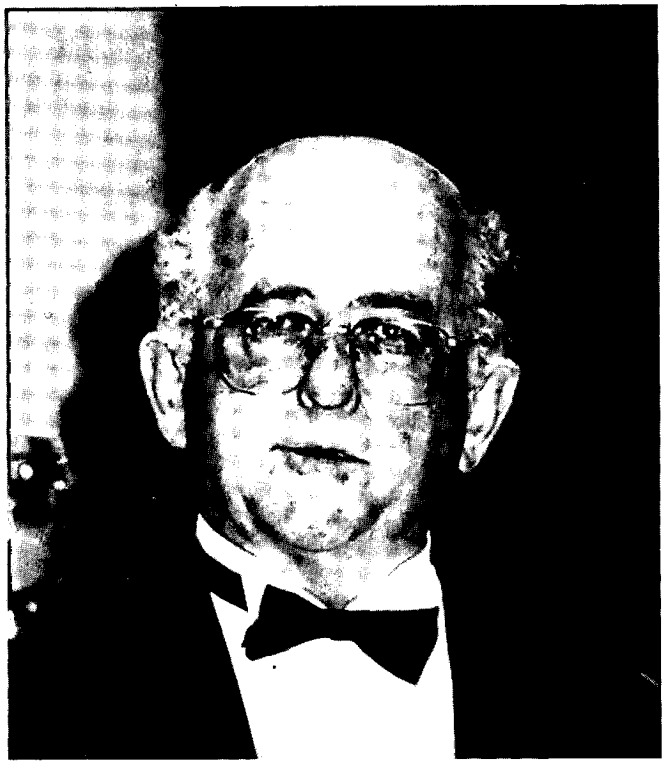
Nightmares and Notoriety?

The 1996 Bench and Bar Dinner in honour of Mr Justice Gummow was held on 24 May 1996 at the Wentworth Hotel. Speakers were Ian Barker QC and Tricia Kavanagh, followed by the guest of honour.

Ian Barker QC

Mr. President, Your Honours, honoured guests, fellow toilers in the forensic killing fields. Probably because of many years of a misspent life, possibly because of an increasingly uncertain intellect which I've trawled behind me through life in a very unrigorous way, I have of late been afflicted by two recurring nightmares. The first one is this: I'm on the outer door of the court, on the doorstep of the court, fully equipped to present a brilliant argument, it's about 5 to 10, and I suddenly realise I'm wearing pyjamas. I'm therefore faced with an exquisite dilemma. Can I go into court, and be there on time, wearing pyjamas, or am I going home to be properly attired and then be late for court. There is nothing in Walker's beautifully drafted Bar Rules about pyjamas. At all events it's about that time I usually wake up and the dilemma remains unsolved. The other nightmare is having to address the Bench and Bar Dinner. I have so far, until this occasion, avoided doing that. I've sat and watched others and wondered at the posture of frigid politeness with which they acerbically insult others and settle old scores. It's quite an art. I decided I perhaps shouldn't do it so I won't hold to public ridicule all those barristers, manifestly my professional inferiors, against whom I lose cases. Neither will I be critical of judges as a class, although they have reduced me to the point where I have this dreadful nightmare. And it is sometimes, crossing Phillip Street in the morning, I think "I wonder if I could decently be run over without it hurting too much?" But it never happens. I will say nothing of the Court of Appeal and its grim sibling the Court of Criminal Appeal. How often have I left, light of heart, its precincts, their merry laughter ringing in my ears, secure in the knowledge that the client may want to go further, which of course brings me to the High Court, an institution about which I'm deeply respectful. I know where it is. For most practical purposes the price of admission is a grant of special leave and, after all, obtaining special leave is no more difficult than ascending the north face of Everest in midwinter ... wearing thongs. Which of course brings me to our guest of honour, Justice Gummow. So far, unfortunately for me, our paths have not really crossed. Now this is probably because my knowledge of the law of trusts rests at the level at which it was when, with the help of Finch and Weber, I spent two happy years in equity pursuing a client's uncle before that stormy petrel of equity John Kearney. Finch and Weber were not merely disrespectful of me, they were indeed from time to time hurtful, suggesting that I might at least have a look at "Equity in a Nutshell" - they thought there was an illustrated edition put out by May Gibbs called something like "Snugglepot goes to Chancery".



So in order to prepare myself for tonight I have read some of the things about you, Justice Gummow, that others have said. Many people were willing to say something upon your appointment. I notice that P.P. McGuinness observed that you were a favourite son of the Commonwealth Attorney General's but I'm prepared to overlook that myself. He didn't object to your appointment. He merely complained that it was made without having you paraded before the public in order that everybody might know you and how you thought before you took such an important decision. He went on to say that in the unlikely event of your becoming increasingly eccentric, or undergoing a Paulian conversion like Sir Anthony Mason he would then say "Well I told you so, we should have had a better look at him". It seems to me that an increasing eccentricity suggests as its starting point some condition of eccentricity. I don't know what he had in mind but he will apparently be watching you closely for any manifestation of any significant degree of whatever eccentricities now burden you. Burbidge Q.C. sagely observed that you would prove cautious in embracing radical ideas. I suppose you would, or would hope so. Someone else said that you were chosen in order to restrain the adventurousness of the High Court which means, I suppose, you'll be having lunch with Justices Dawson and McHugh. Somebody else said you were probably a centralist literalist lawyer and Maurice Stack said that your ten years in dealing directly with the public at Allen Allen and Hemsley, gave you the common touch, and Stewart Fowler observed that

you were shy but pleasant and not given to dancing on tables. Senator Minchin contented himself with complaining that four-sevenths of the High Court came from Sydney. However, Sir Maurice and Hughes Q.C. set the record straight, both praising your honesty and intellectual skills, and Sir Maurice said in a very Sir Maurice sort of way that you would undoubtedly be precisely the sort of High Court judge which you turn out to be.

