KITTO AND THE HIGH COURT OF AUSTRALIA*

*The Hon Justice Michael Kirby AC CMG***

Judicial biographies in Australia are rare.[1] Even famous judges, who have led interesting and varied lives, pass without a proper record of their decisions and intellectual and personal struggles. So it is with the Right Honourable Sir Frank Kitto AC KBE, Justice of the High Court of Australia from 1950 to 1970. He settled in the Armidale District after the conclusion of his service on the High Court. He served as the Chancellor of the University of New England from 1970 until 1981. With his wife Eleanor he devoted his time (apart from working a small grazing property), as he put it, to "a mass of reading that I had had to put aside through the years of my professional life".[2] He described this reading as ranging over subjects "from history and biography ... and philosophy to fiction, both light and classical".[3] He even spoke of the enjoyment of selected programmes on television. One suspects that his viewing was probably connected with his duties in late years as foundation Chairman of the Australian Press Council rather than a quest for enlightenment—generally elusive on the small screen.

Sir Frank Kitto died on 15 February 1994.[4] He wrote, in an oft-quoted essay:

> We must look straight in the face the fact that in spite of all our care and all our toil our judgments are not likely to make our names in history. If we are read by posterity at all it will be only by the posterity of the near future. The reward of judicial work is not, except for the great, any degree of lasting fame; and you will agree, I am sure, that it ought not to be even a question in the judge's mind as he laboriously does his job.[5]

Clearly, Kitto thought that this was the fate of all judges: even of his great and much admired Chief Justice, Sir Owen Dixon. Recording "some recollections of Sir Owen Dixon"[6] in 1986, he said:

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* This is an expanded and revised version of the Sir Frank Kitto lecture given by the author at the University of New England, Armidale, New South Wales, on 22 May 1998.

** Justice of the High Court of Australia.

1 There are two recent biographical books on Justice Lionel Murphy: J Hocking, *Lionel Murphy—A Political Biography* (1997) reviewed (1998) 72 *ALJ* 162 and M Coper and G Williams, *Justice Lionel Murphy—Influential or Merely Prescient?* (1997). See also Chief Justice Barwick's autobiographical work *A Radical Tory* (1995) and D Marr, *Barwick* (1980).

2 Quoted in Australian Press Council, *News* August 1993 at 8.

3 Ibid.

4 See R P Meagher's obituary of Sir Frank Walters Kitto AC, KBE, "Champion of Justice, Knowledge" *Australian*, 18 February 1994 at 13.

5 F W Kitto, "Why Write Judgments?" (1992) 66 *ALJ* 787 at 799.

6 (1986) 15 *MULR* 577 at 578.

> We can hardly expect that his fame, great among lawyers though I believe it will always be, will continue to be widely celebrated by generations of Australians who did not know him for the mighty man that he was.[7]

With these thoughts in mind, and acknowledging the transience of fame, it is inevitable that later generations of lawyers will not have known Sir Frank Kitto nor read, as often perhaps as they should, his opinions written in the High Court. It is therefore prudent to reflect on his life and to record something of his story.

FRANK KITTO: LAWYER AND JUDGE

Frank Kitto was born in Melbourne on 30 July 1903. His paternal grandfather was a Cornishman, said to have been from a family of miners of tin and antimony.[8] His grandfather came to the goldfields in Australia seeking his fortune. He arrived in Ballarat, Victoria in the 1860s. Although he found no gold, he became a mine manager and established a life for himself and his family in Ballarat where Frank Kitto's father was born.[9]

The father began his working life as a telegraph messenger boy. He studied accountancy at night school and remained in the postal service throughout his life. For a time, he served as Deputy Postmaster General in South Australia and later New South Wales. At the end of his career he was appointed a member of the Australian Broadcasting Commission and honoured by appointment as an Officer of the Order the British Empire. His wife, Kitto's mother, Adi Lillian, was the daughter of a Methodist minister, Rev Jesse Carey. The couple had five sons and a daughter. Frank Kitto was the eldest child. He was about ten years of age when the family moved to Sydney.[10]

The young Kitto grew up in a strict Methodist household. His father was a lay preacher. It was only towards the end of his life that Frank Kitto was to throw off his links with the Methodist Church. He did not follow it into the Uniting Church, having become disenchanted with the institutional churches.[11] Instead, towards the end of his life, he explored the beliefs of the Quakers. He was reportedly impressed by the absence of dogmatic insistence on doctrinal imperatives. In Armidale, before his death, he often attended Quaker meetings and was greatly taken by the atmosphere of silent reverence in the presence of God.[12] There are ironies in these reports, for in his life in the law Kitto searched for imperatives. Although he was quiet and serious in personal dealings, in court he could often be extremely direct, even sharp and cutting.

Frank Kitto attended the Mosman Primary School. Later he went to North Sydney Boys' High School to which he rode his bicycle along a dirt road, now Military Road.[13] He did not excel in sport and reportedly found mathematics and science difficult. But

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7 Ibid.

8 Monograph by M Connor, *The Right Honourable Sir Frank Kitto*, unpublished, (1994). Mrs Connor is the second daughter of Sir Frank and Lady Kitto and was Justice Kitto's Associate in the High Court for nine years following his appointment to the High Court. Her monograph is deposited in the Library of the High Court.

