

‘Anomalous Occurrences in Unusual Circumstances’? Towards a History of Extra-Judicial Activity by High Court Justices

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Justices, distinguished guests, ladies and gentlemen, it is indeed a great privilege to be invited here this evening to speak in the High Court of Australia Public Lecture series, following in the footsteps, earlier this year, of my colleague and friend, Professor John Williams of the University of Adelaide.

I’d like to begin by thanking the Court and its staff and to acknowledge all who have helped to make this lecture possible, especially Dr Hanna Jaireth, the Court’s Public Information Manager.

Introduction – Judicial Independence and the High Court

I was drawn to this topic — the history of extra-judicial activity by High Court Justices — by two things: first, my longstanding interest as a constitutional lawyer in the independence of the judiciary from the other branches of government and secondly, by my closely related interest in the High Court of Australia itself.

The independence of the judiciary from government is a fundamental principle of Australian democracy. It forms part of our common law inheritance and is embedded in Chapter III of the Australian *Constitution*. Its rationale is both simple and compelling. Keeping the judiciary apart from the legislature and the executive promotes public confidence in judicial impartiality which is pivotal to acceptance of

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court decisions.¹ Moreover, it ensures that the judiciary can subject the government — as well as individuals — to legal control, thereby preserving the rule of law.²

The High Court of Australia, of course, hears cases on all aspects of Australian law, but has a particular responsibility for the interpretation of the Australian *Constitution*.³ That legal role has, in turn, placed the Court in the midst of some of the great social and political controversies of Australia's post-federation history. The *Bank Nationalisation Case*,⁴ the *Communist Party Case*,⁵ the *Tasmanian Dam Case*⁶ and *Mabo*⁷ all provide familiar examples.

So, to revert to judicial independence, while it underpins the authority of all Australian judges, nowhere is it more important than in this Court. And certainly the framers of the Australian *Constitution* (our so-called 'founding fathers') clearly intended for the High Court to be above the political fray.⁸ In the Conventions of the 1890s, there were numerous statements to this effect, but one of my favourites is that of South Australian delegate Sir John Downer who envisioned the Court as being 'in a calm ether of its own — removed from party strife and political passion'.⁹

Applying Judicial Independence — Extra-Judicial Activity as a Case Study

The theory of judicial independence is one thing though, how it's applied in practice in a society is another. And that's particularly so in Australia with our dual English and American constitutional heritage. So, for instance, despite England's robust history of judicial independence, its apex court was, until recently, a Committee of

¹ Stephen Parker, 'The Independence of the Judiciary' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 62, 68–71.

² *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 10–11; *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 684–5 (Toohey J).

³ See the description of the Court's function on its official website: High Court of Australia, *Role of the High Court* <<http://www.hcourt.gov.au/about/role-of-the-high-court>>.

⁴ *Bank of NSW v Commonwealth* (1948) 76 CLR 1.

⁵ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

⁶ *Commonwealth v Tasmania* (1983) 158 CLR 1.

⁷ *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

⁸ See James Stellios, *The Federal Judicature* (LexisNexis Butterworths, 2010) 69–72; Fiona Wheeler, 'Original Intent and the Doctrine of the Separation of Powers in Australia' (1996) 7 *Public Law Review* 96, 100.

⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 February 1898, 361 (Sir John Downer).

the upper House of Parliament, the House of Lords.¹⁰ And again, until just a few years ago, the English Lord Chancellor was both a judge and Cabinet member.¹¹

Now the fact that Australia has a written federal Constitution has meant that, drawing from America, we've practiced a more rigorous form of separation of powers and judicial independence, at least in the federal sphere, than in England.¹² But precisely where one draws the line — so, *how* isolated *should* our judges be from contact with legislative and executive functions — has always been to some degree contested.¹³

And the more specific question whether judges should engage in extra-judicial activity — by which for present purposes I mean service outside the courtroom as Royal Commissioners, on other executive bodies or, as we'll see, even in diplomatic roles — provides a fascinating case study of these tensions in an area where the *Constitution*, I should say at the outset, does not necessarily provide clear answers.¹⁴

So, what has been the High Court's experience in this regard?

Extra-Judicial Activity and the High Court

Well, the conventional wisdom is that, subject to some well-known exceptions, High Court Justices have generally refrained from the sort of extra-judicial activity I've just mentioned (and that's certainly so today).

¹⁰ See, eg, Aileen Kavanagh, 'From Appellate Committee to United Kingdom Supreme Court: Independence, Activism and Transparency' in James Lee (ed), *From House of Lords to Supreme Court* (Hart Publishing, 2011) 35, 35–6.

¹¹ *Ibid* 36.

¹² See generally Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 3.

¹³ This debate is reflected in, eg, the contrast between the majority and minority opinions in the famous *Boilermakers' Case: R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

¹⁴ For a classical exposition of the competing arguments concerning the engagement of Australian judges in extra-judicial work, see Glenys Fraser (ed), *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals* (Australian Institute of Judicial Administration, 1986). On the limits set by the Australian *Constitution* on such work, see *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 and *Wainohu v New South Wales* (2011) 243 CLR 181.