I notice that Justice Meagher, I think writing in the Australian Law Journal, pointed out that you had been a pupil of Hely and his baleful influence had become apparent. I imagine whatever else you learned from Hely you learned to keep one step in front of your opponent without letting him know how you got there. I once litigated at some length against Hely in a criminal trial of a well known eastern suburbs businessman. During the course of it Hely muttered to me one day that all he wanted to do was to return to the warm cocoon of equity. It may be a warm cocoon, I haven't been there often enough. You once wrote that it was said of the Irish Court of Chancery that no case was certain but none hopeless. I must say my own limited experience of equity suggests that there is a maxim, a working everyday maxim which is not found in the texts; there seems to be an unwritten precept that when all else fails, equity will sit under a palm tree.

You will remember of course that public accounts of judges have not always been flattering. Any judge these days who gives public utterance to a thought which is not entirely fashionable is bound to draw fire. History has many examples of public disrespect shown to judges. For example, Judge Docker of the District Court was habitually referred to by John Norton when writing of court cases in "Truth" as "Dingo Docker" and I read a description the other day, I stumbled upon an article about the late Judge Roy Bean who kept law west of the Pecos. The author said that you could see at a glance that he was as rough as a sandburr and tough as a boiled owl, but you realised also that he was a genuine character with plenty of salt in him. If you came back more than once and really got to know the old man you found that he was a curious mixture of qualities. I don't suggest you should recognise yourself in all this. First you notice he was almost innocent of book learning, that he was egotistical and opinionated, that he regarded cheating as good clean fun, that he drank too much and washed too little. While perhaps Roy Bean was not a judicial role model, his right to be addressed as judge was a little uncertain. He wasn't paid much by the state so he did the best he could. One of the anecdotes about him is that he held an inquest over a corpse. He found on the body $40 and a pistol and fined the corpse $40 for having a concealed weapon.

But enough of this your Honour. Let me say that although our paths have not crossed I have admired you from afar. I admire your ability to communicate in the written word. Although I don't pretend to have read all of your judgments, those that I have read I think I understood. I admire your hairstyle. And let me express my public dismay about the provocative decisions of the High Court and the Federal Court to become bare headed. Sadly I find myself part of a dwindling minority with a genuine interest in the preservation of the solemn traditions. Even Phillip Greenwood, even Greenwood, has said he doesn't want to wear a wig. I find I become increasingly isolated. What of the danger of cranial melanoma? What will the Bar Council do? Will it permit me to go to court robed, wearing a large straw hat? It may be, your Honour, that you can help. According to R.P. Meagher, who seems to be somewhat of an authority on you, you eschew frivolity and any tendency towards wildness of thought is tempered by proper respect for antiquity. Well, I beg you to save the wig because some of us need it.

It seems to be common ground that you are a judge of intellectual rigour. According to Garnsey any case involving a prospectus is one in which you are unequalled. It seems to be common ground that you are quick to assess the true significance of a set of facts. That of course can be an uncertain quality in a judge. I don't suggest in you. The quickest assessor of facts I ever met was the late Justice Ted Dunphy. Justice Dunphy was always on the move, going from Norfolk Island to Lord Howe Island to the Northern Territory to Christmas Island and back again, and I suppose he had to make up his mind quickly about facts because he was always about to go somewhere else. His judgment was not necessarily right all the time, and not necessarily not preposterously wrong, but I did once see the exercise of it in quite a spectacular way. I acted for a man who was tried at Alice Springs for killing a heifer. He was a cook at the Warrego Mine about 10 miles out of Tennant Creek and one evening he went into Tennant Creek for an evening's

cultural entertainment and on the way back this animal crossed the road and he stopped and shot it, and then cut it up and took it back to the mess. Somehow the owner found out about it and he finished up being tried for cattle killing. But his defence was quite simple. He said "As I was driving along I thought I saw a kangaroo. And I stopped the car and decided to shoot the kangaroo." I don't know why the kangaroo filled his heart with murder but that was the story. He shot it and he said "When I got close to it I discovered to my horror it was a heifer. I couldn't restore the creature to life so I did the next best thing and cut it up so as not to waste it." Well, he gave evidence of this and Justice Dunphy watched him with naked hostility for about 10 minutes, in the way judges sort of go on when they think someone's not telling everything that might be told about a subject. He suddenly said, quickly assessing the facts, "What nonsense. Everybody knows that cows don't hop." Well, it was 1965 and it was Alice Springs, I think that observation secured my client's freedom.

It seems to be common ground, your Honour, that you are exceedingly energetic, which I commend you for. May I at the same time in passing commend Justice Young as a model in this regard. On the one occasion I appeared in his court I was awestruck by this manifestation of energy in its purest form, when he came onto the Bench like an Exocet missile, almost overshooting the runway. I commend you your Honour on your fine sense of timing. It was wise to come onto the Bench post-Mabo. You thereby have avoided the public ignominy of being categorised by Justice Meagher as a sort of intellectual Quisling; a judge who protects rights we never had and who is likely to be guided in his endeavours by the siren song of the chattering classes. I'm uncertain precisely who constitutes the chattering classes. I'm a little uneasy that I may be myself included in them. But whatever he really meant it seems to me to come down to this; that if, as a judge, you feel that community attitudes are something which may be taken into account, you should listen carefully to those who remain silent. Additionally of course, you have avoided the public humiliation of being called a pissant by the Member for Kalgoorlie. But I think you should be warned that he may move on you yet, depending on the result of your examination of the effects of pastoral leases on native title. Whatever happens in that case, you'll be insulted by one side or another, or possibly both. I'm afraid that no amount of intellectual rigour will save you from insult in this increasingly boisterous era where experts seem to abound and everybody seems to be shouting at once. I do not imagine however you will be affected or disturbed. For my part if you ever feel like dancing on a table, I will not be critical.

I would like to say something about the Bar while I have a captive audience. I notice Bennett touched upon the same subject. But there's a certain tension at the Bar between those who think that we should promote our public image and those who think it's not worth the trouble. I agree that as a class, we are not loved, we have bad press. Journalists either don't understand or don't want to understand. I find it difficult enough to explain things to my own clients, without explaining to the general public, why I do things and why I make decisions. Sometimes it's practically impossible.