9 Ibid at 1.

10 Ibid.

11 Ibid at 23.

12 Ibid.

13 Ibid at 2.

he bent his mind to overcome the difficulties. He must have done well in the Leaving Certificate because he won an Exhibition to the University of Sydney which exempted him from fees.[14]

During Frank Kitto's university days he would attend lectures in the unprepossessing city buildings which housed the Sydney Law School in Phillip Street, heartland of the legal profession of New South Wales. At night he travelled by tram to Circular Quay on Sydney Harbour and thence by ferry to Mosman on the North Shore. He would ascend the steep hill to Mosman Junction where his parents' home was found. In 1922, the family moved to Adelaide to follow the father's career. Frank Kitto remained in Sydney, boarding with a family in Mosman for three years.[15]

Whilst completing his studies at the University of Sydney in arts and law, Kitto worked during the day at the New South Wales Crown Solicitor's Office. Part-time work did not prevent him from acquiring his law degree with first class honours. Thus prepared, he was admitted to the Bar of New South Wales in 1927. He embarked upon a legal practice which took him mainly into equity with, in due course, a large number of taxation cases and some constitutional work. The year after his admission to the Bar, at the age of 25, he wrote the first published contribution which I could find expressing a legal opinion. It was an article "Are Mortgage Debts Immovables?" published in the *Australian Law Journal*.[16] The article reveals a deep interest in, and fascination for, land law which, from the start, has always been at the core of the English legal system from which the foundations of Australia's law are derived. The writing style of the young Kitto was unmistakable for those who, as lawyers and students, came to know his opinions in the High Court. It was brief and self-confident—with a sweep of English cases and a passing glance at decisions in New Zealand and Canada.[17] There is even a mention of "the public policy of the *Mortmain Acts*",[18] although he was not to become much enamoured of needless examination of legal policy. In the trinity of legal authority, principle and policy, authority reigned for Kitto. Policy, if ever mentioned, came a poor third—as elusive and unfamiliar as the Holy Ghost to many Christians, including in the end even Kitto himself.

Some might regard the subject of this first essay as dry as dust. But Kitto knew, even at the age of 25, that land law was the fulcrum of the law of any civilised country. Mastering it, and its intricacies, was essential for the arduous technical work which is the lot of a leading lawyer. Those who would rise high in the law must train and discipline their minds. They must command its black letters whilst at the same time understanding its wellsprings: its history, its authority and its broad directions.

In 1929 Kitto collaborated with JH Hammond KC on the third edition of Hammond and Davidson's *Law of Landlord and Tenant in New South Wales*. In 1932, his own *Summary Digest of Statute Law Cases (New South Wales) 1825-1931* was published by Butterworths. These undertakings demonstrated his capacity for painstaking work, his insistence on accuracy and his love of clear prose.[19] When Justice WAN Wells of the

14 Ibid at 3.
15 Ibid.
16 (1928) 2 *ALJ* 85.
17 He referred to *Re O'Neill* [1922] NZLR 468 and called Salmond J's judgment "characteristically lucid".
18 (1928) 2 *ALJ* 85 at 87.
19 M Connor, above n 8 at 4.

Supreme Court of South Australia retired in 1984, he paid a handsome tribute to Kitto and his writing skills:

> I regard Sir Frank Kitto as one of the great judges, possibly the greatest judge, that we have produced in Australia—certainly this century. There may have been other judges who are able to pass him in point of scholarship—although I think you would have to look far and wide to find them—but what marked him out was his extraordinary intellectual integrity, and the way in which his judgments demonstrated a structure of logic that was unique. There is an inevitability about his judgments such as one expects to find in a Bach fugue. The man himself—his character—was to be seen in his writing, which always displayed four qualities—simplicity, precision, economy and where you could apply it, grace. It is always, I suppose, a little hard to be graceful about the income tax law. But, where it was possible, he did it.[20]

Frank Kitto's other commitment in life outside the law was to his wife, born Eleanor Howard. She was also the child of a Methodist minister, as Frank's mother had been. The couple became engaged in 1925. She had graduated in science from Sydney University in 1924 and taken a teaching job. Upon their marriage in December 1928, she retired, as was the way of most wives in those days. Thereafter, until her death, the couple enjoyed "almost 54 years of the happiest marriage that one could imagine on this earth".[21]

According to his daughter, Frank Kitto was not a gregarious man. He had a strong sense of duty to the legal profession, his family, his church and his community. When his mother died in 1927, he took over responsibility for his younger brothers and sisters, all of whom he helped in various ways. He took part in a Killara community service organisation. But he shunned publicity and "barriers of reticence affected even his closest relationships. His emotions were deeply felt and deeply buried."[22]

Kitto's legal career continued to flourish. He became Challis Lecturer in bankruptcy and probate law at the University of Sydney. He held that post from 1930 to 1933. In his professional life and whilst still at the junior Bar, he appeared as counsel for the New South Wales Attorney-General in *Trethowan's* case.[23] That litigation concerned the Bill introduced into the New South Wales Parliament by the government of Premier Jack Lang to abolish the New South Wales Legislative Council. The case went through the High Court and took the young Kitto to the Privy Council in 1932.[24] His efforts were not rewarded with success. But, as the young barrister looked around the Board room of the Privy Council in London, it is interesting to speculate whether it ever crossed his mind that in fewer than 30 years he would be sworn as a member of the Privy Council as, in those days, was commonly the case for Justices of the High Court of Australia.

Soon after taking silk in 1942, Mr Kitto KC was briefed by the trustees of the Art Gallery of New South Wales to defend a challenge by the Attorney-General on the relation of two artists, Mary Edwards and Joseph Walinski. The challengers contested the award of the 1943 Archibald prize to Mr William Dobell. The challengers were represented by Mr Garfield Barwick KC. They contended that the winning entry,

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20 Transcript of proceedings, 4 June 1984, cited ibid at 19.
21 F W Kitto, "This is My Life", an address given to the Armidale Central Rotary Club, 1989.
22 M Connor, above n 8 at 5.
23 *Attorney-General (New South Wales) v Trethowan* (1930) 31 SR (NSW) 183; (1931) 44 CLR 394.
24 (1932) 47 CLR 97 (PC).

depicting the artist Joshua Smith, was not a "portrait" (as John Feltham Archibald's will required) but was a caricature which distorted, and did not portray the likeness of, the subject. The story of the case has recently been re-told by Chief Justice Phillips of Victoria.[25] It was a mighty tussle between two brilliant lawyers.

Kitto prepared the defence with great care. Dobell described his successful performance as brilliant. But Dobell was shattered by the courtroom experience over his art. The challenge was dismissed by the judge, Mr Justice David Roper. The relators were ordered to pay the trustees' costs. Later Dobell's portrait of Joshua Smith, like so many others which he executed, came to be regarded as a masterpiece. Sadly, it was severely damaged in a fire in 1959, although later submitted to a controversial restoration. Recently, it was sold at auction in Melbourne for $222,500.[26] Kitto the advocate, had bested Barwick, the most fashionable silk in the nation. He had also upheld artistic freedom against the orthodox who wished to stamp on portraiture a single concept which neither art, nor law, found congenial. Kitto—a man of generally orthodox legal and social persuasions—was later, in his most important decision on the High Court, to defend the politically unorthodox against those who attempted to bring on their heads the full weight of the law.