The well-known exceptions cluster around the extra-judicial service of Justices Sir John Latham and Sir Owen Dixon during the Second World War when they both took leave from the Court to serve as Australia's official diplomatic envoys to Japan and the United States respectively.¹⁵ Latham spent a very difficult year, as you can imagine, in 1941 as our first head of mission in Tokyo — an assignment that came to an abrupt end after the attack on Pearl Harbor in December of that year.¹⁶ And Dixon ran our Washington mission from 1942 to 1944, with all that entailed during those critical years of the war in the Pacific.¹⁷

My lecture title in fact comes from a judgment of Chief Justice French and Justice Kiefel where their Honours suggest that these wartime ventures by Latham and Dixon 'might be regarded as anomalous occurrences in unusual circumstances'.¹⁸ And indeed, in a recent article I argue there is much that was extraordinary about what they did, especially the way in which war so readily broke down the usual barriers between the judiciary and the other arms of government, allowing two of our most senior Justices, without resigning, to accept full-time appointments deep within the executive branch.¹⁹

But to return to my main point, Latham and Dixon's wartime work aside, the orthodox reading of High Court history is that, unlike a number of other Australian courts, its members have generally abstained from extra-judicial work.²⁰ And this is a view of the Court's history that has come from within the Court itself. So, speaking at the Australian Legal Convention in 1955 and in the shadow of the Petrov Royal Commission, then Chief Justice Sir Owen Dixon claimed that the High Court:

¹⁵ Sir John Latham's leave to serve in Japan is noted at 64 CLR iv. Sir Owen Dixon's leave to serve in the United States is noted at 65 CLR iv.

¹⁶ Fiona Wheeler, 'Parachuting In: War and Extra-Judicial Activity by High Court Judges' (2010) 38 *Federal Law Review* 485, 491–5; Zelman Cowen, *Sir John Latham and Other Papers* (Oxford University Press, 1965) 26–7.

¹⁷ See Philip Ayres, *Owen Dixon* (Miegunyah Press, 2003) ch 8.

¹⁸ *Wainohu v New South Wales* (2011) 243 CLR 181, 199 (French CJ and Kiefel J) (footnote omitted).

¹⁹ Wheeler, 'Parachuting In', above n 16, especially 492–4.

²⁰ See, eg, Chief Justice Murray Gleeson, 'The Right to an Independent Judiciary' (2006) 16 *Commonwealth Judicial Journal* 6, 14; Sir Murray McInerney and Garrie Moloney, 'The Case

has always, with only one very trifling exception during the [First World War] ... maintained the position that its judges ought not to be Royal Commissioners.²¹

But Dixon, on this occasion, was mistaken (or, at least, did not express himself clearly). Two Royal Commissions were in fact undertaken by members of the Court during the First World War, one in 1915 and the other in 1918. And when closely looked at, neither, in my opinion, can be described as ‘trifling’ in nature.

So, in the spirit of the second part of my lecture title — ‘towards a history of extra-judicial activity by High Court Justices’ — I’d like to tell the story of these Royal Commissions and some other largely forgotten instances of extra-judicial activity in the Court’s first 40 years. So, while Royal Commissions and inquiries will be my primary focus, I’ll also discuss two other extra-judicial ‘occurrences’:

- First, Sir George Rich’s role as a member of the official Australian delegation to the Third Assembly of the League of Nations in 1922;
- And secondly the appointment in the 1920s of the Chief Justice of the High Court to the National Debt Commission, an executive body in every sense of the word.

And my overarching thesis is that when the Court’s first 40 years are considered — so the period up to the end of the Second World War — there is evidence of a more substantial, though admittedly uneven, history of participation by its members in outside work than is frequently acknowledged.

So, let me begin with Royal Commissions and inquiries.

Royal Commission and Inquiries

Against’ in Glenys Fraser (ed), *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals* (Australian Institute of Judicial Administration, 1986) 3, 32–3.

1 *Rich Royal Commission*

The 1915 Royal Commission was undertaken by someone I've already mentioned — Justice George Rich — appointed to the High Court by the Fisher Labor Government in 1913.²²

The Rich Royal Commission examined the management of a large military training camp at Liverpool, now part of greater Sydney. It was prompted by a speech — what today we'd call a whistleblowing speech — in the House of Representatives by an opposition member, Mr Richard Orchard. Orchard claimed that the camp, to which new recruits were sent for training prior to departure on the troop ships for overseas, was seriously mismanaged. He alleged, among other things, that there were shortages of uniforms and warm clothing for the men, that the huts in which they slept and even their bedding was sub-standard and that the camp's hospitals were poorly run.²³ The Fisher government initially defended the camp.²⁴ But, within a week of Orchard's speech, the Prime Minister told Parliament that Chief Justice Sir Samuel Griffith had been asked 'to appoint a Justice ... to inquire into this matter' which, said the PM, 'strike[s] at the very vitals of our defence system'.²⁵ Rich was appointed Royal Commissioner a few days later. He promptly moved into the camp to see conditions there for himself and begin hearing witnesses.²⁶

It's something of a mystery as to why this Royal Commission has so receded from our collective legal consciousness — from accounts of the Court's history — because it attracted considerable public interest at the time, the newspapers reporting on 'Mr

²¹ J D Holmes, 'Royal Commissions' (1955) 29 *Australian Law Journal* 253, 272 (commentary of Dixon).

²² See generally Simon Sheller, 'Rich, George Edward' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 605.

²³ Commonwealth, *Parliamentary Debates*, House of Representatives, 1 July 1915, 4513–20 (Richard Orchard).

²⁴ Commonwealth, *Parliamentary Debates*, Senate, 7 July 1915, 4598–4600 (George Pearce, Minister of Defence).

²⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 July 1915, 4633 (Andrew Fisher, Prime Minister).

²⁶ Commonwealth, *Report on Liverpool Military Camp, New South Wales*, Parliamentary Papers, General, 1914–1917, vol 2, 281, 283.