A barrister I know once appeared for a client charged with murder, the murder being the shooting of a young woman in the back of the head. It was a long time ago in a distant place. He spoke to the client and advised him that maybe the Crown would accept a plea of guilty for manslaughter. Were there any witnesses who could give evidence to his good character? It seems that the client heard what was being said but did not quite understand why it was being said. He said "Yes, there is this friend who I've got in Brisbane - he would come here if he could. Matter of fact, I've got a letter from him." He's pulled the letter out from the pocket of his shirt and handed it to the barrister, who looked at it, and the first thing he read at the top were the words "Wolstone Home for the Criminally Insane". He said "Why is he in there?" and the client said "Oh, he murdered a sheila - but he'd come if he could." Clearly, he didn't have the faintest idea of what a character witness was for. How do we explain to the general public why we do things for our clients and why should we anyway? We have many arguments about this at Bar Council meetings - my own view is that we should give up the struggle. Because whatever we say, we will from time to time be judged by those vile corporations and people we are required to act for and nothing will ever change that.

There is a notion abroad that legal principles are really impediments to social progress, that legal protections ought not exist for the very wicked. It seems to me that the measure of a civilised society is the extent to which it is prepared to accord procedural rights to the vilest of its members, and I

think the fight is not about whether we should be popular, it's about whether we should be securing the rights which people now have - even if they don't know they have them. You see, the legal profession generally has never been loved, either here or anywhere else as far as I can see, and it is instructive to look at some of those who have publicly disliked it.

I found it instructive to look at the treatment of the German legal profession by the National Socialists in an article by an historian called Kenneth Willig called "The Bar and the Third Reich". Some of the things I read I find eerily echoed, in an entirely innocent way, in the writings of some contemporary journalists in Australia. The German Bar, the advocates, were subjected to enormous pressure and control. I'll read part of the article: "For all the pressures and controls exerted on the Bar, lawyers never seem to overcome the inherent hostility of the Nazis to their profession. As late as 1942 after the reorganisation of the Justice Ministry, Martin Bormann was complaining about the continued objectivity of lawyers and even submitted a list of offending lawyers who had been punished for statements made during defence arguments. Hitler himself certainly left no doubt as to his personal feelings both before and after his 1942 public tirade against the legal profession and revelled in calling lawyers 'traitors, idiots and absolute cretins'. 'The lawyer's profession', he said, 'is essentially unclean for the lawyer is entitled to lie to the Court. The lawyer looks after the underworld with as much love as owners of shoots take care of their game during the closed season. There will always be some lawyer who will jiggle with the facts until the moment comes when he finds extenuating circumstances'."

Perhaps the most galling to the Führer was the failure of the German Bar to completely disassociate itself from the traditions of the Normandig Reichstadt. "The lawyer doesn't consider the practical repercussions of the application of the law. He persists in seeing each case in itself. They cannot understand that in exceptional times new laws are valid." Well, the Führer said: "Let the profession be purified, let it be employed in public service. Just as there is a public prosecutor, let there be only public defenders." Consequently, by the end of the Third Reich the Nazis had solved their problem of how to handle the German lawyer. There were no longer any servants of justice - just servants of the State.

So why do we worry about the criticism we now receive? If people didn't want barristers to act for them we wouldn't have a Bar. What we should be doing is saying "You do not realise how erosive it is of our ordinary rights to say, well, that person is so bad that he doesn't deserve to have any rights at all" - which is the prevailing climate of thought. Should we not be saying how erosive it is of our rights that so called victims of crime take part in the trial process? It is very difficult to articulate these things publicly because people don't like lawyers and matters of legal principle are always for someone else, because most people go through life resolutely believing they will never be arrested.

Let me stop by reading something else. You have probably all read or seen Robert Bolt's play, "A Man For All Seasons" about Sir Thomas More. There was a dialogue between More and his prospective son-in-law, Roper. It went this way. Roper said "So now you give the devil benefit of law", and More said "Yes, what would you do, cut a great road through the law to go after the devil?" Roper said "I'd cut down every law in England to do that." And More said "Oh, and when the last law was down and the devil turned round on you, where would you hide Roper, the law all being flat? This country's planted thick with laws from coast to coast. Man's laws not God's and if you cut them down, and you are just the man to do it, do you really think you can stand upright in the winds that blow then? Yes, I'd give the devil the benefit of law - for my own safety's sake."

It ought to be compulsory reading at the Bar's education course. ❑

Tricia Kavanagh

Chief Justice, Presidents', Justices, Judges, Members of the Bar

At first I was surprised that the President, whose familiarity with Equity is well known, if not notorious, should ask Barker (few of whose clients have clean hands) and me (many of whose clients seek damages for the loss of theirs) to speak on this occasion having, as we do, that fine Equity lawyer, his Honour Justice Gummow as our guest of honour.

However, "whispering", even with the charming lisp that our President affects from time to time, is plainly out of place and common lawyers *are* more likely to express brutal truths more frankly, if less elegantly, than equity lawyers. Their daily task seems to be the drafting of affidavits designed to avoid the facts or, if that cannot be achieved, to obscure them. Of course, the Bench & Bar would not want that tonight.

I am naturally conscious of the flattery implied, at my time of life, in asking me to give the junior's speech. Asking Barker to give the senior's is more obviously justified. However, this is not an appropriate occasion for personal references, except of course so far as they relate to the guest of honour, the Honourable Justice William Charles Montague ("slap-me-on-the-back-and-call-me-Bill") Gummow. In an endeavour to deliver, as instructed, a witty speech, I began my enquiries and I thought I would tell you a little about the process.

Naturally, I consulted his Honour's friends and acquaintances to hear what they could tell me of the real Gummow and his life. The first stop, of course, was Justice Meagher, who not only knows his Honour well, but is notoriously discreet. As you all know, he collaborated with

his Honour on that "amusing fantasy" (but now canonical) *Equity, Doctrines and Remedies*.

Australia's most famous 19th Century Equity lawyer (as Meagher calls himself) did his best to cheer me up.