During the period that followed the Dobell case, Kitto became involved in some of the most important litigation of the time. In many of the cases he appeared against Barwick.[27] In some, he was led by Barwick.[28] In the important *Bank Nationalisation* case in 1948-49, he once again went to the Privy Council, this time as leading counsel and in the same cause as Barwick. They worked together in a constructive way. Barwick, rarely generous in his praise of others, later paid tribute to Kitto's contributions to the respondent banks' arguments.[29] Commentaries suggest that the success of the banks' position before the Privy Council resulted, in no small way, from Kitto's "masterminding of content and strategy".[30] Such a success in defeating the prized legislative scheme of the Chifley Labor government could not have been better timed for Mr Kitto KC. In December 1949, at the federal election, the Labor government was swept from office. A new government under Mr Robert Menzies KC was returned to power with a large majority.

As sometimes happens, the return of the Menzies government produced two long heralded judicial retirements from the High Court. On 31 January 1950 Sir Hayden Starke, who had served since 1920 resigned. This was but seven weeks after the election of Mr Menzies. Starke's seat was filled, in February 1950, by Mr Justice Wilfred Kelsham Fullagar, a Judge of the Supreme Court of Victoria. Fullagar was to become one of Kitto's most admired colleagues.[31] Kitto wrote of Fullagar's capacity to write with "limpid simplicity and classical clarity that conceals profundity".[32] Then, on 3

25 J H Phillips, "Barwick v Kitto" (1997) 71 *ALJ* 832.
26 *Herald Sun* (Melb) 29 April 1998 at 5.
27 For example, *Arthur Yates and Co Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37 at 50.
28 For example, *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269.
29 *Bank of New South Wales v Commonwealth (Bank Nationalisation case)* (1948) 76 CLR 1; *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497 (PC); [1950] AC 227 (PC). See G E Barwick, above n 1 at 71.
30 People in Government, "The Right Hon Sir Frank Kitto KBE" (October 1968) *Management Newsletter* at 6.
31 Above n 5 at 796 and also at 792.
32 Ibid at 796.

May 1950, Sir George Rich, a Justice of the High Court from 1913 resigned. We will never again see a Justice who serves for 36 years, as Rich did. Kitto's hour had come. A week later he was appointed the eighteenth Justice of the High Court.[33] According to the contemporary notes in the *Australian Law Journal*, his appointment was "received with pleasure and satisfaction by the profession".[34] It must also have been something of a surprise for he was then aged only 47 years. Commentators observed that "no two judges could have been temperamentally more dissimilar" than Kitto and Rich.

At that time of Kitto's appointment, Justices of the High Court enjoyed life tenure. So the young Kitto had before him the potential of an extraordinarily long service as a judge of the nation's highest court. At his welcome in the courtroom at Darlinghurst, which then served as the Sydney seat of the High Court, he said:

> We are all in our several ways the servants of a great and fast growing nation. Its future will be influenced in no small degree by the quality of the work we do in upholding the rule of law and proving its worth and effectiveness in the development of a nation in whose righteousness must lie its greatness.[35]

The first case in which Justice Kitto participated, which I can see in the published records, was an application for special leave to appeal heard on 8 June 1950.[36] There may have been other earlier cases which were not reported in those more discerning times. The first reported decision in which his name appears as a Justice is *Thompson v Randwick Corporation*.[37] That was a case involving resumption powers of a local authority in New South Wales. It was heard in August 1950 and with swift efficiency decided a month later. The appeal was allowed. It had come from a single judge of the Supreme Court of New South Wales (Mr Justice Roper) before whom Kitto would often have appeared and undoubtedly would have admired. A joint judgment was published by the High Court[38] in which Kitto participated. He was later to write of his mistrust of joint judgments considering that "on balance, the writing of individual judgments tends to produce the better work".[39]

It did not take Kitto long to embark upon the judicial tasks that fell to him. Three volumes of the Commonwealth Law Reports after his appointment was announced,[40] he was contributing his opinion to one of the most important cases ever to come before the High Court of Australia and probably the most important that Kitto was to decide during his service on the Court.

KITTO AND THE COMMUNIST PARTY CASE

It is difficult for Australians today to appreciate the integrity and courage that lay behind the decision of the High Court on 9 March 1951 in *The Australian Communist*

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33 (1950) 24 *ALJ* 21.
34 Ibid.
35 Ibid at 45.
36 *Collins v Hill* per McTiernan and Kitto JJ, 8 June 1950, unreported but noted (1950) 80 CLR 667.
37 (1950) 81 CLR 87.
38 Williams, Webb and Kitto JJ.
39 Above n 5 at 797.
40 (1950) 80 CLR iv.

Party v Commonwealth.[41] In order to understand the Communist Party Dissolution Act 1950 (Cth), it is necessary to realise that the Menzies government had won a popular mandate fuelled by the genuine fear of many people in Australia about the perceived advance of communism. Recently on Australian television, a programme was broadcast, which included interviews with Australian servicemen who had survived the United Nations "Police Action" in Korea. The servicemen recounted the fears of communism, as did the contemporary and rather bellicose *Movietone News*, reproduced in the programme. The fears were not entirely groundless. We were not then to know that the Soviet Union would collapse and that the most enduring and novel political experiment of the 20th century would lie in ruins before the century was out. At the time of the High Court's decision, the defeat of Fascism and of the Japanese invasion, the conquest of Central and Eastern Europe by the Soviets, the Berlin blockade, the revolution in China and the invasion of Korea seemed to point to extremely significant perils for our own peaceful country, always a little fearful because of its White Australia policy, anxious about racial purity and seen as constantly at risk from populous Asia to the North.

