

**AUSTRALIAN LAW JOURNAL**  
**OBITUARY**

The Hon Athol Randolph Moffitt, CMG, OAM, QC

The fourth President of the New South Wales Court of Appeal, Athol Moffitt, died in Sydney on 26 April 2007. He was 93 years of age. He was born in Lismore and educated at Artarmon Opportunity School and North Sydney Boys' High School. He matriculated to the University of Sydney where he graduated in Arts and Law, the latter with First Class Honours.

Athol Moffitt was the third child in a family that included three girls. As a child, he stammered badly but received speaking lessons. Occasionally, in later life, when he became excited, a hint of the stammer would return.

Moffitt was admitted to the New South Wales Bar in 1938. In this respect, he followed his father, Judge H W ('Herb') Moffitt, who was a judge of the Workers' Compensation Commission. He also followed his sister Gwen, one of the comparatively small circle of women practitioners in those days. When War broke out in 1939, he joined the AIF and served as a Private, rising to the rank of Captain. In 1945 he was deployed to Borneo and his legal skills were used in the prosecution of Japanese military officers who had taken part in the Sandakan death

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marches. As a result, eight Japanese military were convicted and hanged.

Moffitt returned to the Bar in Sydney and soon acquired a large practice, mainly on the common law side. He was sharp minded and a good jury advocate, efficient and decisive. In 1956 he was appointed Queen's Counsel and elected to the New South Wales Bar Council. In 1959 he acted as a judge of the Supreme Court of New South Wales for six months. At the time, he declined permanent appointment "for family reasons". However, in 1962 he returned to the Court as an Acting Judge in Divorce, finally accepting permanent appointment in November of that year.

From the start, Moffitt was a strong supporter of the proposal to establish a separate Court of Appeal in New South Wales. When this institutional change came about in 1967, his vocal support for the idea gained him critics amongst fellow judges of the Supreme Court facing supersession. In 1969 he was appointed a Judge of Appeal. He served as Acting President in 1973 before being appointed President of the Court of Appeal in 1974. It was an office he would hold until his retirement from the Bench in June 1984.

During his fifteen years service on the New South Wales Court of Appeal, Moffitt wrote many important opinions on a great range of legal subjects. Under his presidency, the Court established its reputation for efficiency, although appearing before the Moffitt Court was often seen as

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a difficult, even terrifying, experience by many counsel. Moffitt served as Acting Chief Justice of New south Wales in 1979.

Amongst the leading decisions which Moffitt wrote, several stand out for their good sense, foresight and wisdom. Of these, perhaps *Pettitt v Dunkley* [1971] 1 NSWLR 376 is amongst the finest. It laid down the rule that a failure of a trial judge to give reasons for a decision constituted an error of law because it frustrated the possibility of the exercise of the statutory right to appeal. The principle established in that case was later endorsed for all judicial officers by the High Court decision in *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666, although that Court declined to extend the principle to other public decision-makers.

Other decisions, subsequently applied throughout Australia, included *Pacific Acceptance Corp Ltd v Forsyth* (1970) 92 WN (NSW) 29 concerning the liability of auditors; *National Employers' Mutual General Assn v Waind* [1978] 1 NSWLR 372, 376, dealing with the law governing subpoenas for the production of documents and the procedures to be followed in answering and challenging them; *Stollznov v Calvert* [1980] 2 NSWLR 749 on dismissal for want of prosecution; and *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166 on amendment, limitations law and doctrine of precedent.

Whilst serving as a Judge, Moffitt undertook a Royal Commission of Inquiry into Organised Crime in Licensed Clubs in New South Wales

(1973). This experience alerted him to the corrupt influence of organised crime. It greatly influenced his activities upon his retirement from the Court, on attaining the age of 70. The year after he retired, he wrote *A Quarter to Midnight*, in which he analysed five Australian Royal Commissions, including his own, and expressed concern about the dangers to independent law enforcement in modern Australia. He became a much sought after speaker at clubs and civic organisations, giving his last community talk only a year before he died.

In 1998, Moffitt turned his attention to a separate, but related, subject of the misuse of addictive drugs, writing two books *Drug Precipice* and *Drug Alert*. These books were designed to alert the community's attention to widespread drug use in its midst. In such matters, Moffitt tended to be orthodox and conservative in the solutions he offered, mostly involving more law enforcement with more powers. Thus, he publicly criticised the opening of a legal injection room in Kings Cross, Sydney, in 1999 although one consequence of this facility may be the very low levels of HIV infections amongst Australian (as contrasted to American) injecting drug users.

He married Heather Williams in 1948 and they had two sons. His wife and one son predeceased him. A large funeral service in the Sydney suburb of Killara was attended by many community leaders from law, politics and the defence services. It was conducted according to Anglican rites. His surviving son, Malcolm, spoke for the family.

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Athol Moffitt was appointed a Companion of the Order of St Michael and St George in 1979 and he received the Medal of the Order of Australia in 2001.

He was intense, diligent and obviously very clever as a judge. His judicial writing might sometimes have benefited from the use of shorter sentences with more full stops. However, no one doubted his complete integrity, sharp intellect and the wealth of experience he brought to the judicial seat. The consolidation of the New South Wales Court of Appeal, since copied in most Australian jurisdictions, is a monument to the success of the institution he helped to found.

Michael Kirby

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