

THE HON T F BATHURST
CHIEF JUSTICE OF NEW SOUTH WALES
BOOK LAUNCH
HEYDON: SELECTED SPEECHES AND PAPERS
WEDNESDAY 15 AUGUST 2018*

1. It is a great pleasure to join you this evening to launch *Heydon: Selected Speeches and Papers*. There is much to say about Dyson Heydon's achievements to date. This is attested to not just by the 800 pages comprising this book, but the fact that it represents a mere drop in the ocean of legal writing that Dyson has contributed both to this country and abroad.
2. I know Dyson well. I imagine he is also well-known to most of you here this evening – if not directly, then by reputation – so I will leave the personalia to Rodney Cavalier and focus my attention on the text. At the outset I must confess the task of writing a speech to introduce a book which itself contains some of the greatest legal speeches given in this country was daunting. I know Dyson's good nature will make him tolerant of any shortcomings that may follow.
3. To put it simply, this book stands out because of the breadth of the subjects the author has covered, and most extraordinarily, the depth to which he covers them. It reveals unparalleled ability in innumerable subjects including criminal, constitutional and comparative law. It also shows his ability to reflect

* I express my thanks to my Research Director, Ms Naomi Wootton, for her assistance in the preparation of this address.

deeply on the lives, habits and peculiarities of others, manifesting an understanding not just of the law, but of people – which some might say is a rare phenomenon in a lawyer.

4. Not everyone will agree with everything said in the book, and that is to its credit. This is because the author practices a form of intellectual honesty and integrity which manifests in decisive views supported by persuasive reasoning. In that regard he emulates such great lawyers as Roddy Meagher and Peter Hely, of whom he has written so movingly in the text. This decisive style tends to be hammered out of the modern lawyer at an early stage of their training, when they are taught to give advice with as much ambivalence as possible, peppered with clichés like “on balance” and “the better view is” – even for the most obvious of conclusions. Unsurprisingly, it is not a style that you will find in this book. To prove my point one need look no further than chapter 38, entitled “Four Great Australian Legal Disasters” – said to be the Commonwealth Criminal Code, the Uniform Evidence Acts, litigation funding and the structure of the profession as a business. Characteristically, he pulls no punches.
5. The other notable feature of his style is the extent to which each paper, no matter the topic, is rich in literary, religious and historical references. He not only delivers insights into discrete legal topics but imparts analogous lessons from history and literature.
6. Before delving into the content it is important to recognise the work of the editors, John Sackar and Thomas Prince, in compiling this volume. The

choice of publications and categorisation of those into the six parts that make up this book is masterful. They chose material informed by the desire to publish previously unpublished, or difficult to access publications, and the desirability of including renowned, significant, and influential material.

7. The first set of publications are compiled into part one, entitled “Lawyers”, which consists of addresses the author has made concerning other eminent figures of the past 50 years or so. The first chapter is Dyson’s address at the Fifteen Bobber of the Honourable Justice Gummow. Following this are descriptions of other judicial or lawyer-giants including Lehane, Sheller, Hely, Gleeson, Kearney and Meagher, to name just a few, and Dyson’s address to the Bench and Bar in 2003, delivered shortly after his appointment to the High Court. He opens with the line “it is necessary to remember that judges are like baboons. The higher up the tree they climb, the more they reveal their unsavoury characteristics”. I repeat that line not just to garner a cheap laugh at the expense of someone else’s joke – but because it reflects the author’s serious reflections on the role of appellate judges and appellate courts, judicial activism, and originalism which comprise part three of the book.
8. This part is essential reading for any sitting judge. It includes some of the author’s most influential speeches, including the Quadrant Dinner address, and also the more recent “Threats to Judicial Independence: The Enemy Within”, written towards the end of his tenure on the High Court. This chapter warrants careful attention by those who might seek to paint independence as ego. It is immediately apparent that the author’s concerns are largely based in

respect for the parties. He notes that “to a large degree the law has developed out of intense and painful dramas” and that “compromise is alien to the process of doing justice according to law. A compromise adverse to the interests of a losing litigant cannot be revisited”.

9. The last three chapters are on the substantive topics of constitutional law, evidence and criminal law, and equity and contracts. In the constitutional sphere we find Dyson’s critique of aspects of the United Kingdom *Human Rights Act*, in the chapter “Are Bills of Rights Necessary in Common Law Systems?”. It outlines his concern with the quasi-legislative role given to courts under that Act, and he concludes that “the Convention is so vague that it invites judges to pour their views on controversial practical, social and moral questions into the empty vessels of words”.
10. His views on evidence and criminal law are informed by this constitutionalism along with deep insight into these topics from an academic and practical perspective, and an extensive knowledge of comparative jurisprudence. Chapter 33, “The common law of evidence and human rights”, argues that the rules of evidence advance certain human rights goals. Three later chapters reflect in some way on the life and work of Sir James Fitzjames Stephens, including a mammoth 66 page piece on his aims and techniques in the drafting of the Indian Evidence Act. He notes that the Act continues to apply, and has influenced the laws of evidence in many other countries, such that it has now come to regulate the litigious affairs of nearly two billion people.

11. Finally we come to the sixth and final part, entitled “Equity and Contracts”. It is the shortest, as a result of a conscious decision of the author and editors “to avoid further proliferation in the field of equity”. Within the chapter “Comment on Lord Hoffmann’s ‘Interpretation of Contracts’” one finds a defence of certainty in construction and a searing critique of the slowness with which problems turning on contractual construction are now heard, compared with the position 40 or 50 years ago. To quote, “[t]his is bad not only for litigation generally. It is bad for commercial litigation in particular. A commercial court is supposed to be a piepowder court. The merchants come in, stamp the dust off their boots and want a speedy answer”. It is a lesson every commercial lawyer, commercial court and particularly appellate court should keep in mind. Merchants do not want unnecessary shows of learning, they want results.
12. This part, and the book as a whole, conclude with a chapter in defence of the remedial constructive trust. I should also note that restitution does not escape mention – first in an early chapter in honour of Roddy Meagher, where it is described as the “distant but sinister urge of the restitution tsunami” and in the last chapter, where the rise in the modern law of restitution is derided as “revolutionary”, generating “much uncertainty” and causing “profound damage to received legal conceptions”. To repeat, the author pulls no punches, and the reader will be the richer for it.
13. Whether you agree or not with his many robust opinions and conclusions, it is clear the author has thought deeply about his colleagues, legal method and legal institutions out of respect for those institutions, those colleagues, and

importantly the individuals whose lives are affected by the way we do our jobs.

14. In the opening chapter of his book, Dyson writes of the passage of Bill Gummow's ancestors from St Petersburg to Shanghai to Manchuria, and ultimately to Australia. He emphasised the benefit that had brought to the Australian community. Dyson himself was born in Canada, to an Australian father and Canadian mother. Just as we are fortunate that Bill Gummow ended up in this country, so we are fortunate that Dyson did.

15. All that is left to do is to once again offer my thanks to John Sackar and Thomas Prince for their superb work in editing, to Robert Size for his editorial assistance, to Mark Leeming for suggesting the book and to the team at Federation Press – both for this publication and for tonight. Thank you.