It is in this context that the Menzies government's legislation has to be understood. It purported to declare the Australian Communist Party unlawful and to dissolve it. It provided for "declarations" to be made, by an instrument published in the *Commonwealth Gazette*, in respect of persons who thereby suffered various significant civil disabilities.[42] It was a drastic piece of legislation. Unsurprisingly, the Australian Communist Party challenged the Act's constitutional validity in the High Court. There was no piece of legislation more important to the newly elected government; nor any which it had a clearer electoral mandate from the people. The government relied upon the incidental power, the defence power and the power of the executive government under the Australian Constitution to sustain the law. It asserted that the legislation was necessary "for the preservation of the Commonwealth and its institutions from internal attack and subversion". It sought to support the constitutionality of the Act by reliance on recitals in the Preamble to the Act. By these, the Parliament described the perilous circumstances which justified the enactment and stated them as facts determined by the Parliament for the Court and everyone else concerned.

The legal team for the Commonwealth, upholding the Act, was led by Mr Barwick. It included two future Justices of the High Court (Taylor and Windeyer), as well as six junior counsel all of whom went on to high judicial office. The leading counsel to challenge the legislation was Dr HV Evatt KC, a past Justice of the High Court and recently President of the General Assembly of the United Nations. He appeared for the Waterside Workers' Federation of Australia, the predecessor of the Maritime Union of Australia, and for the Federated Ironworkers' Association. It was one of those great constitutional cases which tests the fidelity of our national institutions and the strength of our Constitution. Kitto had not sat on the Court for even six months when the argument in the *Communist Party* case began in Sydney on 14 November 1950. Argument continued up to 19 December when the Court reserved its decision. The judgment, delivered in early March 1951, came as a tremendous shock to the

41 (1951) 83 CLR 1 at 271. For a description of the similar concerns of the British Labour Government at the time, see P Deery, "'A Very Present Menace'? Attlee, Communism and the Cold War" (1998) 44(1) *Aus Jo of Politics and History* 69.

42 The terms of the Act are set out in a footnote in (1951) 83 CLR 1 at 1-8.

government and, probably, to the majority of the nation. Only Chief Justice Latham upheld the validity of the Act. Justices Dixon, McTiernan, Williams, Webb, Fullagar and Kitto struck it down.

Against the background of Kitto's career which I have briefly described, it may have been thought (although never said in those more graceful days) that Justice Kitto was a "capital C conservative". His skills were in black letter law. He was known to be a "resolute opponent of ... rogue reformers who would lay impious hands on the ark of the law".[43] He had just succeeded in a substantial brief for the banks in striking down the nationalisation scheme of the former Labor government. Yet in less than a year, he performed his function as a judge of our highest Court, in accordance with his understanding of the law and the Constitution precisely and only as his learning and conscience dictated. Such actions present an important warning to those who try to stamp on judges the labels which are invented for politics and popular discourse where the rules are more fluid and where personal inclinations generally reign over principle.

Kitto's judgment in the *Communist Party* case was written in his characteristic style. No help whatever was provided to the reader by way of headings or layout. The text is dense (as was the common manner of that time). The solution to the problem was to be found in an analysis of past decisions. Not for Kitto bold conceptions about the nature of the Australian polity which the Constitution established. Not for him the ultimate subservience of the Federal Parliament to the people of the nation who made the Constitution.[44] His judgment was silent on any limitations imposed by implied rights or the structure of the document. But Kitto, for one, was not going to surrender his judicial analysis of the true facts to accept, as facts, a recital of supposed justifications stated by the Parliament in the Preamble to the Act.

> Some facts relating to the Australian Communist Party are alleged in the recitals in the preamble to the Act, and others may be said to be implied by the word "communist" in the name of the Party. Such facts are in their nature controversial, and evidence which might be adduced with respect to them in the present litigation could not enable findings to be made which would necessarily be proper in other litigation challenging the validity of the Act. But facts of this kind, even if they could be conclusively established, do not go to the question of power but go only to the question whether this legislation would, in practical result, conduce to an end within power.[45]

Unusually, Kitto proceeded to talk directly, and in the second person, to the reader of his reasons:

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43 As he later wrote in the foreword to the first edition of R P Meagher, W C M Gummow and J R F Lehane, *Equity Doctrines and Remedies* (1975) at vi.

44 Cf *McGinty v Western Australia* (1996) 186 CLR 140 at 243 per McHugh J. Cf M D Kirby, "Deakin, Popular Sovereignty and the True Foundation of the Australian Constitution" (1996) 3 *Deakin L Rev* 129; H C A Wright, "Sovereignty of the People—A New Constitutional Grundnorm" (1998) 26 *F L Rev* 165.

45 (1951) 83 CLR 1 at 277.

> Turn to facts concerning the character, objects, activities or propensities of an association, which is made the specific subject of a law, and you turn away from the relevant enquiry; you are looking no longer at the legal operation of the law but at the practical results likely to follow in the train of its operation; you are concerning yourself, not with power, but with matters which provide a reason for a purported exercise of power.[46]

When it came to the substantive provisions of the Act, Kitto was no more content to surrender judicial supervision to the Executive than he was to a recital in a Parliamentary Preamble:

> I find it impossible to attribute to the legislation any other intention than that the Governor-General may exercise his power with complete immunity from judicial interference.[47]

This and other statements in his opinion indicated the insistence of Justice Kitto upon a principle fundamental to the rule of law. No provision enacted by the Parliament under the Constitution could be unexaminable by the courts of this land. Even the great power of the Parliament and of government had to submit, ultimately, to the test of constitutional legality. This decision was a ringing assertion of Thomas Fuller's cry three centuries earlier: "Be you ever so high, the law is above you."[48] The logic of Kitto's reasoning was compelling. One by one he demolished the key provisions of the Communist Party Dissolution Act. And, in the end, "the remaining sections of the Act cannot stand by themselves and are therefore invalid".[49] The essence of it was found in this aphorism:

> There is an essential difference between, on the one hand, a law providing for the dissolution of associations as to which specific facts exist and, on the other hand, a law providing specially for the dissolution of a particular association.[50]

Kitto was thus saying that, in Australia and under its Constitution, people and the bodies in which they freely associated, could be punished or disadvantaged by law, made within power, for doing things previously declared unlawful. But not for simply being, or joining, in an association or holding opinions shared by other members of the association. Action and antisocial conduct could properly attract legal regulation if otherwise within power. Thought and free association, as such, would not.

