trial and the ensuing sentence that condemned him to death are simply vivid illustrations of history in our lawbooks.

If we look through the first century of the decisions of the High Court of Australia in the authorised reports we would find many cases of historical importance. Within the Australian context, some clearly stand out. They would surely include the decisions in the *Engineers' Case*.<sup>34</sup> In *Ex parte Walsh and Johnson re Yates*.<sup>35</sup> In the cases involving Egon Kisch,<sup>36</sup> the *Bank Nationalisation Case*,<sup>37</sup> the *Communist Party Case*,<sup>38</sup> the struggle over the determination to hang Robert Peter Tait<sup>39</sup> and, possibly, the companion decisions of *Mabo*<sup>40</sup> and *Wik*.<sup>41</sup>

In most if not all of the foregoing decisions, there can be no doubt that the Justices of the High Court were conscious, at the time of each decision, of the historical importance of what they were doing. It may be doubted whether, in three and a half centuries time, lawyers will still be pouring over those records of history with the same excitement that we can feel on reading the terse interchanges between the captive King Charles I and his judges. Yet each one of the Australian cases was an important milestone in the history of this country.<sup>42</sup>

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<sup>31</sup> M D Kirby, 'The Trial King Charles I: Defining Moment for our Constitutional Liberties' (1999) 73 *Australian Law Journal* 577. Judicial interest in earlier English history is alive and well. See J J Spigelman, *Becket and Henry – the Becket Lectures* (2004).

<sup>32</sup> C V Wedgwood, *The Trial of Charles I* (1964).

<sup>33</sup> Cobbett's *Complete Collection of State Trials* Vol IV, 1640-1649 (1809) 1000 ff.

<sup>34</sup> *Amalgamated Society of Engineers v Adelaide Steamship Company Limited* (1920) 28 CLR 129.

<sup>35</sup> (1925) 37 CLR 36.

<sup>36</sup> *The King v Carter; ex parte Kisch* (1934) 52 CLR 221, 234, 248.

<sup>37</sup> *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1.

<sup>38</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

<sup>39</sup> *Tait v The Queen* (1962) 108 CLR 620.

<sup>40</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

<sup>41</sup> *The Wik Peoples v Queensland* (1996) 187 CLR 1.

<sup>42</sup> H P Lee and G Winterton, *Australian Constitutional Landmarks* (2003).

In the *Communist Party Case*, Justice Dixon uttered the well-known justification of the use by judges of matters of general history known to educated people in the society in which they operate:<sup>43</sup>

Just as courts may use the general facts of history as ascertained or ascertainable from the accepted writings of serious historians ... and employ the common knowledge of educated men upon many matters and for verification refer to standard works of literature and the like ..., so we may rely upon a knowledge of the general nature and development of the accepted tenets or doctrines of communism as a political philosophy ascertained or verified, not from the polemics of the subject, but from serious studies and enquiries and historical narratives. We may take into account the course of open and notorious international events of a public nature. And, with respect to our own country, matters of common knowledge and experience are open to us.

Yet, in his essay on the use of history in the High Court, Justice Selway reminds us of the comment that Justice Gummow made amidst the controversies over the history under review in *Wik*:<sup>44</sup>

There remains lacking, at least in Australia, any established taxonomy to regulate ... uses of history in the formulation of legal norms. Rather, lawyers have 'been bemused by the apparent continuity of their heritage into a way of thinking which inhibits historical understanding'. Even if any such taxonomy were to be devised, it might then be said of it that it was but a rhetorical device devised to render past reality into a form useful to legally principled resolution of present conflicts.

The difficulty of the Dixonian green light to the use of history in court decisions is that it obviously has limits. Sometimes those limits are difficult to chart. Basic concerns of due process and procedural fairness will be raised where judges invoke, without notice to the parties themselves, historical facts that the parties might have desired to question, challenge, answer or rebut.<sup>45</sup> In such cases, it becomes a question of the precise way that the judge proceeds to use the historical material. Somehow there needs to be a compromise between fairness to the parties and an appreciation that judges are not entirely hostage to the parties' research. By definition, that research is usually self-interested, variable in quality and often unsatisfying. It is this consideration that has led Professor Enid Campbell to suggest that courts in the future – certainly final courts – might be provided with independent research institutes out of recognition of the fact that practising lawyers are often not equipped, or motivated (even when they are otherwise interested) to help in discovering background historical and other material important to informed judicial decision-making.<sup>46</sup>

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<sup>43</sup> (1951) 83 CLR 1, 196. See M Dreyfus, 'Historians in Court' in I MacCalman and A McGrath, *Proof & Truth: The Humanist as Expert* (2003) 71, 73 ('*Proof & Truth*').