Justice Rich's Inquiry' in detail.²⁷ This publicity, however, may ultimately have led the government to rue its decision to respond to the Liverpool Camp controversy in this way. Rich's report, delivered a month after his appointment, was adverse to the government.²⁸ He vindicated nearly all of the opposition's claims, concluding that the Camp subjected the men 'to unnecessary privations and hardships' which were 'not only cruel, but calculated to endanger their lives'.²⁹

Stung by this outcome, some government members sought to undermine Rich's findings in Parliament. The Minister of Defence, Senator George Pearce, implied that Rich had been influenced by 'grumblers'.³⁰ And Senator Albert Gardiner pointedly suggested that 'Mr Justice Rich may have viewed the camp from the stand-point of one who is accustomed to all the comforts of a first-class hotel like Menzies', or the Grand'.³¹

I don't know how Rich responded to this, but even prior to these barbs, it appears that the early High Court Justices harboured reservations about the appropriateness of their participation in government inquiries and may not necessarily have agreed to do so in peacetime. I say this because in July 1915, Rich wrote to fellow High Court Justice Sir Edmund Barton, then in England, to thank him and Lady Barton for their condolences on the death of Rich's son, John, whilst on active service in France. Rich explained in this letter that he was in the midst of an inquiry into the Liverpool Camp and he told his absent colleague:

²⁷ For a sample of coverage in *The Argus* alone, including at least one article title referring to 'Mr Justice Rich's Inquiry' see: Editorial, *The Argus* (Melbourne), 8 July 1915, 8 (government's decision to appoint a High Court Justice to conduct inquiry 'commended'); 'House of Representatives: Liverpool Training Camp, Full Inquiry Promised', *The Argus* (Melbourne), 8 July 1915, 12; 'Liverpool Camp: Royal Commission Appointed', *The Argus* (Melbourne), 13 July 1915, 9 (announcement of Rich as Royal Commissioner); 'Liverpool Camp: Mr Justice Rich's Inquiry, Preliminary Sitting', *The Argus* (Melbourne), 15 July 1915, 7 (opening of the Royal Commission); 'Liverpool Camp: Inquiry by Mr Justice Rich, Lack of Shooting Practice', *The Argus* (Melbourne), 17 July 1915, 18; 'Liverpool Camp: Mr Orchard's Charges, Mr Justice Rich's Interim Report', *The Argus* (Melbourne), 24 July 1915, 15; 'Liverpool Camp: Mr Justice Rich's Report, Mr Orchard's Charges Upheld', *The Argus* (Melbourne), 21 August 1915, 20 (final report); Editorial, *The Argus* (Melbourne), 23 August 1915, 8 (editorial on Rich's report). *Report on Liverpool Military Camp, New South Wales*, above n 26, 281.

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Ibid 292.
Commonwealth, *Parliamentary Debates*, Senate, 31 August 1915, 6337 (George Pearce, Minister of Defence). See also at 6342–9 (Senator Edward Millen).

We had always considered ... Royal Commissions were out of our line so that when ... [Griffith] wired ... I ... remind[ed] him of our resolution. However they all thought there were special circumstances.³²

Rich did not identify what these were, but presumably the members of the Court agreed that the defence ‘vitals’, to which the Prime Minister had referred in Parliament, were sufficient to justify Rich serving as a Royal Commissioner in this instance.

2 Griffith Royal Commission

So, that’s the first Royal Commission conducted by a High Court Justice — not so ‘trifling’, as I said. However, the second Royal Commission undertaken by a member of the Court in this period — by none other than Chief Justice Sir Samuel Griffith himself — concerned an even more combustible topic (at least potentially).

What happened is that in January 1918, Prime Minister and Attorney-General, Billy Hughes, wrote to Griffith requesting that a ‘Senior’ member of the Court be made available, as a matter of urgency, to report on the recruitment levels needed to maintain Australia’s military forces overseas.³³ Now, as anyone who has studied Australian history will know, this was clearly a politically charged and divisive topic — the second conscription referendum had failed only a month earlier.³⁴ And indeed, contemporary newspaper accounts suggest that one purpose of this Royal Commission was to attempt to defuse some of this conflict by providing an

³¹ Ibid 6361 (Albert Gardiner, Vice President of the Executive Council). And see also at 6360–71 (Albert Gardiner).

³² Letter from George Rich to Sir Edmund Barton, 24 July 1915: Sir Edmund Barton Papers, Correspondence 1901–1919, Mitchell Library, MSS 249/4, 197–200 (the quote appears at [198]) (CY Reel 2450). This resolution, or a similar one by members of the High Court, was also alluded to by Griffith in a telegram to Acting Prime Minister Watt on 18 July 1918: Papers of Lord Novar, NLA MS 696/4792.

³³ Letter from W M Hughes to Sir Samuel Griffith, 19 January 1918: Sir Samuel Griffith Papers, Memorandums, Articles and Addresses, 1887–1919, Mitchell Library, MSS 363/8X, 122–3 (the quote appears at [122]) (CY Reel 3070).

³⁴ L F Fitzhardinge, *The Little Digger 1914–1952: William Morris Hughes, A Political Biography* (Angus & Robertson, 1979) 283–97.

assessment of Australia's recruiting needs, in the words of the Director-General of Recruiting, 'free from real or supposed political bias'.³⁵

After conferring with fellow High Court Justice, Sir Edmund Barton,³⁶ Griffith was appointed Royal Commissioner on 6 March 1918.³⁷ While Hughes' original letter had described the inquiry as involving 'a matter of great public importance',³⁸ the terms of reference provided to Griffith were remarkably narrow. He was essentially asked to specify an enlistment level that would keep Australian forces at their existing capacity,³⁹ an issue he approached like a mathematical problem.⁴⁰ Indeed, he completed his three-page report a week after his appointment.⁴¹ It recorded the existing size of the AIF, likely future losses of men, the numbers required to replace them, and so on. Griffith's conclusion was that 5,400 new recruits were needed each month, but also that an additional 34,000 men were required in case of sudden 'heavy losses'.⁴² Once the report was made public, it's notable that Hughes was quick to claim that it vindicated his recent referendum stance that 7,000 new recruits per month were needed.⁴³