The clearest vindication of this conception of the Australian Constitution was the subsequent endorsement of it by the people of the nation when they voted on a proposal to amend the Constitution to overcome the High Court's decision.[51] But it was a close run thing. The total "yes" vote represented 48.75 per cent of the electors voting. The total "no" vote was 49.85 per cent, the balance being informal votes. The referendum was carried in Queensland (55.21 per cent), Western Australia (53.98 per cent) and, at the last minute, in Tasmania (49.28 per cent Yes, as against 48.77 per cent

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46 Ibid at 278.

47 Ibid at 280.

48 Quoted in *Gouriet v Union of Postal Workers* [1977] 1 QB 729 at 762 per Lord Denning MR, not one of Kitto's favourites.

49 *Communist Party Case* (1951) 83 CLR 1 at 282.

50 Ibid at 278.

51 The referendum was held on 22 September 1951. See A Blackshield, G Williams and B Fitzgerald, *Australian Constitutional Law: Theory, Commentary and Materials* (1996) at 970. G Henderson, *Menzies' Child—The Liberal Party of Australia* (revised ed 1998) at 114ff.

No). But it failed to secure the constitutional majority of electors throughout the nation and in a plurality of States.[52]

The High Court of Australia, before and since the *Communist Party* case, has had many, many important cases. More will come. But none could be more important than that decision. There is a certain irony in the fact that legislation bearing similarities to the Australian statute was upheld at about the same time by the Supreme Court of the United States of America.[53] This was so despite the ringing words of the Bill of Rights and the long tradition of judges in that country to look at the broad picture of power and liberty. In this matter, at a critical moment, a judge steeped in mortgage debts, adhering to the doctrine of strict legalism, proved a more valiant and certainly a more effective guardian of liberal constitutionalism than most of his American counterparts. Kitto shared at least this much of the philosophy of his professional rival Barwick who once said:

> The important thing is that liberty is not necessarily secured by verbal formulae, as in a Bill of Rights, however precise in their expression. Rather, it is an independent judiciary, by developing and applying the principles of the common law with its emphasis on the essential importance of the individual and the citizen's duty to his neighbours, its insistence on the observance of natural justice where the citizen is likely to be affected in person or property and the use of habeas corpus in relation to physical restraint and requiring the executive and legislative arms under their allotted limits, which will ensure that tyranny does not gain sway.[54]

On this occasion Barwick, the advocate, succeeded in persuading only one of the seven Justices to uphold the Act. Kitto was true to the bias of the common law. He would have said that he merely construed the language of the Constitution and found no power that supported the federal Act. It was therefore null and void.[55]

LAW AS SYLLOGISM

Sitting in the High Court, with cases read, and principles reminded, every day, it is common to have the opinions of the judges of the past paraded in support of the propositions advanced for the litigants of the present. Kitto's judgments are often read.

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52 As required by the Constitution, s 128.

53 *Dennis v United States* 341 US 494 (1951). By a vote of 6 Justices to 2 (Vinson CJ for the Court, Black and Douglas JJ dissenting) the Supreme Court upheld the constitutional validity of the *Smith Act* (Title I of the *Alien Registration Act* 1940 (US)). The decision was later modified, but not expressly overruled, by *Yates v United States* 354 US 298 (1957). After *Yates* no further prosecutions were brought under the *Smith Act*.

54 G E Barwick, above n 1, cited by Brennan CJ (1997) 187 CLR vii.

55 The decision of the High Court in 1951 may be contrasted with the decision of the Constitutional Court of Turkey forty years later in 1991. This dissolved the United Communist Party of Turkey, liquidated its assets and banned its officials from holding political office. These steps were taken pursuant to the Turkish Law No 2820, sec 107(1), the constitutional validity of which that court upheld. A proceeding by the United Communist Party before the European Court of Human Rights succeeded. That Court found unanimously that the Turkish actions violated the European Convention on Human Rights and Fundamental Freedoms, Art 11 (freedom of association). It ordered Turkey to pay damages to the individual claimants: *United Communist Party of Turkey v Turkey* (1998) 26 EHRR 121.

Recently, in the *Hindmarsh Island Bridge* case, both the majority and the dissenter[56] called in aid Justice Kitto's explanation of the way in which the operation and effect of a law help to define its constitutional character. In this way, legal ideas put on paper 30 years and more earlier contribute to the solution of contemporary legal problems. The insights of the past guide our way to solutions for the dilemmas of the present.

If one passage stands out as the most frequently cited of all of Justice Kitto's opinions it is probably that in which he examined the "borderland in which judicial and administrative functions overlap".[57] It may seem a tedious question. Kitto admitted that it was impossible to "frame an exhaustive definition of judicial power".[58] Undaunted, he offered his own approach which is one that is frequently followed:

> Thus a judicial power involves, as a general rule, decisions settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an enquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges persons between whom it intervenes, to observance of the rights and obligations of the application of law to facts as shown to exist.[59]

This was Kitto's syllogistic view of law. It was a view in harmony with that of Chief Justice Dixon whose *dictum* about complete legalism was one that Kitto wholeheartedly endorsed. Judges were there to find facts. They were there to define the applicable law. The application of the law to the facts would produce a result that was clear and binding on those involved and on all persons in the society ruled by law.

For Kitto, law and the Constitution were not malleable. Not for him judicial scaleograms and theories about pragmatic influences on the psychology and sociology of the judge. His notion of federalism was one of balanced and cooperating forces living together in the one polity. For Kitto the judge, arguments about inconvenience fell on deaf ears. In the *Airlines of New South Wales* case he said:

> The Australian union is one of dual federalism, and until the Parliament and the people see fit to change it, a true federation it must remain. The Court is entrusted with the preservation of constitutional distinctions and it both fails in its task and exceeds its authority if it discards them, however out of touch with practical considerations or with modern conceptions they may appear to be in some or all of their applications.[60]

Denouncing malleability and the suggested influence of social forces was a recurring theme of Kitto's High Court opinions. Kitto was resistant to anything which he classified as excessive judicial alteration of the law. Calling it "development" and referring to "changing times" did not make the alteration more palatable to him. In one

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56 *Kartinyeri v Commonwealth* (1998) 72 ALJR 722 at 727 per Brennan CJ and McHugh J and at 751 per Kirby J (dissenting). See also at 735 (fn 63) and 736 (fn 65) per Gaudron J referring to Kitto J's judgments in the *Communist Party* case and *Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 205 at 225-226.