"It's a terrible task", he said, and then confided to me, "He's really Gummoff".

"Gummof, Vladimir, Born in Harbin, China. You know, Rene Rivkin and all that."

The only truth in this (I later found out) related to Rene Rivkin, who was born in Harbin, but who, of course, is completely irrelevant.

Meagher then added, "Became 'Bill' very quickly at Sydney Grammar - lost the accent very quickly, very bright."

Perhaps this is what his Honour meant when he wrote of Gummow in an article about which he did not tell me but which I unearthed in the *ALJ* -

"He speaks no language except English and his native tongue."

I felt a little like saying, as Meagher himself said when appearing as Counsel before Justice Kirby and was asked whether he knew of any Commonwealth or American authorities on a particular point.

"Your Honour is such a tease."

I fled his Honour's chambers wondering why he was trying to make his friend seem a more colourful identity? Or was it an attempt to head off a suggestion that the book should be retitled in order of judicial precedence? The 4th edition will undoubtedly be by Gummow, Lehane and Meagher.

The 3rd edition of this text has had an extraordinary influence on all areas of Barristers' Practice since the authors pronounced:

"It would be a bold lawyer who would assert knowledge of what the law of 'estoppel' was today in Australia and this is because, rather than despite the fact that the High Court of Australia has on at least *four* occasions in the past decade examined the doctrine."

These judgments were the talk of the bar common rooms in all jurisdictions and we all agreed that it would indeed be a very bold lawyer who asserted a knowledge of the law of estoppel.

However, all Judges should be comforted in the knowledge that if they make some foolish error clarifying this or other murky areas of the law of equity, their erstwhile colleague will be in a position to correct it and restore doctrine to its orthodox uncertainty.

But on with the search ...

Allens was the next stop. I attempted to call the various partners of his Honour, to be told "retired", "runover", "read the book". Frantically, I dived on Valerie Lawson's book, but there was only one mention of Justice Gummow. Apparently at Allens there was an Upstairs/Downstairs system: the partners had a dining room and the clerks a lunch room. It said that his Honour used to eat with the clerks and gossip.

Well, this *was* something. Gummow as a man of the people! And a gossip as well. No wonder Meagher had warmed to him.

I rushed to the 8th floor and spoke to Bill McMahon, his clerk for the ten years he practised at the Bar - "Knew him well. Can't remember a single story", said Bill. "Dyson Heydon gave a witty speech at the 15 bobber, speak to him."

"Lost it", said Dyson, "can't remember a thing in it. Made most of it up. Trevor Morling took my only copy, ask him. Please feel free."

Rang Trevor Morling, "Did I, wonder why I wanted that - can't remember a thing about it - will search and ring you back."

Another equity pleading, I thought.

Desperate now, I ordered the press clippings to be taken out. He must have said something that was newsworthy! Not a single published comment from his Honour, but a statement released through the Federal Court's Director of Public Information -

"His Honour's only regret in taking up the High Court appointment was that it would bring to an end his role as a University Law School Teacher."

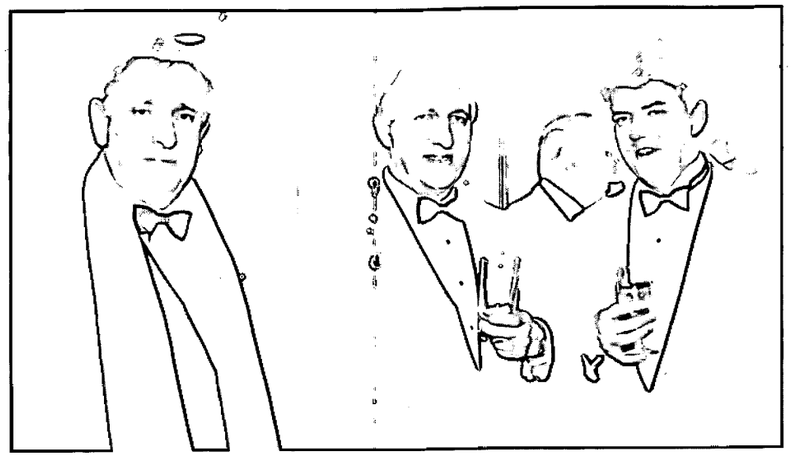
What? No regrets at leaving the Federal Court? At coping with the endless panorama of bureaucratic obfuscation and unreasoning obstinacy, the fascinating riddles of the *Tax Act* and their present strange obsession with wealthy, grown men whose lives are taken up with placing an air-filled leather bladder between two sticks? (Or do they call them posts?)

But on with the search.

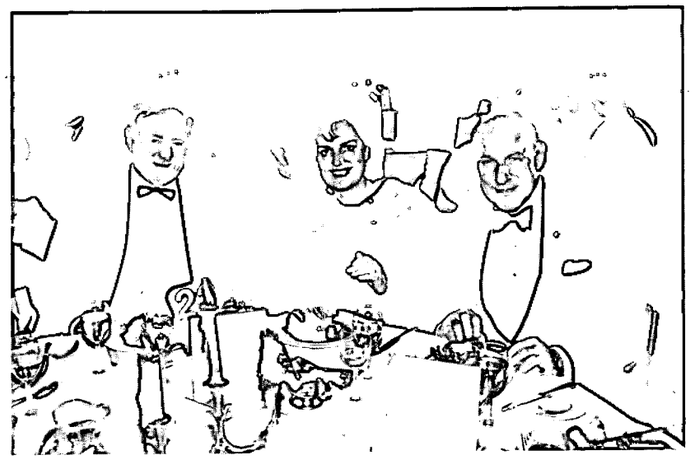
One of his Honour's Federal Court colleagues said illuminatingly, "he delivers clear, concise judgments, very speedily".

