THE AUSTRALIAN LAW JOURNAL

Volume 98, Number 5

May 2024

CURRENT ISSUES – Editor: Justice François Kunc

A Tale of Two Bicentenaries 311

The Bicentenary of the Supreme Court of Tasmania 311

The Bicentenary of the Supreme Court of New South Wales 314

The Curated Page 316

LETTER TO THE EDITOR 317

ARTICLES

THE CREATION OF THE SUPREME COURTS OF NEW SOUTH WALES AND VAN DIEMEN'S LAND

The Hon Susan Kiefel AC KC

This article discusses what led to the creation of the Supreme Courts of New South Wales and Van Diemen's Land and in particular the changes and pressures which grew after the establishment of the Colony of New South Wales. Factors influencing change included the powerful role of the Governor, the peculiar role of the Judge-Advocate and courts which bore little resemblance to those in England. Social changes and the development of trade created pressures to alter the court systems as did the expansion of the Colony into Van Diemen's land. Despite the efforts of many, the creation of the Supreme Courts took time. 318

ADAPTING TO FRONTIER CONDITIONS: THE ADMINISTRATION OF THE LAW IN VAN DIEMEN'S LAND 1803–1824

Stefan Petrow

From its settlement in 1803 the penal colony of Van Diemen's Land experienced frontier conditions in the working of the law due to its geography, convict population, bushranging, and the British Government's reliance on lay magistrates rather than Judges to dispense justice. This first major transition away from frontier conditions occurred in 1816 with the inception of the Lieutenant-Governor's Court under Deputy Judge Advocate Edward Abbott. This article focuses on the various ways Abbott's court adapted to local conditions when deciding civil cases in a summary way, including avoiding legal formality, allowing married women and convicts to be litigants and sanctioning ex-convicts and married women representing their husbands to appear as agents. The adaptations to local conditions ended in 1824 when the new Supreme Court of Van Diemen's Land began adhering to English court practice in civil and criminal cases. 326

THE FOUNDATION OF JUDICIAL METHODS IN EARLY NEW SOUTH WALES

Bruce Kercher

This article examines the legal reasoning of the members of the Supreme Court of New South Wales during the period of its first Chief Justice, Sir Francis Forbes (1824–1836). Their approach was markedly different from those who had preceded them. From 1788 onwards, the earliest amateur judges made no explicit attempt to explain the decisions they made. In a drastic change commencing in 1817, Judge Barron Field took a surprisingly technical approach. Sprinkled with Latin, his judgments applied strict English law, regardless of the colony's differences from England. Chief Justice Forbes and his colleagues, Dowling and Burton JJ, delivered a series of admirably short, clear judgments, strongly based on legal principle. They relied on English law, but explicitly considered its application to colonial differences, including the existence of a large indigenous population, and a significant convict community. Forbes and his judicial colleagues laid a strong foundation for the future of the Supreme Court. 342

COMPARATIVE PERSPECTIVES: ENGAGING PRODUCTIVELY ACROSS LEGAL ORDERS

Val Napoleon

There are many questions, fears, concerns, and hurdles when we are faced with engaging with a legal order other than our own. For the most part, we want to be respectful of other peoples and their laws. However, we experience hesitations and sometimes paralysis about where to begin, how to learn, and how to work across plural or multiple legal orders. I am suggesting that we can create both macro and micro frameworks to theoretically and practically beginning to understand the law of others. For example, what are the conditions and standards of law, and how do people reason through the resources of law to solve problems. The reality is that even if we cannot yet see the foundations, operations, and institutions of law in another society, one starts with knowing they are there, then we build our intersocietal capacities. To provide examples, I set our law and legal process drawn from the Gitxsan legal order, one Indigenous people in Canada. 352

FIRST NATIONS AND STATE SOVEREIGNTIES IN AUSTRALIA: CHALLENGES FOR ENDURING COURTS IN CHANGING TIMES

Marcelle Burns

Love v Commonwealth; Thoms v Commonwealth (2020) 270 CLR 152 has been celebrated as recognising the special relationship of First Nations to this continent now known as Australia, with the effect that First Peoples cannot be deported in circumstances where they are not Australian citizens. While some have argued the High Court's decision represents an implied recognition of First Nations sovereignties, this article argues that the Court has effectively denied First Nations sovereignties, and that this denial is inconsistent with United Nations human rights bodies calls for colonial courts to give full and fair consideration to First Nations' sovereignties. This article concludes that the judicial denial of First Nations sovereignty raises questions about the legitimacy of state sovereignty, which can only be remedied through treaties. The challenge for judicial officers is to imagine a time when the common law, "in truth had always recognised" First Nations sovereignties. 362

FINDING JUDGES – APPOINTMENT, DIVERSITY THEN AND NOW

Joshua Thomson SC

It is fundamental to the administration of justice that the public, and the legal profession, should have trust and confidence in the judiciary. That means it is necessary to ensure that the judiciary reflects the diversity of society. Without that, trust and confidence in the operation of the judicial system is diminished. A two-step process of analysis should be adopted, which is designed to ensure that diversity of all types is promoted, but which still ensures capable and meritorious appointments. The first step requires identification of a "zone" or "pool" of acceptable candidates. The second step involves selecting an appropriate candidate from that "zone" or "pool", having regard to matters such as diversity, the composition of the Court and the character of the candidates. It is inherently flawed to search for a single candidate who is regarded as the most outstanding or meritorious. 374

BOOK REVIEWS – Editor: Angelina Gomez

From Convicts to Computers: Two Hundred Years of the Tasmanian Supreme Court, by Justice Stephen Estcourt AM 381

Constant Guardian, Changing Times: The Supreme Court of New South Wales 1824–2024, by The Hon Keith Mason AC KC and Larissa Reid (eds) 387

Australian Law Journal Reports

HIGH COURT REPORTS – Staff of Thomson Reuters

DECISIONS RECEIVED IN FEBRUARY/MARCH 2024

AB (a pseudonym) v Independent Broad-based Anti-corruption Commission ([2024] HCA 10) (*Criminal Law*) 532

Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG ([2024] HCA 4) (*Arbitration; Shipping and Navigation*) 445

Delzotto v The King ([2024] HCA 8) (*Criminal Law*) 485

Hurt v The King ([2024] HCA 8) (*Criminal Law*) 485

Lesianawai v Minister for Immigration, Citizenship and Multicultural Affairs (2024] HCA 6) (*Citizenship and Migration*) 475

R v Anna Rowan (a pseudonym) ([2024] HCA 9) (*Criminal Law*) 508

R v Rohan (a pseudonym) ([2024] HCA 3) (*Criminal Law*) 429

Xerri v The King ([2024] HCA 5) (*Criminal Law; Statutes*) 461