57 *Labour Relations Board of Saskatchewan v John East Ironworks Limited* [1949] AC 134 at 148.

58 *The Queen v Trade Practices Tribunal; Ex parte Tasmania Breweries Pty Ltd* (1970) 123 CLR 361 at 373.

59 Ibid at 374.

60 *Airlines of New South Wales Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54 at 115.

case[61] he took pains to chastise a distinguished New South Wales judge, who later became a Justice of the High Court,[62] for overstepping the mark. He said:

> I think it is a mistake to suppose that the case is concerned with "changing social needs" or with "a proposed new field of liability in negligence", or that it is to be decided by "designing" a rule. And if I may be pardoned for saying so, to discuss the case in terms of "judicial policy" and "social expediency" is to introduce deleterious foreign matter into the water of the common law—in which, after all, we have no more than riparian rights.[63]

After he left the High Court, Kitto wrote comparatively little for the public outside the work which he performed in the Australian Press Council. But in his essay on the writing of judgments, he took a last thrust at those who conceived of the judicial office as involving law making:

> [The judge] ... is commissioned to apply the law as it is from time to time and not something that he thinks should be the law but knows is not. I hasten to add, lest I be misunderstood, that I would certainly include in the proper function of the Judge the right and duty to give effect as existing law to such developments of the case law as principles already enunciated by the courts imply or justify by reason of their inherent capacity for extension by logical processes, including in those processes not only inference and deduction but also analogy where analogy is sound. I am inclined to think that if you put it in some such way as that—limiting judicial development of the law to developments by applied logic from *within* principles already established, and therefore excluding as impermissible purported developments (they really ought to be called alterations) fastened onto existing law by the Judge who thinks that his God-given understanding of justice tells him infallibly what the law ought to be and that he needs no other justification for asserting that that is what the law is—you may find a reconciliation between the old-fashioned, over-terse proposition that the Judge applies the law and does not make it and the proposition, nearer the truth but still not exact, that the Judge has a law-making function. The reconciliation perhaps is that our legal system includes a law that principles judicially evolved contained within themselves "their fair logical result" as Dicey called it, that is to say all that may fairly and logically be taken from them, by way of extending the evolutionary process that produced them, to deal with new factual situations so that the Judge does not usurp the role of the legislator when he takes part in that process, but does usurp it when he superimposes upon the already declared law a new proposition which he gets from outside it. In the latter case the criticism of his action is not so much that he suffers from a difficulty in distinguishing between the deity and himself in the understanding of abstract justice as that he perverts the law. No Judge is entitled to do that, however strongly his ideas of justice may make him wish that he could. I take this to be elementary. It is rejected by some very able people, but so are the Ten Commandments.[64]

There you have not only Kitto's writing style. You also have his essential judicial philosophy. By the standards of one of those "very able people" to whom he was obviously referring (Lord Denning), Kitto's sentences were complex. They are long. One sentence in the passage just cited contains no fewer than 120 words. There are

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61 *Rootes v Shelton* (1967) 116 CLR 383.

62 Jacobs JA in his reasons in *Rootes v Shelton* (1966) 86 WN (NSW) (Pt 1) at 101-102. Justice Jacobs became a Justice of the High Court in February 1974 and served until April 1979. Cf generally JJ Doyle, "Judicial Law-Making—Is Honesty the Best Policy?" (1995) 17 *Adel L Rev* 161 at 203.

63 (1967) 116 CLR at 386-387.

64 Above n 5 at 794 (footnote omitted).

many sub-propositions contained within it. Not for him the punctured style of the evangelist. Not for him the urgent expression of short sentences with a generous sprinkling of full stops. Here is a complex mind at work, seeing all the qualifications, limitations and permutations of a proposition. His high intellect demanded persistence by the reader. It required attention from those for whom he was writing. It was inherent in his view of the law that the work he performed was technical. It was the work of the legal temple. It was not incumbent on him to speak to ordinary citizens, any more than a neurosurgeon is bound to perform his operations in a way that ordinary folk will understand. The syllogism was the key to his world. It also reflected Sir Owen Dixon's philosophy. Law was found and declared from within the inherent logic of that which already existed. It was not made up by the judges. Whenever they indulged in making up, they exceeded the judicial function. If invention was all the law involved, it would, for Kitto, have lost its integrity and purpose. By definition, law was pre-ordained, although discovering it might take much concentration, study of past rules and sharp linear application of logical reasoning.

KITTO TODAY

Nowadays, many law students, and not a few judges, might regard Kitto's position as historically understandable but unbearably naive. His faith in the capacity of logic alone to produce solutions to entirely new problems would be doubted in an age when so many new problems compete for legal answers. His belief that past constitutional decisions, and the mere text of that terse document, yield the answers to every new constitutional problem might seem unworkable. The demise of the declaratory theory of the judicial function, under the dual assaults of academics and great judges,[65] presents the risk that Kitto's opinions will be discarded as irrelevant to the role of the modern Australian judge on the edge of a new millennium. But Kitto, like every other leader of the Australian judiciary, has left a mark. I want to suggest five matters, in particular, in which his contributions remain highly relevant to the lawyers of today.

Judicial independence

Kitto demonstrated from the start of his judicial service his robust judicial independence. His decision against the Menzies government's legislation in the *Communist Party* case, so soon after his arrival at the High Court, demonstrated his judicial allegiance to no political side and no social philosophy—only to his view of the Constitution and the law. There have been many similar examples, before and since. But this was a particularly vivid one. It is a fundamental human right of everyone to have, in the determination of criminal or civil proceedings at law, a "fair and public hearing by a competent, independent and impartial tribunal".[66] It is a negation of the judicial role for a judge to enter a courtroom with a preconceived opinion that a case must be determined one way or the other. Every judge, like every citizen, has a personal philosophy based upon a complex of life's experiences. Psychologists and some lawyers who have studied the processes of decision-making tell us that we can

65 For example, Lord Reid, "The Judge as Law Maker" (1972) 12 *JPTL* 22. Cf MH McHugh, "The Judicial Method" (1999) 73 *ALJ* 37.