I got the impression that this was said in the same way

(L to R) Chief Justice Brennan AC, KBE, David Bennett QC, Chief Justice Gleeson AC

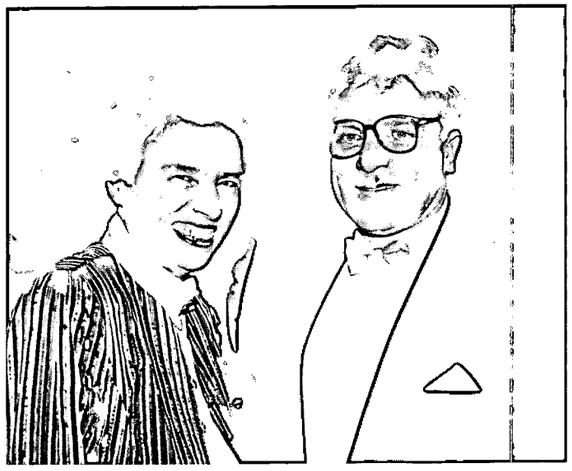


(L to R) Bob Sorby, Justice Madgwick, Mark Richardson

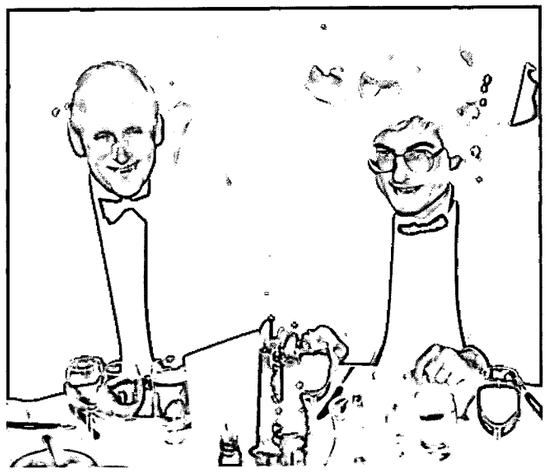


(L to R) Justice Mahoney, Sue Crennan QC, Sir Laurence Street KCMG, K St J.

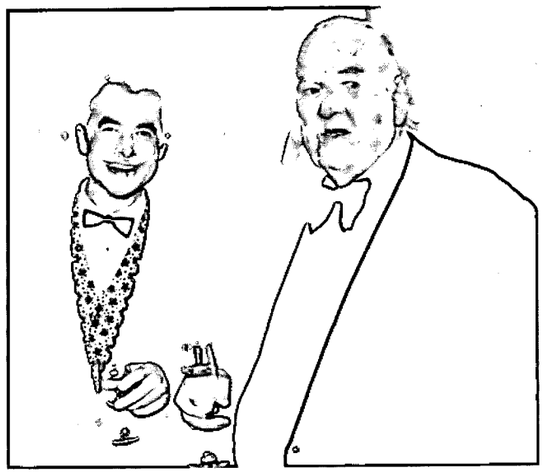
Anna Katzmann, Brian Dooley, Lorna McFee



Judge Backhouse QC and Jim Thompson

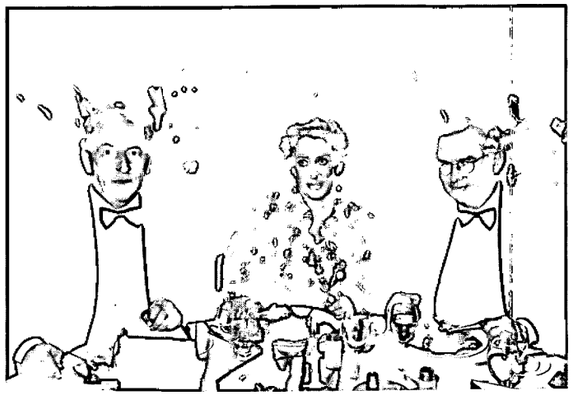


Ian Pike, Chief Magistrate and Steven Rares SC

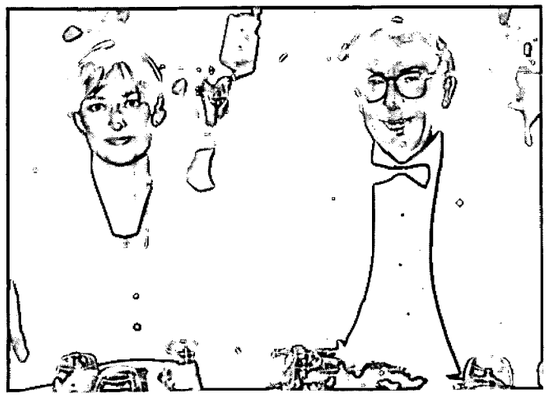


Martin Gorrick and Sir Morris Byers CBE, QC

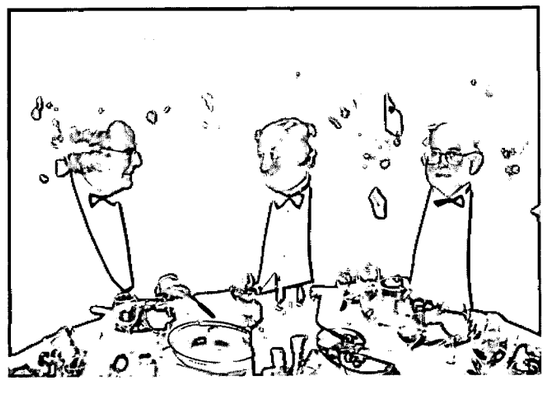
(L to R) Richard Cobden, Sophie Goddard, Peter Callaghan SC



Michael Phelps, Tricia Kavanagh, Jeff Shaw QC, MLC



Jacqui Gleeson and Justice McHugh AC



(L to R) Chief Justice Black, Norman Lyall, Ian Barker QC

that people in Baghdad said, when a TV camera was turned to their faces during the Iraqi-Kuwait war, "Mr Hussein is a brilliant general and a very nice man besides. Everyone says so."

I did learn one curious fact. The Federal Court Judges had decided to drop the "Mr" before their title "Justice". His Honour, taking the libertarian line, moved rescission and urged that the use of "Mr" be optional. He won the vote. But of the deals struck, the arms twisted, the threats, the promises, the manoeuvring in smoke-filled back rooms, how the factions voted, who did the number crunching, who did the toe-cutting, history does not relate. Was Gummow the Senator Richardson or a Barry Jones? Did he say to Michael Black - "all right, no more Mr Nice Guy? ". All is silence. We know he became "Mr" again for a short while before he had to relinquish it. Perhaps the acquisition of "the Honourable" makes up for it.