<sup>44</sup> (1996) 187 CLR 1, 182-183.

<sup>45</sup> Selway, above n 29, 135.

<sup>46</sup> Campbell, above n 12, 5.

The *Mabo* and *Wik* cases were bound to be highly controversial, given the preceding understanding of the common law, the deep interests both economic and emotional at stake, and the judicial choices that had to be made. The use of historical materials, designed to elucidate the choices in those cases has evoked much comment and some criticism.<sup>47</sup> Such criticism may or may not be justified. However, it is important to remember the differing functions of the historian and the judicial decision-maker. It is vital to keep in mind the differing facilities, time frames and duties proper to each professional.

#### IV JUDGES AND HISTORIANS

Such a point was well made by former Justice Hal Wootten<sup>48</sup> at a conference organised by the Australian Academy of the Humanities, aimed to bring historians and lawyers together. Hal Wootten could look at the issue from the vantage point of an experienced trial lawyer and judge; but also from the standpoint of a scholar and former law dean. In a sense, he could understand the perspective of each side of the critical controversy. For the historian, facts are normally provisional. There is rarely, if ever, a final word or interpretation on an era, on social events or even an occurrence. On the other hand, judges and lawyers speak in the language of finality. They do so because that is what the orders of courts are designed to provide. They work within the somewhat artificial environment of courtrooms and the hearing places of tribunals. They are subjected to rigorous time constraints. They labour with imperfect and incomplete materials. They have neither the time nor the inclination nor the skills to ruminate too long over a particular case. Other cases constantly crowd their desks, demanding resolution.

The foregoing may not be reasons for imperfections in judicial decision-making. But they do explain the differing focus of judicial attention. They also explain the tensions that arise over the way lawyers gather most historical, as well as other, facts. Lawyers puncture the stream of verbal explanation with their questions. Often, they do not let the historian elaborate, qualify or explain at scholarly length. Lawyers attack the premises of the chronicler. They demand that those premises be exposed when, often, they must depend on surmise, guesswork and assumption.

Hal Wootten and the other participants in the Academy conference could understand the problems of which the historians complained. But they demanded that the historians, for their part, see the reasons for the courts' methods. Hal Wootten read the participants part of the splendid passage from *Pearse v Pearse*<sup>49</sup>

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<sup>47</sup> J Fultcher, 'Sui generic History – the Use of History in *Wik*' in G Hiley (ed), *The Wik Case: Issues and Implications* (1997) 51. See also Williams, above n 30, 334-336; G Del Villar, 'Pastoral Leases and Native Title: A Critique of *Ward* and *Wik*' (2004) 16 *Bond Law Review* 29.

<sup>48</sup> H Wootten, 'Conflicting Imperatives: Pursuing Truth in the Courts' in *Proof & Truth*, above n 43, 15.

<sup>49</sup> (1846) 1 DeG & SM 12, 28-29; 63 ER 950, 957, per Sir James Knight Bruce V-C.

which, in 1846, explained the inescapable limitations on the search for historical truth in a courtroom:

The discovery and vindication and the establishment of truth are the main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means. Not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination. Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much.

At the Academy conference, a most powerful point concerning this interface between the historian, judges and lawyers was made to explain the reasons why judges demand the proof of the premises upon which historical assertions rest. The story was told by Professor Graeme Davidson. He did so by reference to a case tried in England before Justice Gray concerning the ‘Holocaust denial’ of historian David Irving. A Cambridge historian, Richard Evans, was called to give evidence that there were too many factual errors in Irving’s writings to justify his assertions about the anti Jewish measures of the Nazis so as to warrant his complaint about defamation by a critic of his work. History was not completely freed from provable facts. It was not wholly a matter of opinion. Its truths were, at least in broad outline, discoverable and provable. They could be established, where necessary, within the constraints necessary to a court of law.<sup>50</sup> Needless to say, Professor Evans pronounced himself entirely satisfied with the law’s procedures. For him the High Court in London ‘turned out to be a good place to settle the historical and methodological points in issue in the Irving case’. What David Irving thought is not recorded. But it can be imagined.

