EDITOR'S INTRODUCTION

In this special edition of the *University of Queensland Law Journal* the theme is 'Worst Top Court Decisions of the Last Quarter Century'. I chose this theme not long after writing an article strongly criticizing the High Court of Australia for its two recent voting rights decisions.[1] The latter of those two woeful decisions, *Rowe v Electoral Commissioner,*[2] struck me — and still strikes me — as one of the most feebly reasoned and interpretively daft decisions I had ever, and have ever, read. So surely, I realised, others would have their own favourite candidates for 'Worst Decision' winner (or perhaps more aptly loser) too.

From that realisation sprang forth the theme for this special issue. As is my custom with these *UQLJ* special issues, my approach is a *laissez-faire* one. I aim to recruit a stellar line-up of contributors, tell them the theme, and leave them to interpret it and write their articles however they see fit.

The result of that in this instance is a collection of eight articles, four by Australian legal academics and a further four from overseas legal academics in the United States, United Kingdom, Canada and New Zealand. What you will see in the pages that follow is that we have alternated between a home-grown Australian legal scholar's contribution and one from an overseas jurisdiction.

First up is the contribution by Professor Anne Twomey. With no prompting from me, she too chooses the *Rowe* case[3] as Australia's Worst Case in the last 25 years. Although her analysis differs at points from mine, she produces a powerful indictment of the majority judgments in that case — in terms of their approach to constitutional interpretation; their implicit endorsement of the principle that one Parliament can significantly bind a successor, and even amend the Constitution; and the poor and far-fetched reasons given in support of the majority's conclusions.

Next we move over to the United States, and the case chosen by Professor Michael Ramsey of the University of San Diego School of Law, which is the 2005 *Gonzales v Raich*[4] case. Professor Ramsey argues that *Raich* decisively undercut the US Supreme Court's nascent moves to return American legal culture to founding principles in matters of federalism. Of course for those who favour wholly national solutions to near on everything, even what to do about medical marijuana, *Raich* will be seen as a triumph, not a tragedy. But Ramsey notes that the *Raich* outcome could not have happened without the votes of Justices usually most committed to federalism; that *Raich* could have been decided in favour of the federalist constitutional division of power at little political cost, unlike the politically much more divisive 2012 challenge to the federal health care reform; and that, as a bonus of bad consequences, *Raich* denied two women relief from painful physical suffering.

For our third Worst Case we return to Australia, this time to a private law case and the choice of Professor Charles Rickett who selects *Bridgewater v Leahy*.[5] Professor Rickett considers this to be a troubling one in terms of a range of private law subjects — equity, contract law and restitution law. Indeed he argues it is a case where a serious injustice was done to the defendants, and where the law of unconscionable bargain was stretched almost to breaking point. It is even one where the relief

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1 That article of mine will appear very soon. See 'The Three "Rs" of Recent Australian Judicial Activism: *Roach, Rowe* and (No) 'Riginalism' (2012) 36 *Melbourne University Law Review* (forthcoming).

2 (2010) 243 CLR 1.

3 *Ibid*.

4 545 U.S. 1 (2005).

5 (1998) 194 CLR 457.

ultimately granted had not been asked for by either side in argument in the High Court of Australia or in the courts below.

Next we move to the United Kingdom, tort law, and the choice of King's College London legal academic Sandy Steel. He opts for *Fairchild v Glenhaven Funeral Services Ltd*[6] as his candidate for Worst Case. Steel argues that on the issue of proof of causation — when may a claimant recover substantial damages from a defendant despite being unable to prove that the defendant's wrongful conduct caused the damage — *Fairchild* gives an incoherent and unjust answer.

Returning again to Australia, and the public law realm, Gabrielle Appleby of the University of Adelaide Law School ever so slightly pushes the boundaries of the theme and argues that all the progeny of the *Boilermakers' Case*[7] constitute a group category sort of winner for this Worst Case title. In effect Appleby attacks much of the current jurisprudence relating to the separation of judicial power doctrine in Australia — a doctrine this native born and educated Canadian has long thought almost wholly lacks in tangible good consequences and whose twists, turns and implications at times border on scholasticism. Appleby, of course, is more measured, but still argues that amongst other things the doctrine flowing from the *Boilermakers'* progeny today inhibits the development of a system of efficient and accessible administrative decision-making tribunals and causes difficult and technical choice of laws questions for litigants.

Following on from Appleby's article we cross the Tasman to New Zealand, and the article by Jessica Palmer and Andrew Geddis of the Faculty of Law at the University of Otago. Palmer and Geddis begin by asking — and carefully considering — how one goes about selecting the criteria to be employed in choosing a Worst Case. Having done this, and in a way that repays close reading, they proceed to choose a case on the basis that the top New Zealand court simply failed to do one of its core jobs. It took up an issue that, according to all the separate judgments in the case, did not need to be considered to resolve the dispute before them and then left that issue more fraught with uncertainty, more convoluted, and quite simply in a worse state that it had been before. And as that issue related to contract law, and when and how prior negotiations may be used to determine the meaning of a contract, this needless undermining of clarity and predictability was particularly egregious. So Palmer and Geddis choose *Vector Gas Ltd v Bay of Plenty Energy Ltd*[8] for their Worst Case.

Our final Australian contributor is Professor Allan Beever. As with Sandy Steel, he too chooses a tort law case. Professor Beever's selection is *Barclay v Penberthy,*[9] where the plaintiff brought suit against the defendants for (amongst other things) the loss to it caused by the injuries to its employees. Beever argues that the three important propositions for which *Barclay v Penberthy* stands should all have been rejected. The High Court of Australia erred with respect to every important matter.

The last article in our special issue on 'Worst Top Court Decisions of the Last Quarter Century' is by Professor Ran Hirschl, Canada Research Chair at the University of Toronto. Professor Hirschl lifts his gaze up to the Olympian heights where top courts attempt to portray obvious political rulings as stemming from some established constitutional doctrine. Although this failing is no doubt occasionally perceptible in all the jurisdictions thus far considered, and likewise in Professor Hirschl's (and my native) Canada too, he opts to discuss two rather glaring instances of this, one from the Supreme Court of Pakistan and one by Turkey's Constitutional Court. For those who doubt that H.L.A. Hart's Rule of Recognition (or ultimate test of legal validity) for a

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6 [2003] 1 AC 32.

7 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('Boilermakers'').

8 [2010] NZSC 5; [2010] 2 NZLR 444.

9 [2012] HCA 40.

jurisdiction can sometimes be unilaterally changed by the judiciary, this article is compulsory reading.

No doubt readers will have their own Worst Case candidates. But I hope you find the choices of our eight esteemed contributors to this special issue thought-provoking and enjoyable.

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