But I hear he is not nearly as disappointed as the Hon Justice Kirby is reported to have been when he was told on leaving the NSW Court of Appeal, he had to relinquish his role as President of the Court of Appeal of the Solomon Islands, an office I'm reliably informed which carried with it the certainty of a knighthood!

However, all this was a bit thin. Frantically I contacted the Law School. I was informed that his Honour played the piano at Prawn Night Singalongs. Oh really? Frank Curran does that! He is said to have stared down a student bold enough to ask him to speak up. He obliged, of course, by speaking up in the same monotone. Yes, and ...?

More desperate than ever, I returned to Meagher and to his article -

> "His Honour (I read) is widely read in areas outside the law. He eschews frivolity. Any tendency towards wildness of thought is tempered with a proper respect for antiquity ... his discourse is incisive but not charitable."

Then it came to me. This was a precise description of the footnotes and comments in *Equity, Doctrines and Remedies*, those footnotes and comments are clearly, "incisive but not charitable". Was Gummow Meagher's speech writer, the straight man? Was he Abbott to Meagher's Costello? So he was the real author of such gems as -

> "Many liberal, that is woolly-minded judges, of whom Hunt J had gratuitously named himself one" ;

or

Referring to Lord Denning's Curious raid upon a field of Equity noting, perhaps, unsurprisingly this has been taken up with reverential wonder in Canada by the Courts. (*Lloyds Bank v Bundy* [1975] QB236 ...) or

The reference to hapless Lord Denning describing his views as palpable nonsense and adding another criticism of the Canadians as lacking intellectual rigour; or

Whilst likening the appellate judges who invented the Mareva injunction to the leaders of the Gadarene swine (possessed by demons) is certainly incisive and not charitable, there was that strange lapse that indicated ignorance of the fact that it was the Second Person of the Trinity who manoeuvred them to the cliff's edge. Quite clearly, such a lapse must have been made by someone with a Sydney Grammar education, rather than that of the Jesuits at Riverview, where Justice Meagher was leader of the ton and naturally on much better terms with the Trinity. Poor Justice Meagher taking the blame for these incisive but not charitable comments all this time.

And this could explain the strange reticence of his Honour's colleagues. It was not that there were no stories. Rather, they were terrified of revenge, swift, terrible, incisive and uncharitable.

To confirm my impressions I reached up to his Honour's present colleagues, who shall remain nameless. Except the former Chief Justice, Mason, who said; "Oh, Bill, he was just saying there are a number of decisions he'd like to have changed - maybe 100 of them".

But then I learned of a softer, more self-indulgent side of his Honour's personality. I discovered that he has revived the old custom of wearing carpet slippers to Court and he takes six spoonfuls of sugar in his tea.

A new, gentler and more amiable Justice William Charles Montague Gummow (born in Sydney in 1942) comes into view. Residing in the pastoral simplicity of Canberra, far from the malign influences of his youth as a gadabout co-author, his Honour will hopefully return to the simple pleasures of lunch-room gossiping, piano playing at prawn nights and be free to entertain us with his fancies about the law of equity, secure in his knowledge that, if he is amongst the majority, he must also be right.

I will not bother to defend his Honour from the absurd motion of Senator Nick Minchin (the Newt Gingrich of the Australian Senate) that "the Senate regrets the domination of the Sydney Bar on the High Court".

I believe his Honour Justice Kirby is still writing a brief response which we will undoubtedly read in the *Herald*, *The Australian*, the *Telegraph* and the *Canberra Times* and hear on ABC, 2UE, 2GB and see him deliver on the ABC, Ten, Nine, etc.

I prefer to rely on his Honour's own words given on his swearing in to the High Court. He described a judge he admired and clearly hopes to emulate as

> "... a sceptical descendant of the enlightenment with an intellectual detachment and a belief that the road to the result can only be along the quiet path of reason and reflection".

Such a person is a most worthy member of our High Court and, if he typifies the NSW Bar, I am proud indeed to be a member of it.

I give you a toast to the witty man, the ordinary man, the man of intellectual rigour, a sweet man, once a friend of Justice Meagher's ... ❑

Justice Gummow

I too have had a similar problem to the other speakers who preceded me, which is faced with this task, what on earth are you going to say. The first thing I did was to approach my Chief Justice (all Chief Justices are sagacious people and omniscient) and I said "What on earth will I do?" and he said "Exercise tact." Of course he was speaking as a person not of New South Wales origin in the law so it was useful. He said "Now, for example, use some tact. Don't for example compare them to Queenslanders. Don't say when compared to Queenslanders they're uncouth and savage people". I thought about that and then I realised what it was that had brought David Jackson among us. He's at home now.

So encouraged by the Chief Justice to be tactful I thought a bit more and I thought "That won't get anywhere because what they want is brutality, not tact". I asked somebody else and they said "Well, tell them what you think of them". I said "That wouldn't be a good idea at all, particularly since I started off and was for many years a member of Norman Lyall's branch of the profession". Then a wiser person said "Well, what you've got to do, and its quite simple, at any NSW Bar function all you've got to do is make personal attacks on particular individuals. It's got two things about it: firstly you'll enjoy it, secondly there's just an endless supply of material".

I thought about that, then I thought about my first dealings with the Bar as an articled clerk at Allens. I don't think it's the same now but then there were real live human clients to be observed with individual problems to be advised and not all cases were mega-cases. The litigation department had two notable senior solicitors, the first real live litigators I ever came upon. One was Jane Matthews and one was John Bryson. I can't think of anything unpleasant to say about them. They were fun people then and they're amusing now. Jane Matthews in particular assisted a ferocious senior partner with defamation work with Frank Packer. There was a special trick at the High Court which was that the Registry shut at 12.30 and unknowing solicitors of course, on the last day to file an application for special leave would turn up at 2 o'clock. But smart people like us at Allens (and this is what the clients paid for) we would get up there by half past 12 and Frank Packer would ring up and abuse the senior partner for the clerk having taken a taxi rather than one and sixpence for the bus, which is how you become and stay rich.

