

**University of New South Wales – Gilbert & Tobin Centre of
Public Law**

2010 Constitutional Law Conference Dinner

Theories of Everything and Constitutional Interpretation

Chief Justice Robert French
Sydney, 19 February 2010

Sir Anthony Mason and Lady Mason, Sir Gerard Brennan and Lady Brennan, the Attorneys-General of the Commonwealth and of the State of New South Wales, your Honours, ladies and gentlemen – it is a great pleasure to be present yet again at the Annual Constitutional Law Conference Dinner. I did not attend the conference sessions today. There is only limited pleasure to be derived from watching the entrails of judgments over which one has laboured being picked apart by birds of prey. It was, however, pleasing from a distance to observe that the annual delineation of statistical profiles of power on the Court undertaken by Andrew Lynch and George Williams was made more challenging by the thick fog of collegiality which they found to have settled over us in 2009.

The conference program offered, as it usually does, up to the minute analyses and commentary on the moving wavefront of constitutional case law over the past year or so. And there seems to have been a lot of it. We started in February 2009 with *Wurridjal*¹ in the course of which *Teori Tau*² was overruled to hold that the just terms

¹ *Wurridjal v The Commonwealth* (2009) 237 CLR 309.

requirement of laws acquiring the property of any person extended to property in the territories. In *Wong*³ the Court rejected a contention that sections of the *Health Insurance Act 1973* (Cth) relating to practice standards were caught by the prohibition in s 51(xxiii) against laws for the provision of medical and dental services which authorised any form of civil conscription. In *K-Generation*⁴ we found that notwithstanding the functions conferred upon them by *Liquor Licensing Act 1997* (SA), the judges of the Licensing Court of South Australia remained fit to serve in the temple of federal judicial power.

At the end of March and the beginning of April we heard *Pape* and on 3 April made orders answering questions in a special case in favour of the validity of the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth)⁵. Reasons for judgment were published on 7 July 2009. The case, as you all know, raised a number of important issues relating to the sources of Commonwealth power to expend money. I am sure the judgment has received a good working over in today's sessions. I need say no more about it than to observe that Mr Pape made some constitutional history by trying to bite the hand that tried to feed him.

² *Teori Tau v The Commonwealth* (1969) 119 CLR 564.

³ *Wong v The Commonwealth* (2009) 236 CLR 573.

⁴ *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.

⁵ *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

In August, in *Lane v Morrison*⁶ the Court declared provisions of the *Defence Force Discipline Act 1982* (Cth) to be invalid in relation to the establishment of the Australian Military Court. This decision, also of considerable significance, had its origins in an alleged "tea-bagging" incident between naval personnel in August 2005. Teachers of constitutional law will no doubt relish the opportunity that it presents of being able to engage student interest in Ch III with explanations of tea-bagging.

In September, the slumberous Melbourne Corporation doctrine, which had been roused to action in *Austin*⁷, retained sufficient life to support the conclusion in *Clarke*⁸ that the superannuation surcharge was invalid in its application to the pension benefit of members of the State Parliament of South Australia.

In November, the Kable dog woke up and barked at s 10 of the *Criminal Assets Recovery Act 1990* (NSW) in *International Finance Trust Co Ltd v New South Wales Crime Commission*.⁹ The section was declared to be invalid.

Also in November, the reduction by New South Wales law of the water entitlements of farmers in the Lachlan River area withstood a challenge that it was, being linked to Commonwealth funding, in effect an acquisition of property on other than just terms within the meaning of s 51(xxxi) of the Constitution. That was *ICM*

⁶ (2009) 239 CLR 230.

⁷ *Austin v The Commonwealth* (2003) 215 CLR 185.

⁸ *Clarke v Commissioner of Taxation* (2009) 258 ALR 623.

⁹ (2009) 261 ALR 220.

Agriculture.¹⁰ Its companion case, *Arnold*¹¹, raised s 100 of the Constitution and judgment in that case was delivered nine days ago in time for John Williams to prepare a commentary on it for this conference. *Kirk*¹² of course, still fresh in headlines and commentary, was delivered earlier this month.

In the year that has passed since the last convening of this conference we have seen 10 constitutional decisions all of some significance delivered by the Court. This compares with the four decisions which you had occasion to review at the beginning of 2009.

The Annual Constitutional Law Conference and conferences like it are important. Constitutional scholars and lawyers are not thick on the ground in Australia. The coming together of many, if not most of them, at this event provides a temporary critical mass to energise and inspire scholarship and the better understanding of recent events and associated future possibilities in relation to constitutional development.

The Constitution creates the space in which all other domestic laws operate in this country. It defines the extent of our legal universe. There is in that universe much dark matter, the small "c" constitution providing the context of history, unstated assumptions and conventions, and common law principles especially interpretive

¹⁰ *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 261 ALR 653.