³⁵ 'A Recruiting Conference, Government's Scheme Discussed, Address by Senator Pearce', *The Brisbane Courier* (Brisbane), 21 March 1918, 7 (these words attributed to Donald Mackinnon, Commonwealth Director-General of Recruiting); 'Men for the War, Recruiting Conference, Many Points Considered, Views of Minister and Director', *The Argus* (Melbourne), 21 March 1918, 7. See also Editorial, *The Argus* (Melbourne), 22 March 1918, 8 observing of Griffith's report that '[c]ontroversy as to the number of recruits required to reinforce Australians at the front has been set at rest'; Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1918, 5031 (William Watt, Acting Prime Minister and Treasurer); Ernest Scott, *Australia During the War* (Angus & Robertson, 1936) 443–5.

³⁶ Letter from Sir Samuel Griffith to W M Hughes, 31 January 1918: Papers of W M Hughes, NLA MS 1538/16/68, 68.

³⁷ Scott Prasser, *Royal Commissions and Public Inquiries in Australia* (LexisNexis Butterworths, 2006) 258.

³⁸ Letter from W M Hughes to Sir Samuel Griffith, 19 January 1918: Sir Samuel Griffith Papers, Memorandums, Articles and Addresses, 1887–1919, Mitchell Library, MSS 363/8X, 122–3 (the quote appears at [122]) (CY Reel 3070).

³⁹ Commonwealth, *The War, Australian Imperial Force, Report by the Royal Commission*, Parliamentary Papers, General, 1917–1919, vol 4, 647, 648.

⁴⁰ The Commission did not hear from witnesses, Griffith drawing his information from defence records as seems to have been required by his terms of reference: *ibid* 648.

⁴¹ *Ibid* 650.

⁴² *Ibid* 650.

⁴³ 'Prime Minister's Comments, Deficiency Exceeds 30,000', *The Argus* (Melbourne), 22 March 1918, 7; 'AIF Reinforcements, Accumulated Deficiency of 30,000, Monthly Requirement, 5400, Sir Samuel Griffith's Report', *The Brisbane Courier* (Brisbane), 22 March 1918, 7; Roger Joyce, *Samuel Walker Griffith* (University of Queensland Press, 1984) 354.

Reflecting on this through modern eyes, it's hard — I think — to escape the impression that the Griffith inquiry was established by Hughes, as authors McInerney and Moloney have suggested, 'to obtain, from a distinguished Judge, a desired answer to a political problem'.⁴⁴ Yet, looking at the newspapers of the time, Griffith's work attracted limited public attention compared to the Rich Royal Commission and the evident risks for the Court in undertaking this second inquiry did not come to pass.⁴⁵ According to Griffith's biographer, Roger Joyce, the Chief Justice's report had a minimal impact on the issues it addressed.⁴⁶

3 *Royal Commissions Refused*

So, that's the two Royal Commissions conducted by High Court Justices during the Great War. By contrast, after the war — and that's where I want to turn my attention now — the Court became increasingly sensitive to the risks posed by extra-judicial activity to the 'calm ether' that Sir John Downer had described. Of maybe, it's fair to say, it reverted to its original position on Royal Commissions referred to by Rich in his 1915 letter.

Either way, after the war — with the two wartime precedents presumably in mind — the Commonwealth government persistently asked the Court to provide Royal Commissioners from within its ranks. To this point, I've been able to ascertain that, between the wars, the Court was approached in relation to no less than six separate Royal Commissions, possibly more.⁴⁷ But each time, the Court said 'no'.

⁴⁴ McInerney and Moloney, above n 20, 32.

⁴⁵ Though the press reported Griffith's appointment as Royal Commissioner and his findings: see, eg, 'Men for the War: Commission of Inquiry, Sir Samuel Griffith Appointed', *The Argus* (Melbourne), 7 March 1918, 7 (noting this inquiry was 'part of the Ministry's recruiting scheme'); 'Men for the War: Reinforcements, Monthly Quota Required, Chief Justice says 5,400', *The Argus* (Melbourne), 22 March 1918, 7; Editorial, *The Argus* (Melbourne), 22 March 1918, 8; 'Reinforcements: Number Required, Duties of the Commission', *The Sydney Morning Herald* (Sydney), 7 March 1918, 7; '27,000 Men Short: Reinforcements, Commissioner's Report', *The Sydney Morning Herald* (Sydney), 22 March 1918, 6; 'The New Recruiting Scheme, Ascertaining Numbers Required', *The Brisbane Courier* (Brisbane), 7 March 1918, 8; 'AIF Reinforcements, Accumulated Deficiency of 30,000, Monthly Requirement, 5400, Sir Samuel Griffith's Report', *The Brisbane Courier* (Brisbane), 22 March 1918, 7.

⁴⁶ Joyce, above n 43, 354.