Through the instrumentality of these senior litigation people one got to know some of the junior bar and one first entered the chambers of my later fatter coauthor to be greeted by an amazing sight, of course, and an ambience as they say now of genial squalor, basically. Then one went downstairs to the chambers of A.M. Gleeson, another edging ahead junior. The atmosphere there was brisk. My note says "bleak" but I think brisk really, if not chilly. One' s eye on entering the room immediately went up towards the ceiling and on top the row of bookshelves immediately between that and the ceiling there was a series of prints and they were of people with swords slashing one another. About 20 of them. That set the tone. Now, it's always said that the room was grey, which was not true. The chairs were black. Black vinyl. It was impossible to sit on them with any comfort. This of course, as I realised later, is a great trick for barristers to adopt. It keeps the clients on their edge. It keeps them edgy. In addition to slipping around from the general construction of these chairs, the vinyl itself seemed oleaginous. Only after a while did I work out much much later that this was the congealed sweat of nervous litigants and incompetent solicitors who had ventured in for advice. Later, in the fullness of time, the chairs were part of the equipment purchased by David Jackson I think when he arrived. He said "They've got to go" and he sold them as a job lot to Morton Rolfe. It's quite true. He rang me up and he said "I've flogged them for $75 to Morton Rolfe, would you believe it. He's quite happy with them". I don't know what's happened to them since but Spigelman should get one of them for the Powerhouse I think. As an indication of a particular form of indoor furnishing of an unhappy period.

Then one got to know from a distance some of the leading silks and they had speech problems. The first was Hope QC. It was not really a speech problem but his brain worked so fast that his power of speech could barely keep up with it; an extraordinarily quick thinking individual. Then there was Aickin QC. Sir Keith tended to keep below an equity whisper as it was called here. On one memorable occasion Gleeson and some senior partners from my firm and some captains of industry went down to see Mr. Aickin QC. in Victoria. Why do people go to Melbourne? Well, they go to Melbourne because the barristers have read the brief before they arrive. When they get there they're ready for them and when they go in and sit down they're not on the telephone all the time to other clients looking for a better brief. These, as well as great skill of course, were characteristics of Sir Keith. Anyhow they sat there and he had got an air conditioner installed - it was whirring away - and he was whispering all this wise advice about this takeover problem. It was only when I got out at the end of course that each had sat there nodding at the others, they got out and of course the inevitable was that none of them had heard what he'd said.

Each was too genteel to disclose this to the others as they sat there nodding assent.

Then there was Mr. Byers QC. No speech problems there. One heard for the first time in court this amazingly mellifluous voice, a beguiling advocate, luring judges into the acceptance of propositions I'm not sure they always fully understood. But they were conjured into the net. I was sitting in the High Court one day next to Murray Gleeson and Sir Maurice was addressing them. There was a look of less than full comprehension I must say looking across the whole seven of the Justices. As Sir Maurice kept speaking, Gleeson said to me "Look at him, what's he doing. I know what he's doing. He's saying to the judges 'You know and I know what this point is. Let's not tell anybody else'." And that was a real problem for his opponents, a real problem.

On one occasion I was very happy to be briefed with him. We were charged with going off to the Equity Court to persuade an Equity Judge that for some constitutional reason this judge did not have jurisdiction. McHugh, who I spoke to beforehand, said to me "Look, never tell a judge he hasn't got jurisdiction, they don't like it". He's dead right. Off we went, so I said "Well what are you going to do?" to Sir Maurice, "what are you going to do?". He said "I'll persuade him". And I said, "Well, there's only one thing to do" because I knew the judge better than he did, having toiled away in the horror of the equity duty list. "The only thing to do" (and in this I used before their currency really, words later put into popular use by our late prime minister) "you've got to take it right up to this bloke, take it right up to him". And he looked at me and he said "You forget why we're here". I said "What's that", and he said "We aim to please". He was right of course and I often think about that, particularly in more recent times as I sit through special leave applications.

Then I thought "Well there has to be more to this than making personal attacks" so I asked somebody else what to say and the answer was "You've got to talk about some subject that's right out of fashion, that's absolutely taboo, something that's right off the map for lawyers these days". I thought "God, what's that". I said "What can that be?" and he said "Legalism, they don't have it any more. They're not into it". I thought "That's probably right". I thought about it and I thought of three examples of legalism or, as one of those newspaper writers would say, "black letter law". One of them in the solicitors' firm where I started off and two of them observed from a very great distance in the High Court.

The first one, which I observed as a not then ageing person at Allens, involved the trial of *Portnoy's Complaint*. No-one remembers *Portnoy's Complaint* now. It was a novel by an American called Phillip Roth and in Australia in 1970 it was banned as obscene. Penguin got the bright idea that if they couldn't import it, they could print it here, and in great secrecy they printed 70,000 copies which were snapped up. Then there was the prosecution brought in every State by the State governments for obscenity and the trial in New South Wales went on in the District Court. There were two trials; in each case there was a hung jury and then the authorities gave up. And in the biography of Patrick White, who was a witness, there's an account of this in the biography at page 503. It says the Crown Prosecutor (it doesn't disclose his name) was an Irish Australian. Well at the New South Wales Bar that doesn't tell you anything. Then it says "with a nasal delivery". That doesn't tell you much either. It said "He jabbed at the witness as he put the questions, he jabbed an old, long, crooked index finger". Now who had an old, long, crooked index finger? Only much later I was lucky enough to be on his floor at the Bar and of course it was Jack Kenny and, yes, if you read the biography of Patrick White at 503 he's the man. He gave a rather different account of the trial than what appears in the book if you asked him.