¹¹ *Arnold v Minister Administering the Water Management Act 2000* [2010] HCA 3.

¹² *Kirk v Industrial Relations Commission* [2010] HCA 1.

principles. As Justice McHugh said in *Theophanous v Herald & Weekly Times Ltd*¹³ albeit in dissent:

The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture. This is especially true of a Constitution, the provisions of which are frequently no more than an outline for government that is intended to endure for centuries.

The existence of a constitutional universe can engender in some the desire to develop constitutional cosmologies, theories of everything which will offer simple rules to guide interpretation and understanding. But as with the physical universe, theories of everything remain elusive. The simplest of them inform various species of religious fundamentalism.

Appealing as such theories may be to our aesthetic sense and yearning for simplicity, there is, as astrophysicist and science writer John D Barrow remarked, "More to everything than meets the eye". It is not surprising that his popular book *Theories of Everything* published in 1991 has been republished in a new and fully revised edition under the title *New Theories of Everything*. He concludes in his book that:

There is no formula that can deliver all truth, all harmony, all simplicity.

¹³ (1994) 182 CLR 184 at 196.

In constitutional law, there is a considerable list of interpretive theories. I was pleased to see however, in the latest edition of Blackshield and Williams' *Australian Constitutional Law and Theory*, a quotation from an article in the *Ohio State Law Journal* in 1989 by one Daniel Farber. In that article, which concerned the originalism debate, the author said:

... the real problem may not be that originalism is less desirable than some other global theory of constitutional law, but that no global theory can work. If so, we might do better to abandon the attempt to create a theory of constitutional interpretation, and get on with the business of actually interpreting the Constitution. Perhaps, in other words, constitutional interpretation is best thought of as an activity that one can do well or poorly, rather than as an application of some explicit general theory.¹⁴

That passage has some resonance with the observation in the joint judgment of Gummow J and myself in *Wong* that:

... diverse and complex questions of construction of the constitution are not answered by adoption and application of any particular all-embracing and revelatory theory or doctrine.¹⁵

There is a general question about the purpose and utility of interpretive theories. Some set out what their proponents say is a legitimate way or perhaps the only legitimate way of approaching constitutional interpretation. Others simply classify under some general label what particular constitutional judges or particular courts do in particular cases or generally. They may be descriptive of a methodology. With these, I

¹⁴ Farber D, "The Originalism Debate: A Guide for the Perplexed" (1988-1989) 49 *Ohio State Law Journal* 1085 at 1103.

¹⁵ *Wong v The Commonwealth* (2009) 236 CLR 573 at 582.

have no difficulty. It is a good thing to reflect upon the unstated assumptions and perhaps unconsciously adopted methods that inform our thinking about particular constitutional problems. Is one acting according to silent principles? If so, are they universally applicable? In any event should they be stated?

There is a huge literature on modes of, and debates about, constitutional interpretation. In his Maurice Byers Lecture in 2007, Justice Heydon valuably set out what he called "a taxonomy of theories of constitutional interpretation". In a paper published in 2003 on methodologies of constitutional interpretation in the High Court of Australia, the late Justice Brad Selway identified the approach to interpretation which he then attributed to a majority of the High Court Justices in the following terms:¹⁶

The primacy of the constitutional text has been asserted and maintained. The approach is fundamentally conservative and legalistic, based upon precedent and logical analysis. But the approach is not rigid or "tied to the past". Where it is clear that the Constitution needs to develop then this has been achieved.

The contemporary correctness of Justice Selway's observation is a matter for the commentators. Speaking for myself, I see little evidence of "isms" in the current methodology of the Court. One looks to the words of the Constitution and to their possible meanings and application. The interpretive choices or choices of application presented will be informed by principles developed in previous decisions of the Court. They will also be informed by the history and historical context of the words or phrases in issue and by their functions within the structure of the Constitution. The way in

¹⁶ Selway B, "Methodologies of Constitutional Interpretation in the High Court of Australia" 14 *Public Law Review* 234 at 250.

8.

which these and other factors present themselves for consideration will depend upon the nature of the case which falls for decision.

At a recent function in Chicago somebody from Australia, a graduate of the University of New South Wales teaching at Chicago University Law School, told me that I am a functionalist. That observation was made without rancour, so I do not take it to have been by way of condemnation. Perhaps it was inspired by the reference to multi-factorial evaluation in *Clarke*. Needless to say, I eschew stereotypes. I also eschew theories of everything. That having been said, both normative and classificatory discussion of constitutional interpretation can help us all to shine a light on our own thought processes. And that is a good thing.