Allowing fully for an insistence on the law’s way of doing things, the Academy meeting demonstrated that sometimes there is a need for the law to adapt its ways to special circumstances.

One special circumstance to which the law may need to adopt involves securing historical evidence from indigenous peoples. An understanding of their history and culture is the bridge that must be built between their world of understanding present and past reality and our own if injustice arising out of misunderstanding is to be avoided. That bridge is littered with many obstacles. The different languages may provide one such impediment. The fact that Aboriginal history was not written down, as that of Western civilisation has been, means that it is absurd and unjust to demand a continuous written record extending to the time before the settlers arrived in Australia. Cultural issues also arise in communication with judges and lawyers, at least communication by some Australian Aboriginals. The law’s procedures of interrupting their dialogue and squeezing it into the orthodox mode of testimony,

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<sup>50</sup> G Davison, ‘History on the Witness Stand: Interrogating the Past’ in *Proof & Truth*, above n 43, 53, 63. See now Richard Evans, *Lying About Hitler* (2002).

familiar to courtrooms, runs headlong into the narrative style typical of their traditional forms of communication. Court practice makes no real allowance for parables, for metaphors, for poetry and for the communication after the song lines. The demand that each premise be proved as an established fact may not be possible when dealing with the legal claims of that part of the nation that is represented by the indigenous peoples.<sup>51</sup> Many of these issues were raised by the appeal to the High Court in *Yorta Yorta Aboriginal Community v Victoria*.<sup>52</sup> Within the High Court on these subjects there were distinctly different views. Justice Gaudron and I took one approach. The majority of the Court took another.

Each world – law and history – can explain itself to the other given enough time. However, after the optimism of the early days that followed *Mabo* and *Wik*, the results of later cases in the High Court have led to an expressed disillusionment with the courts on the part of many indigenous leaders, as a means of providing a venue accepted by both sides: one able to decide the issues in contest justly and on the basis of equality of arms and information.<sup>53</sup> Perhaps this conflict is eternal and insoluble. Perhaps there is no resolution to it. Perhaps it merely teaches that the ultimate solution to the economic, legal, social, educational, medical, housing and other disadvantages of the indigenous people of Australia lies in the other branches of government – not the judiciary. Perhaps the courts meant well; but were just not equipped to solve such complex, multi-faceted problems of the Australian nation by a few bold litigious strokes.

## V THE INESCAPABLE PROBLEMS OF HISTORY

We may conclude from this quandary that the law's methodology and the techniques of courtrooms work appropriately enough in a case like that of David Irving's. But they are less effective in resolving the complex questions of the rights within the same polity of peoples whose history and experience have been so utterly different from that of the majority. We may feel that the growing willingness of courts to look at extrinsic materials makes it likely that history will play an increasing part in judicial reasoning and rhetoric and in exposing the points of

<sup>51</sup> A Glass, 'Making the Facts Speak' in *Proof & Truth* above n 43, 123; A McGrath, 'History and Land Rights' in *Proof & Truth*, above n 43, 233; A McGrath, "'Stories for Country': Aboriginal History and Land Claims' in *Proof & Truth* above n 48, 251.

<sup>52</sup> (2003) 214 CLR 422; cf *Yourgala v Western Australia* (2001) 207 CLR 344, 381-382 [104]-[105].

<sup>53</sup> This was the opinion of Mr Noel Pearson at the Centenary Conference of the High Court of Australia, October 2003. He said that, in the light of recent decisions of the courts, the Aboriginal people had to look to other branches of government for justice, not the courts. See N Pearson, 'Land is Susceptible of Ownership' in P Cane (ed), *Centenary Essays for the High Court of Australia* (2004) 111, 124. Also N Pearson, 'The High Court's Abandonment of "The Time-Honoured Methodology of the Common Law" in its Interpretation of the Native Title in Mirriuwung Gajerrong and Yorta Yorta' (2003) 7 *Newcastle Law Review* 1. A similar view about the 'damage of raising unrealistic expectations about what might be achieved by recourse to the law' was expressed by Merkel J in 1999. See review by the author of *Litigation – Past and Present* (2004) by Wilfred Prest and Sharyn Anleu (eds), in 25 *Australian Bar Review* 89.

principle upon which judges and lawyers of the past have differed and that need to be resolved in each succeeding generation.