66 International Covenant on Civil and Political Rights, Art 14.1. See FF Martin and Ors, *International Human Rights Law and Practice* (1997) at 43.

never be entirely free from our attitudes, moods and inclinations.[67] Examination of the voting patterns of judges in the cases which they decide shows, over time, clusters of consistent decision-making which may be influenced (even unconsciously) by the judges' social attitudes and inclinations.[68] These attitudes and inclinations should be recognised by a judge. A conscious effort should be made to correct the mind against bias and prejudice of any kind. In the exercise of that conscious effort lies the protection of the fundamental human right to which I have referred and of the rule of law. Judges should never approach their professional tasks with a view to backing the "home side",[69] whatever that may be.

Kitto gave an early and dramatic illustration of his commitment to these basic principles. Doubtless, he would not have thought of them in terms of fundamental human rights. Certainly, he would not have expounded them in those terms. But his example stands before his successors, all of whom must strive to attain the same standards of neutrality and independence. The independence of all judges, magistrates and tribunal members who decide disputed cases is vital to the rule of law. But, in Australia, nowhere is it more so than in the High Court which is the ultimate protector of the law and the Constitution. From past decisions and judicial reasoning outsiders might think that they can predict how a High Court Justice will decide a case. They examine the law books and scrutinise comments during argument as the Etruscan soothsayers studied the entrails of sacrificial offerings. But the spirit of an independent judicial mind, such as Justice Kitto's, demonstrates that prediction can be a chancy thing. Certainly, it is so if based upon the judge's supposed social or political alignment. There are few more vivid illustrations of this truth than Justice Kitto's decision in the *Communist Party* case.

Legal excellence

Kitto's reasons in the High Court also illustrate the importance of legal excellence in the discharge of the duties of the Justices. Any who are not up to the intellectual challenges are soon known, particularly amongst the watchful audience of the Australian legal profession. Unlike the Supreme Court of the United States of America, the High Court remains the final court for legal appeals from other courts throughout Australia deciding a huge variety of cases based on federal and state legislation, the common law and equitable principles. It is a court of general jurisdiction. It is not confined to constitutional or human rights decisions. It is one of the few final appellate courts in the common law world that does not have to grapple with the mysteries of a general Bill of Rights. But the range and complexity of the work of the High Court imposes a taxing intellectual regime requiring disciplined thought. Kitto was an exemplar of disciplined thinking and writing. He was sharp in mind and sometimes his tongue in court would match. Grown men in silk gowns were known to faint and to fear a day in his demanding presence.

Nowadays, the High Court takes no special delight in exposing brusquely the weakness of thinking and preparation that are sometimes evident in the arguments before it. One can see a hint in Kitto's writing that doing so was not exactly alien to his

67 Cf J P Forgas (ed), *Emotion and Social Judgments* (1991) at 76-78.

68 Cf A R Blackshield, "Quantitative Analysis: The High Court of Australia, 1964-1969" [1972] *Lawasia* 1.

69 R Bader Ginsburg, "Judicial Independence" (1998) 72 *ALJ* 611 at 611.

nature.[70] But his were judicial opinions which can be examined in virtually any field of the law and there is always enlightenment. He shared, with the great Chief Justice Griffith, a confident command of 19th century English jurisprudence. He shared with Chief Justice Isaacs the deployment of powerful language in the cause of persuasion. He shared with Chief Justice Dixon the philosophy of judicial restraint. Whilst he did not have Windeyer's inquisitive fascination for the policies that lay behind the common law principles or of our legal history, he wrote in every area of the law which he touched with accuracy, brevity and precision.

Now that there is less confidence that the past readily offers the legal answers for the present and the future, there is a greater tendency on the part of the judges to explore authority with a view to discerning the legal principle and legal policy that lies behind it.[71] Kitto was a master of the whole landscape of the law. In his twenty years of service on the High Court he set the high standards of technical skill that helped to win for the High Court of Australia its reputation as a Court of outstanding jurists. If the functions of judges have changed or are now seen to be somewhat different, and particularly in the High Court since the abolition of Privy Council appeals and the advent of special leave to appeal,[72] the need for excellent lawyering remains undiminished. It controls, in effect, the type of person who should be appointed to the Court. It needs as its judges people who have double skills: legal excellence in technical law combined with foresight, and the capacity to perceive the big picture in which the Constitution and the law take their place.

The judicial role

Kitto did not hesitate to expound, as well as practise, his conception of the judicial role. It was obvious enough from his written reasons. In the passage which I have quoted he expressed his favour for a very limited judicial law-making function. But he accepted that such a function existed. Where else did the common law, or that great additional stream, equity, derive from, if not from the judges of the past?[73] He did not regard the present as offering the last word on judge-made law. In the field of equity, for example, he declared that "as it stands today, a structure that commands our admiration, [it is] ready to be made more admirable still".[74] Who could make it more admirable except the judges? Certainly not the legislature. Probably not common lawyers.

Looking at some of Kitto's expositions of the judicial role with today's eyes, we may think that they demonstrate a hankering after the "fairytale"[75] that modern judges, unlike their forebears, simply find and declare the law and have little part to play in

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70 Above n 5 at 787 "In an after dinner speech ... a member of the Bar once urged the High Court to put more colour into its written work. (I think he regarded its spoken work as colourful enough)".

71 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 253 per Deane J.

72 *Judiciary Act* 1903 (Cth), ss 35, 35AA, 35A. See the remarks of Gleeson CJ on the occasion of his swearing in as Chief Justice of Australia, 22 May 1998, concerning the effect on the character of the High Court and its work of the abolition of Privy Council appeals and the introduction of special leave in all civil appeals.

73 F W Kitto, foreword to the First Edition of Meagher, Gummow and Lehane, above n 43. See 3rd edition at v.

74 Ibid at vii.

75 Lord Reid, above n 65.

making it. But for all that, Kitto's exposition of judicial restraint stands as a warning to judges against over-confidence in their capacity, and legitimacy, to solve every problem brought before them.