⁴⁷ See J M Bennett, *Keystone of the Federal Arch* (Australian Government Publishing Service, 1980) 44–5; Graham Fricke, 'The Knox Court: Exposition Unnecessary' (1999) 27 *Federal Law Review* 121, 127–8; Ayres, above n 17, 62–3, 70; Letter from R G Casey to Sir John Latham, 14

This shift to the High Court's contemporary position that, in Dixon's words, 'its judges ought not to be Royal Commissioners',⁴⁸ is generally attributed to Chief Justice Sir Adrian Knox who succeeded Griffith after the war in 1919.⁴⁹ However, the break between the two periods was not necessarily abrupt. In July 1918, while Griffith remained Chief Justice and hostilities in Europe continued, a meeting of the Justices rejected a request from the Hughes Government for a Justice to inquire into the internment by the Minister of Defence of a group of alleged Sinn Fein members.⁵⁰ Griffith had originally agreed to make himself or Justice Powers available for the inquiry,⁵¹ but subsequently recanted, concerned, among other things, that the task might — as Griffith's views were recorded at the time — 'associate the High Court with political action'.⁵²

But back to the Knox Court. What is of particular interest is that its refusal to undertake Royal Commissions was resisted by the Commonwealth government, at times stridently so.⁵³ In this regard, an exchange that occurred in 1928 between then Commonwealth Attorney-General John Latham — who, in 1935, would himself become High Court Chief Justice — and Sir Adrian Knox is especially revealing. Latham wrote to Knox specifically to object to the Chief Justice's decision not to chair a Royal Commission into claims of attempted bribery of certain members of the

June 1938: Papers of Sir John Latham, NLA MS 1009/1/5205. A possible additional approach relates to the Royal Commission on the *Constitution*, established in 1927: Graham Fricke, 'Knox Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 403, 406.

⁴⁸ Holmes, above n 21, 272 (commentary of Dixon). This position was affirmed in 2006 by Chief Justice Gleeson: Gleeson, above n 20, 14.

⁴⁹ See, eg, Holmes, above n 21, 272 (commentary of Dixon); Bennett, above n 47, 44–5; Gleeson, above n 20, 14.

⁵⁰ Telegram (copy) from Sir Edmund Barton to Sir Samuel Griffith, 29 July 1918: Papers of Lord Novar, NLA MS 696/4798. In relation to these events, see generally Joyce, above n 43, 354–5; Don Markwell, 'Griffith, Barton and the Early Governor-Generals: Aspects of Australia's Constitutional Development' (1999) 10 *Public Law Review* 280, 290.

⁵¹ Telegram (copy) from Acting Prime Minister Watt to Sir Samuel Griffith, 2 July 1918: Papers of Lord Novar, NLA MS 696/4780; Telegram (copy) from Sir Samuel Griffith to Acting Prime Minister Watt, 3 July 1918: Papers of Lord Novar, NLA MS 696/4781.

⁵² Letter (copy) Lord Novar to Secretary of State for the Colonies, 29 August 1918: Papers of Lord Novar, NLA MS 696/4770, 4772 (Lord Novar, the then Governor-General, reporting Griffith's views).

⁵³ See Bennett, above n 47, 43–5.

House of Representatives.⁵⁴ In this didactic letter,⁵⁵ Latham claimed that it was in the ‘public interest’ that judges conduct Royal Commissions — though admittedly in ‘rare cases’ — because, he said, of the judiciary’s ‘unrivalled reputation for competence, impartiality and fearlessness’.⁵⁶ These special cases, Latham told Knox, involved issues ‘much more important than those which arise merely between individual litigants’.⁵⁷

By contrast, Knox’s reasons for rejecting this particular request show that the Court saw the public interest quite differently. In his letter to the government, Knox described the proposed Royal Commission as ‘necessarily and inextricably connected with politics — and the seamy side of politics at that’⁵⁸ and he went on expressly to adopt the ‘Irvine Memorandum’ of 1923.⁵⁹ And I should interpolate that the Irvine Memorandum is well-known to those who study judicial independence in Australia. In it the Chief Justice of the Supreme Court of Victoria, Sir William Irvine, stated that his Court’s judges should not serve on Royal Commissions.⁶⁰ This was because public confidence in the judiciary flowed from the circumstance that judges had traditionally ‘confined themselves’, said Irvine, to judicial work and thereby avoided ‘political controversy’.⁶¹

Now, while Attorney-General Latham was not persuaded by these arguments in 1928, it’s notable that when he became Chief Justice in 1935, he declined still further government requests to supply an inquiry head from within the Court. And the

⁵⁴ As to this Royal Commission, see Commonwealth, *Parliamentary Debates*, House of Representatives, 15 May 1928, 4826 (Prime Minister Bruce announcing the government’s intention ‘to invite the Chief Justice of the High Court, Sir Adrian Knox, to investigate the allegations immediately’).

⁵⁵ The letter, dated 22 May 1928, is reproduced in Newman Rosenthal, *Sir Charles Lowe* (Robertson and Mullens, 1968) 92–4 and is discussed in George Winterton, ‘Judges as Royal Commissioners’ (1987) 10 *University of New South Wales Law Journal* 108, 114–5 (Winterton describing the tone of Latham’s letter as ‘remarkably forceful, impatient, [and] almost angry’: at 114).

⁵⁶ Letter from John Latham to Sir Adrian Knox, 22 May 1928 reproduced in Rosenthal, above n 55, 92–3.

⁵⁷ *Ibid.* 92.

⁵⁸ Letter (copy) (‘Private & Personal’) from Sir Adrian Knox to Prime Minister S M Bruce, 17 May 1928: High Court of Australia (copy on file with author).

⁵⁹ *Ibid.* See also Letter from John Latham to Sir Adrian Knox, 22 May 1928 reproduced in Rosenthal, above n 55, 92–4.

⁶⁰ Rosenthal, above n 55, 89–90 (setting out the Irvine memorandum).

Latham Papers — held just across the way in the National Library — contain some fascinating glimpses into this.⁶²

4 *McTiernan Inquiry*

Now, it's sometimes thought that the Knox Court marked the end of High Court participation in Royal Commissions and inquiries,⁶³ but that's not actually the case. So, going back to Dixon's 1955 claim that the Court had only conducted one Royal Commission, not only was Dixon in error here, but he failed to take account of a secretive executive inquiry — albeit not strictly a Royal Commission — undertaken by Justice Edward McTiernan during the Second World War.