Now what's that got to do with legalism? Well the answer is that part of a skilled legal technique is giving succinct and comprehensive advice. It's out of favour now. It's got to go for pages, and tell people "maybe this" and "maybe that". Not one thing or the other. The whole of the *Portnoy* thing only ever happened because the then senior partner at Allens, Norman Cowper, was a solicitor of the old school as well as being a good lawyer and a person with an interest in books and publishing. The Penguin people came along to him and they showed him *Portnoy's Complaint*. He was aged 71. He sat down and read it. I saw the letter of advice which he gave and on which they acted, and it was two paragraphs long. The last paragraph was "I've read this book. It's a book about a neurotic New York man who seems to have a series of erotic adventures. Some of it's quite disgusting. But no jury, properly instructed, could convict on any charge of obscenity. Yours faithfully." It was on the strength of that advice that those people acted and they were proved right in the end. It wouldn't happen today. There'd be roomfuls of little people producing memos in these big firms. The client would end up in a total state of confusion and advanced poverty and nothing would have happened, but there would have been a lot of chatter about community values.

The other two examples of legalism in operation involve the High Court and I observed them as a student and they struck me then as significant and they still do. One of them involved the death penalty and it's a case some of you will know about. It's called *Tait -v- The Queen*[1]. Of course we don't have the death penalty in Australia now, haven't had for many years, but it was certainly in existence in Victoria in 1962 and Mr. Tait had committed a rather nasty crime and he'd been convicted and his avenues of appeal had been

1 (1962) 108 CLR 620. On 31 October 1962 the High Court granted an injunction staying the execution of Tait. By the time Tait's application for special leave to appeal came before the High Court on 6 November 1962 the Chief Secretary of Victoria had made an order under s.52 of the *Mental Health Act* 1959 acknowledging Tait was either mentally ill or intellectually defective and his sentence of death had been commuted to life in gaol. *Ed.*

exhausted. It was then thought that he'd gone mad and thus, maybe, at common law one shouldn't and indeed couldn't hang a lunatic (another word you can't use now). You couldn't hang a lunatic. So further proceedings were instituted in the Supreme Court of Victoria. Whilst this further motion was still in the Supreme Court on 30 October 1962, the Victorian Executive Council fixed the execution for 1 November. The Supreme Court, under enormous pressure of time, sat until 10.30pm on the night of the 30th, and produced a judgment. The Premier of the day, who rightly said, I guess, that he had popular opinion behind him, gave no instructions to counsel to offer the Court any undertaking to defer the execution until there had been time to get the matter to the High Court on a leave application. So it was in that state of affairs that on 31 October 1962 Sir Owen Dixon and the other High Court judges, and Sir Owen Dixon was then quite an old man, managed with some speed to assemble a Full Court in Melbourne. This was on the morning of the 31st. The execution was for the next morning and they restrained the officers of the Victorian government from carrying out the sentence and there are some wonderful gloomy passages in the transcript where Sir Owen Dixon enquires whether they understand that if they did not obey the order they won't be just in contempt, but they will have committed murder themselves. Starting, I think, with the Premier. The transcript also shows it was the unhappy lot of (the now) Brian Shaw Q.C. to go along and tell the High Court that Sir Henry Bolte had told him not to give any undertaking whatever and indeed actively to resist any suggestion that the matter should be delayed beyond the 31st of October. Now of course at that time there was an enormous popular outcry for and against but predominantly I think, if one ignored those chattering classes, in favour of the carrying out of the execution and what this illustrates then is that aspect of legalism if you like to use that word which requires the lawyer, whether it's an advocate or a judge, to stand aside from the tumult of the moment and what is shouted about as being the felt and pressing need and concern of the day and to think more deeply about it and to take a longer view of just what's involved.

The other example is another decision of the High Court in the Communist Party Dissolution case[2]. It seems absurd now, but in 1949 and 1950 Australians en masse were enormously scared of what they saw as the "red peril". It wasn't just as we think now a few funny MPs who thought there were reds under the bed. There was an enormous feeling of panic really throughout the western world - this was the time of McCarthy in the United States for example - and there was brought of course in legislation here, the *Communist Party Dissolution Act* which would have most severely impacted upon civil liberties. The High Court held that the Act was beyond power. One might very much doubt whether the United States Supreme Court of that day and in those circumstances would have reached the same result. It required, I think, an enormous act of courage or enormous detachment.

Then there was the referendum to try and change the Constitution. The High Court judgment had been delivered on 9 March 1951. The referendum failed on 22 September. Six months later, on 21 April 1952, when he was sworn in that Sir Owen Dixon used the words "strict and complete legalism is the only safeguard to resolving great disputes"[3]. It is inconceivable that anyone in that Court on that day did not know that he was saying that against the background of what had happened in the previous year with the Communist Party litigation. And what he was saying, in a Delphic fashion of course, but in unmistakable fashion if one thinks about it, is that in the sort of position he occupied one has to take a longer view, both a longer view backwards and a longer view forwards and of course the hindsight of history would say he was absolutely correct that Communism now seems a rather absurd doctrine. How on earth, one says, could it ever have taken hold? What was the great fire that needed to be put out by these drastic measures?

"Strict and complete legalism is the only safeguard to resolving great disputes"

People keep asking me: "what's it like on the High Court". That's usually preceded by "How do you like living in Canberra?" as if you've been sent to Siberia or somewhere. I quite like living in Canberra some of the time, but not all of the time. On the one hand there's this view that we just loll about looking at the occasional special leave application, trotting down the corridor saying to one another "Look, have you seen this one?" with references to some intermediate courts of appeal that we won't name. The other view of it all is that we live in some sort of cellblock where we're chained up writing judgments day in, day out in hideous grime. The truth of course is that it's somewhere in between and it is, I think, the most enjoyable if rigorous occupation in the law anyone could hope to enjoy.

And next time there's a judgment that comes out which attracts criticism from all sides, no-one is happy with it because it doesn't manage to satisfy all these tumultuous needs that appear to be pressing at the time, just think about what was done in cases like the Communist Party Dissolution case. ❑

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

3 (1952) 85 CLR xi, on the occasion of his swearing in as Chief Justice of the High Court. *Ed.*