Justice Selway has suggested that, at least in constitutional analysis, I 'dispute the appropriateness of using history at all'.<sup>54</sup> However, this is not my belief. If anything I have written was so unclear as to suggest such a view, I hereby recant. I do so without any Cramnerian pre-burning prevarication.<sup>55</sup> My objection is rather to the notion that history *controls* the meaning of a national constitution. My protest is against the idea that the thoughts and purposes of the founders forever govern those who live under the constitution as their organ of government. This is what I regard as an intolerable fiction.<sup>56</sup>

Justice Selway well describes the horrors to which such an historical view of the Constitution can sometimes lead. In the infamous *Dred Scott* decision,<sup>57</sup> Chief Justice Taney of the United States Supreme Court rejected the notion that slaves in that country had legal rights which the courts would uphold. He did so by reference to their precise legal position at the time that the American colonies had separated from Great Britain in 1776:

The legislation and histories of the times ... show that neither the class of persons who had been imported as slaves nor their descendants, whether they had become free or not, were then acknowledged as part of the people, nor intended to be included in the general words used in that memorable instrument.

We saw dark reflections of a similar notion in the belief that persons detained by the Commander-in-Chief at the Guantanamo Bay facility of the United States were beyond the power and authority of the federal courts when they were not citizens of the United States. The Supreme Court recently knocked that misguided idea on the head.<sup>58</sup> The idea of *confining* a living national constitution to the historical opinions of its writers, or the ideas of its time of writing, is so incompatible with the governmental *function* of such a document that it must be rejected. Although one still sees reflections of such a view in court reasoning, happily it is rarely given effect in Australia in contemporary judicial outcomes.<sup>59</sup>

I would be the last to argue that, in seeking the meaning of the constitutional text, a court should not make use of all possible aids to construction. Such aids include

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<sup>54</sup> Selway above n 29, 144.

<sup>55</sup> Jasper Ridley, *Bloody Mary's Martyrs* (2001) 132.

<sup>56</sup> *Brownlee v The Queen* (2001) 207 CLR 278, 322 [127]; *SGH Limited v Federal Commissioner of Taxation* (2002) 210 CLR 51, 86-87 [77]-[78]. See also M D Kirby, 'Constitutional Interpretation and Original Intent' (2000) 24 *Melbourne University Law Review* 1.

<sup>57</sup> *Scott v Sandford* 60 US 393 (1857). See Selway above n 29, 154. See also *Al Kateb v Godwin* (2004) 78 ALJR 1099.

<sup>58</sup> *Rasul v Bush* 542 US 1 (2004).

<sup>59</sup> See eg, *Sue v Hill* (1999) 199 CLR 462; *Ex parte Taylor; re Patterson* (2001) 207 CLR 391, 398 [21, 493 [307]; and *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 78 ALJR 203 are clear illustrations of a non-historical approach by the majority. There are many others. Cf *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

historical materials and statements of the founders' purposes.<sup>60</sup> The derivation of meaning is not a mechanical function for judges or for anyone else. Least of all is it so in interpreting a national constitution. But in the giving of meaning, contemporary judges must ultimately shoulder the responsibility themselves. They cannot forfeit their function to purely historical studies of what the founders meant. The founders were speaking to the centuries. Once they had endorsed their compact and recommended it to the sovereign people who accept it as their basic charter of government, the Constitution passed beyond the founders' control.<sup>61</sup> History is a useful tool of analysis. It is not a confining intellectual straight-jacket. This truth was perceived long ago by one of the founders of the United States of America. Writing to James Madison, Thomas Jefferson said:<sup>62</sup> 'No society can make a perpetual Constitution or even a perpetual law. The earth belongs always to the living generation.'

## VI THE INEVITABLE JUDICIAL FAILURE OVER 'HISTORICAL TRUTH'

In our courts, it is increasingly recognised that judges are imperfect assessors of credibility and truth-telling in the ordinary trial process.<sup>63</sup> For practical reasons, appellate courts must normally accept the resolution by trial judges of contested testimony. Yet even here exceptions are allowed against the risks of serious and demonstrable injustice.<sup>64</sup>

The difficulties of sorting out contests over truth in damages claims, hard though they may sometimes be, pale into insignificance beside the difficulty of discovering the truth of contested matters of history. Of these, Professor Maoz has said:<sup>65</sup>

Judges are not capable of ruling on such issues. Judges should not engage in such activity. One may doubt whether there exists such a concept as 'historical truth'; one may doubt whether historians are capable of reaching it; one may argue that it is not facts but narratives that historians offer us. Regardless of what conclusions one draws, it is submitted that the task to adjudicate history should not be imposed on courts, nor on commissions of inquiry. If indeed a historian is doomed to fail in his efforts to establish 'historical truths', the more so the judge. This is not only because the judge lacks the necessary skills for the mission; it is because he must come up with an 'objective truth' on an issue where no such truth is obtainable.