I won't go into the details of this inquiry here — I've traversed it to some extent already in a recent article⁶⁴ — but essentially in early 1943, McTiernan was appointed by Attorney-General Evatt to report on claims of fraudulent behaviour at the Aircraft Production Commission Testing Laboratory in Sydney that had potentially — and this was the fear — compromised the structural integrity of the Beaufort Bombers.⁶⁵ The matter was so sensitive that censorship bans were placed on reporting of the inquiry⁶⁶ and, as far as I've been able to ascertain, McTiernan's lengthy report has never seen the light of day,⁶⁷ though a summary, prepared for

⁶¹ Ibid 90 (Irvine memorandum).

⁶² See, eg, Letter from R G Casey to Sir John Latham, 14 June 1938: Papers of Sir John Latham, NLA MS 1009/1/5205 (Federal Treasurer, Richard Casey, sounding out the Chief Justice over High Court participation in a Royal Commission into medical services payments under a national insurance plan). See also Holmes, above n 21, 268 where Latham notes that, as Chief Justice, he declined to preside over a Royal Commission into claims against a Commonwealth MP.

⁶³ See, eg, Holmes, above n 21, 272 (commentary of Dixon).

⁶⁴ Wheeler, 'Parachuting In', above n 16, 486 and 494.

⁶⁵ NAA: SP109/3, 301/16 (Airservices and Aircraft. Inquiry Conducted by Hon Justice McTiernan into Alleged Falsification of Records in Connection with Aircraft Production). This file includes, among other things, a copy of McTiernan's instrument of appointment dated 24 February 1943, a letter from F G Shedden, Secretary, Department of Defence to E G Bonney, Chief Publicity Censor, 3 March 1943, describing the nature of the inquiry and a letter from Prime Minister Curtin's Press Secretary to the Censor, 3 March 1943, outlining the government's concerns about possible structural flaws in aircraft.

⁶⁶ Ibid (letter from E G Bonney, Chief Publicity Censor to F G Shedden, Secretary, Department of Defence, 4 March 1943).

⁶⁷ Justice Michael Kirby, 'Sir Edward McTiernan — A Centenary Reflection' (1991) 20 *Federal Law Review* 165, 177–8.

Cabinet, is in the National Archives.⁶⁸ The only other trace I can find in the public sphere is a note in volume 66 of the *Commonwealth Law Reports* recording that the inquiry ran from 1 March to 10 July 1943.⁶⁹

5 Conclusions: Royal Commissions and Executive Inquiries

Pausing then, what can we say about this trio of inquiries by High Court Justices — Rich, Griffith and McTiernan? Each drew a Justice into executive service and each, at the same time, demonstrated a risk of that service. In Rich’s case, he became the subject of political sniping, though not, it seems, in a sustained or ultimately damaging way. In Griffith’s case, the indications are — at least to modern eyes — that the government may have sought to use his independence for political ends. Of McTiernan, secrecy makes the circumstances of his inquiry difficult to assess, but that, in itself, emphasises its antipathy to ordinary judicial work.⁷⁰

What binds these inquiries together, of course, is that they were all conducted in wartime, a circumstance that, as I mentioned earlier, has traditionally weakened, in the national interest, the ordinary requirements of judicial independence and separation of powers (though whether rightly so is another question).⁷¹ This then highlights the Knox Court’s decision, between the wars, *not* to become involved in Royal Commissions. Yet, that decision was not, as it’s sometimes portrayed, a blanket ban on peacetime extra-judicial work, which takes me to my two final, and again largely forgotten, happenings in High Court history.

Justice George Rich’s Trip to the League of Nations

The first being Justice George Rich’s trip to the League of Nations.

⁶⁸ NAA: A2700, 939 (‘Summary of the Report and Findings of Mr Justice McTiernan as to the Affairs of the Pymont Laboratory’). The summary in this file indicates that McTiernan’s report exceeded 70 pages in length.

⁶⁹ 66 CLR iv.

⁷⁰ Wheeler, ‘Parachuting In’, above n 16, 494.

⁷¹ As former Chief Justice Gleeson has observed of extra-judicial service by members of the High Court, ‘[w]ar seems to create special cases’: Gleeson, above n 20, 14.

In 1922, Rich became the first High Court Justice to serve in a diplomatic-type role when, at the invitation of Prime Minister Hughes,⁷² he travelled to Geneva as a member of the official Australian delegation to the Third Assembly of the League of Nations. The Assembly's agenda was wide-ranging and Rich represented Australia on two committees: the first examining 'Legal and Constitutional Questions', and the second 'Political Questions', including the controversial topics of 'Protection of Minorities' and 'Mandates'.⁷³

Trying to piece together from this distance what Rich did in Geneva is not easy, but there's no reason to suppose that his role there was insubstantial or purely formal in nature. Indeed, the delegation head, High Commissioner to London and ex-Prime Minister, Sir Joseph Cook, wrote to Prime Minister Hughes after the Assembly that 'Mr Justice Rich's legal knowledge and experience were most valuable in dealing with the numerous legal points that cropped up from time to time'.⁷⁴ And the delegation's official report seems to indicate that Rich was — as one would expect — an advocate at the Assembly for the Australian government's policy position, notably in relation to our management of the mandated territory of Nauru.⁷⁵

It seems Rich enjoyed this work. On his return to Australia, he wrote warmly to Hughes that 'Geneva was very interesting. I am glad you asked me'.⁷⁶ He referred to his 'report', written in London, and gave a brief account of a speaking tour of the United States where, said Rich, 'I did some propaganda'.⁷⁷ Hughes must have known what this was because Rich did not give details. But other sources make it clear that Rich used his speeches in the United States — he travelled to New York, Buffalo and

⁷² Letter ('Personal') from George Rich to W M Hughes, 21 December 1922: Papers of W M Hughes, NLA MS 1538/1/168, 168.

⁷³ *Report, Third Assembly of the League of Nations, September 4th – September 30th 1922*: Papers of W M Hughes, NLA MS 1538/16/3456, 3462–5.

⁷⁴ Letter from Sir Joseph Cook to W M Hughes, 9 November 1922 in *Report, Third Assembly of the League of Nations, September 4th – September 30th 1922*: Papers of W M Hughes, NLA MS 1538/16/3456, 3458.

⁷⁵ *Report, Third Assembly of the League of Nations, September 4th – September 30th 1922*: Papers of W M Hughes, NLA MS 1538/16/3456, 3523, 3527.

⁷⁶ Letter ('Personal') from George Rich to W M Hughes, 21 December 1922: Papers of W M Hughes, NLA MS 1538/1/168, 168.

⁷⁷ *Ibid* 168.

Chicago — to promote the League and its work,⁷⁸ something he also did publicly in Australia.⁷⁹ A set of speaking notes in the Mitchell Library in Sydney indicate that he regarded the failure of the United States to join the League as ‘deplorable’.⁸⁰

So, that’s the first extra-judicial venture by a High Court Justice between the wars.

Sir Adrian Knox and the National Debt Commission

The second is something of a paradox: the decision in 1923 of Chief Justice Knox — the same Knox who fended off Royal Commissions — to agree to become a statutory member of the National Debt Commission sitting alongside the federal Treasurer and other executive officials.⁸¹ The Commission was established in that year by Act of Parliament to manage the sinking fund for repayment of Commonwealth debt — as Earle Page said in his second reading speech, ‘independently of the Treasurer’⁸² — and, in that way, to promote confidence in Commonwealth finances.⁸³

Knox seems to have regarded this role as Debt Commissioner as compatible with his position on the Court since parliamentarians were informed of his agreement to serve as the Bill made its way through Parliament.⁸⁴ However, in debate on the Bill, the designation of the Chief Justice as a Commissioner was criticised by some MPs including none other than then Liberal Union member for Kooyong, John Latham.⁸⁵

⁷⁸ See, eg, ‘League of Nations, Instrument for Securing Peace, Mr Justice Rich’s Views’, *The Sydney Morning Herald* (Sydney), 18 December 1922, 8; ‘League of Nations, Real World Force, Australian Delegate’s Return, English-Speaking Union’, *The Sydney Morning Herald* (Sydney), 21 December 1922, 8; notes for a speech, ‘The Work of the Third Assembly of the League of Nations’, delivered by Rich in Australia some time in 1923: Sir George Rich Papers 1915–1948, Mitchell Library, MSS 7383 (Rich refers to his trip to the United States at p 14 of this item).

⁷⁹ See ‘Value of League of Nations, Mr Justice Rich Reviews its Work’, *The Argus* (Melbourne), 17 March 1923, 25.

⁸⁰ Sir George Rich (speech notes), ‘The Work of the Third Assembly of the League of Nations’, 1923: Sir George Rich Papers 1915–1948, Mitchell Library, MSS 7383 (p 12 of this item).

⁸¹ See *National Debt Sinking Fund Act 1923* (Cth), s 6 which designated the Chief Justice of the High Court one of five ex officio members of the National Debt Commission.

⁸² Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 1923, 487 (second reading speech, Dr Earle Page, Treasurer).

⁸³ Ibid 487–90.

⁸⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 July 1923, 583, 585 (Littleton Groom, Attorney-General).

⁸⁵ Latham did not become a Nationalist Party member until 1925: see Stuart Macintyre, ‘Latham, Sir John Greig (1877–1964)’ in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1986) vol 10, 2, 3.

Latham was so opposed to the measure that he joined with Labor in voting against it at Committee stage,⁸⁶ arguing that Parliament ‘should jealously guard against the utilization of the services of members of the Judiciary for other than strictly judicial work’.⁸⁷ Latham and the other critics were in the minority, however, the government intimating to Parliament that the Chief Justice had been placed on the Commission to help ensure it would ‘command respect’ and ‘be impartial’.⁸⁸

Now, as a result of the *National Debt Sinking Fund Act*, successive Chief Justices of the High Court served quietly, and, I must say, without apparent controversy,⁸⁹ on the Commission for over half a century — including, in due course, Sir John Latham. And it was not until 1989, at the request of Sir Anthony Mason,⁹⁰ that legislation was passed to remove the Chief Justice from Commission membership.⁹¹

Reflections and Review

So, let me endeavour to draw some of this together, before concluding. Where do these largely forgotten narratives take us? There is a great deal I could say, but I’ll confine myself to four observations.

1. First, as flagged earlier, my argument is that looking at these formative decades in the Court’s history, its members did more extra-judicial work, of more significance, than is commonly recognised. The astute listener will realise that I’ve confined my attention on this occasion to formal extra-judicial assignments and left informal, largely private, activities — such as the executive advising done by Justices Griffith,

⁸⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 July 1923, 588.

⁸⁷ Ibid 583 (John Latham). He also questioned whether the Chief Justice had time to undertake this task (at 583). For other criticisms by MPs of the measure see, eg, the views of the Leader of the Opposition, Matthew Charlton: ibid 582–3.

⁸⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 1923, 488 (second reading speech, Dr Earle Page, Treasurer). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 3 July 1923, 584–5 (Littleton Groom, Attorney-General); 3 July 1923, 586–7 (Dr Earle Page, Treasurer).

⁸⁹ Though as early as 1961, Professor Geoffrey Sawer suggested that the Chief Justice’s appointment to the Commission might be unconstitutional given its ex officio, as opposed to voluntary, nature: Geoffrey Sawer, ‘The Separation of Powers in Australian Federalism’ (1961) 35 *Australian Law Journal* 177, 182.