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<sup>60</sup> As permitted by *Cole v Whitfield* (1998) 165 CLR 360. See Selway, above n 29, 146.

<sup>61</sup> R MacQueen, 'Why High Court Judges Make Poor Historians' (1990) 19 *Federal Law Review* 234, 265.

<sup>62</sup> Letter 6 September 1789. See J Appleby and T Ball (eds), *Jefferson: Political Writings* (1999) 596.

<sup>63</sup> *State Rail Authority (NSW) v Earthline Constructions Pty Ltd* (1999) 73 ALJR 306; *Fox v Percy* (2003) 214 CLR 118.

<sup>64</sup> A Maoz, 'Law and History – A Need for Demarcation' (2000) 18 *Law and History Review* 619, 625.

<sup>65</sup> A Moaz, 'Historical Adjudication: Courts of Law, Commissions of Inquiry and "Historical Truth"' (2000) 18 *Law and History Review* 559.

Yet sometimes an official decision-maker is obliged to know, or find and apply, notions of historical truth. It may be about the Holocaust, the Communist Internationale or Aboriginal links with particular tracks of land and sea. Then it becomes a question of what the decision-maker can properly do.

Often such cases are the bitterest that arise for judicial decision. Usually a judge is not privileged to decline jurisdiction or withhold decision. In 1994 a case of high emotions came before the Supreme Court of Israel. A docu-drama *Mishpat Castner* [the Castner trial] was programmed for screening on Israeli State television. In the drama, the author had Castner accuse a well-known woman (Hannah Senesh) of handing over two Jewish comrades to the Hungarian police, after which they perished. The woman's brother petitioned the Supreme Court of Israel, sitting as the High Court of Justice, to order the Israeli Broadcasting Authority to remove the scene from the play. The Israeli court rejected the petition. That great jurist, President Aharon Barak, writing for the majority, stated:<sup>66</sup>

The controversial paragraph does not reflect historical truth. It has no historical foundation whatsoever. It is not true. [Nevertheless] a democratic society which loves freedom does not make its protection of expression contingent on them reflecting the truth ... A democratic society does not protect a legend by harming Freedom of expression and art. The legend must stem from the free expression of opinions and views. It must not be a result of governmental restrictions on freedom of expression and art. Hannah Senesh's legend will exist and flourish thanks to the freedom of the truth, not following the silencing of the untruth.

And Justice Barak quoted another distinguished President of the Supreme Court, once a frequent visitor to Australia, Justice Moshe Landau:<sup>67</sup>

The distortion of historical facts does not justify the disqualification, because its creators could argue that there is no single historical truth; rather each historian has his own truth. And anyway, since when does untruth disqualify a movie or a play from being screened or performed in a State which guarantees freedom of expression to the citizen?

Truth – historical truth – may indeed sometimes be loved unwisely. Between this insight, the rejection of total relativism, the performance of judicial functions in the real world that we inhabit in the courts and the compulsory exercise of lawful jurisdiction lie the dilemmas of the judiciary as history finders and history tellers.

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<sup>66</sup> *Senesh v Israeli Broadcasting Authority*, High Court (Israel) 6124, cited Moaz above n 64, 626.

<sup>67</sup> *Ein Gal v Board for Supervision of Films and Plays* noted in More, 'Film and Theatre Censorship in Israel' (1979) 9 *Israel Year Book of Human Rights* 225 and quoted in Moaz, above n 64, 626.

## VII CONCLUSION

I can just see Alex Castles rushing up to me after these words. His excitement, as an historian and broadcaster, with the Israeli cases would have been unending. His impatience with judges would have been loudly and vehemently expressed. As a liberal Australian and historian, his empathy with the indigenous people before the courts would have been boundless. His appreciation of the problems of history and law and law and history would come bursting forth from a lifetime's experience. A torrent of excited words. We, his friends, all miss his energy and lateral thinking on an occasion such as this. But we are truly fortunate to be the beneficiaries of his scholarship and of his authentic Australian spirit which lives on – just as history teaches.