⁹⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 May 1989, 2824 (Peter Morris, Minister for Industrial Relations and Minister Assisting the Treasurer delivering the second reading speech on the National Debt Sinking Fund Amendment Bill 1989 (Cth)).

⁹¹ *National Debt Sinking Fund Amendment Act 1989* (Cth).

Barton, Latham and Dixon⁹² — to one side. That’s another lecture, but of course it adds to the overall quantum of off-court work.

2. Secondly, these accounts expose the early Court’s efforts to grapple with the normative standards governing the release — or not, as the case may be — of its members for outside work. The relevant touchstone then was the same as now: the need to preserve the Court’s reputation for impartiality⁹³ — its place in the ‘calm ether’ above ‘party strife’.⁹⁴

The challenge though for the early Court in making this assessment was its novel role as guardian of the federal *Constitution* which arguably required it to exhibit a higher degree of autonomy from the other branches of government than colonial and state courts of the period.⁹⁵ Interestingly, the Court’s initial (and later) position on Royal Commissions seems to have recognised this. As Rich wrote to Barton in 1915, the Court had determined not to undertake such inquiries, though it seems that the imperative of war persuaded he and his colleagues to bend their self-imposed rule.⁹⁶

3. Which takes me to my third observation that war emerges here as the factor most commonly associated with the performance by members of the Court of outside tasks.⁹⁷ This might suggest that the Court’s overall tradition of extra-judicial service in the period under consideration was, in fact, one of restraint. However, in my opinion, to say that risks isolating the executive functions performed by Justices in

⁹² On Griffith and Barton’s advisory work while High Court Justices, see, eg, Markwell, above n 50. On Latham and Dixon’s advisory work, see Wheeler, ‘Parachuting In’, above n 16, 490–1 (including the references given there).

⁹³ As Professor George Winterton put it: ‘The principal objection to the employment of judges for extra-judicial duties is that it can endanger public confidence in the independence, impartiality and competence of the judiciary’: above n 55, 120 (footnote omitted). This is essentially the same concern that led Sir Samuel Griffith in 1918 to withdraw his offer of a Justice for the Sinn Fein Internment Inquiry, Griffith fearing the inquiry might ‘associate the High Court with political action’: see above text accompanying n 52.

⁹⁴ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 February 1898, 361 (Sir John Downer).

⁹⁵ See, eg, Jeremy Webber, ‘Supreme Courts, Independence and Democratic Agency’ (2004) 24 *Legal Studies* 55, 68–70; McInerney and Moloney, above n 20, 33; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 46 (Kirby J).

⁹⁶ See above text accompanying n 32 and following sentence.

⁹⁷ Gleeson has made a similar point: above n 20, 14. See generally Wheeler, ‘Parachuting In’, above n 16.

wartime from wider analysis of the propriety of the Court's involvement in off-court work. I believe there are very real questions about whether war can justify members of the Court becoming an embedded part of the executive — as Latham and Dixon did as diplomats during the Second World War⁹⁸ — or engaging in largely secret extra-judicial activities, like the McTiernan inquiry.⁹⁹ The Rich and Griffith Royal Commissions, by contrast, as independent inquiries open to public scrutiny,¹⁰⁰ were far more compatible with judicial office than these later ventures, though participation in each posed risks for the Court that, as we've seen, may have only narrowly been averted.

4. My final observation then is to connect the past with the present. The modern Court does not engage in the sort of extra-judicial functions of which I've spoken today.¹⁰¹ It does not do so in peacetime, and, I hazard to predict, would be unlikely to do so in war. The explanation for this shift towards placing a greater distance between the Court and the executive is multi-faceted and I wouldn't presume to essay a detailed account of the Court's reasoning here.¹⁰² As I said, the touchstone of safeguarding the Court's independence and impartiality (its integrity) has remained constant over time — what has changed though, in many respects quite dramatically, is the environment in which the Court operates.

And let me take just one illustration of this. The world in which Justice George Rich went to the League of Nations on behalf of the Commonwealth government is a very different one from today where global economic and political systems are highly

⁹⁸ Wheeler, 'Parachuting In', above n 16, 493.

⁹⁹ I have explored these questions in detail elsewhere: *ibid* 496–502.

¹⁰⁰ There is nothing to suggest that the McTiernan inquiry was not conducted in an independent fashion, but the censorship surrounding it does not allow this to be seen to be so. By contrast, as diplomats, Latham and Dixon were subject to governmental command: see, eg, as to Latham, *ibid* 493–4.

¹⁰¹ McInerney and Moloney, above n 20, 32–3; Gleeson, above n 20, 14. See also Chief Justice Robert French, 'The Chief Justice and the Governor-General' (2009) 33 *Melbourne University Law Review* 647, 654–6 and the discussion in *Wainohu v New South Wales* (2011) 243 CLR 181, 198–200 (French CJ and Kiefel J).

¹⁰² For a discussion of this issue in the context of the federal judiciary as a whole see, eg, Fiona Wheeler, 'Federal Judges as Holders of Non-Judicial Office' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 442, 449–50, 466–7.

integrated and Australia is a considerably more pluralistic and multicultural society. What may have seemed apolitical and remote from local controversy in 1922 would not, I believe, be so regarded today. The same can be said of placing a member of the Court today on a body like the National Debt Commission, though even in 1923 I still don't fully understand the circumstances in which Knox agreed to serve on this body but yet so vigorously fended off Royal Commissions.

There is still much to learn, but hopefully I've taken you this evening closer towards a history of extra-judicial activity by the Court's Justices.

Thank you.