If we look at the High Court historically, it is probably fair to say that there are times, as in legal history generally, in which there is a great burst of creativity and then a time of consolidation and greater caution. If it may sometimes seem to one generation that the courts are unduly timorous, perhaps the judges of that time are merely reflecting the mood common to the citizenry and profession of which they are members. A period of judicial caution of the kind which Kitto favoured is ordinarily followed by a period of creativity and judicial boldness. Anyone who believes otherwise is ignorant of Australian legal history and of the history of the laws of England which went before. In this respect, Kitto was a judge of his time. Perhaps his advocacy of restraint has lessons for this age. But if it does, they are lessons not only for the judiciary but also for the legislatures and for the executive government concerning their law-making responsibilities. Often, what is described as "judicial activism" is little more than the attempt by judges to remedy cases of serious injustice which the legislature and Executive have neglected. Isaacs, Evatt, Murphy, Mason and Deane may sometimes seem like voices calling their contemporaries and successors back to the inventiveness of the confident judges of the past. But there is also a need for the voices of caution, restraint and judicial legitimacy. Kitto's is one of the clearest and most eloquent of these.

Law and equity:

Kitto was a master of the principles of equity, that detailed and developed system of law created to repair the gap "wherever the Common Law might seem to fall short of [the] ideal in either the rights it conceded or the remedies it gave".[76] In his home State, New South Wales, long after the separate administration of equity had been terminated in England[77] and in the other States of Australia, its detailed rules were applied in a separate part of the State Supreme Court, generally by a senior judge identified with the title "Chief Judge in Equity".[78] This was the part of the Supreme Court of New South Wales in which Kitto probably felt most at home.

Once appointed to the High Court, Kitto wrote on equity's principles with assurance, grounded in deep knowledge. The High Court has generally been able to count one or more Justices at any given time who are disciples of the law of equity and who command its intricate details. Kitto was such an expert. He brought to bear in his opinions the strong belief that equitable doctrine should be preserved as "the saving supplement and complement of the Common Law ... prevailing over the Common Law in cases of conflict but ensuring, by its persistence and by the very fact of its prevailing, the survival of the Common Law".[79]

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76 Foreword to Meagher, Gummow and Lehane, above n 43 at v.

77 Judicature Act 1873 (UK), s 24. See now Supreme Court Act 1981 (UK), s 49.

78 Eventually the New South Wales Parliament enacted the Law Reform (Law and Equity) Act 1972 (NSW). This Act contains provisions equivalent to the Judicature Act, ss 24 and 25. See Meagher, Gummow and Lehane, above n 43 (3rd ed 1992) at 44. Cf *Felton v Mulligan* (1971) 124 CLR 367 at 392; *O'Rourke v Hoeven* [1974] 1 NSWLR 622 at 626 per Glass JA.

79 Foreword to Meagher, Gummow and Lehane, above n 43 at vii.

It is important that the High Court should always have amongst its members judges who are closely familiar with the rules of conscience and fidelity developed in the Chancery courts of England and extended by decisions of Australian courts and courts of other lands of our legal tradition. Australian courts have generally been resistant to dilution of the traditional principles of equity.[80] Attempted adaptations have sometimes been rejected as heretical developments of that body of law made by courts of other jurisdictions.[81] About the refinement and development of particular equitable principles there can be legitimate debate, including amongst the *cognoscenti*. But the need for *cognoscenti* cannot be disputed.

The assurance with which Kitto wrote in the area of equity may be illustrated by many cases.[82] Take his exposition of the circumstances in which, as against a mortgagee and purchaser guilty of fraud, a mortgagor is entitled, by equitable doctrine, to have its contract and transfer set aside. In *Latec Investments Ltd v Hotel Terrigal Pty Ltd (In Liquidation)*, he responded to submissions that fraud in the sense used in the *Real Property Act* 1900 (NSW)[83] was special—limited to cases where there had been a fraudulent misrepresentation:

> The whole course of authority on this branch of the law is to the contrary. Moral turpitude there must be; but a designed cheating of a registered proprietor out of his rights by means of a collusive and colourable sale by a mortgagee company to a subsidiary is as clearly a fraud, as clearly a defrauding of the mortgagor, as a cheating by any other means ... There was pretence and collusion in the conscious misuse of a power. It may be that those concerned salved their consciences by telling themselves that the mortgagor company, being already in liquidation, was in so powerless a financial condition that the course they were taking was unlikely in the long run to do anyone any harm. But it was a dishonest course nonetheless, and the proper name for it is fraud.[84]

Lay observers of the legal scene may not always appreciate the importance of equitable doctrine for the integrated operation of our legal system. But Kitto knew. And he taught what he knew.[85] In every generation we need such teachers.

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80 For example, *Breen v Williams* (1996) 186 CLR 71.

81 For example, *McInerney v MacDonald* [1992] 2 FCR 138 at 152; (1992) 93 DLR (4th) 415 at 424 which was not followed in *Breen v Williams*.

82 I am grateful to Lehane J of the Federal Court of Australia for the following examples of Kitto J's style and method in this area: *Attorney-General (NSW) v Donnelly* (1958) 99 CLR 538 at 576 (charitable trusts—approved on appeal [1959] AC 457 (PC)); *Blomley v Ryan* (1956) 99 CLR 362 at 412 dissenting (unconscionable conduct); *Livingston v Commissioner of Stamp Duties (Queensland)* (1962) 107 CLR 411 at 448-452 (equity acts *in personam*); *Shepherd v Federal Commissioner of Taxation* (1965) 113 CLR 385 at 393 (assignment of future property); *Olsson v Dyson* (1969) 120 CLR 365 at 374 (equitable assignment and estoppel).

83 Sections 42 and 43.

84 (1965) 113 CLR 265 at 273-274.

85 Kitto was also a major figure in the Australian case law on intellectual property. I am indebted to Gummow J for suggesting the following cases as examples both of his style and substance: *In re Wolanski's Registered Design* (1953) 88 CLR 278; *Southern Cross Refrigerating Co v Toowoomba Foundry Pty Ltd* (1953) 91 CLR 592; *Mark Foy's Ltd v Davies Coop & Co Ltd* (1956) 95 CLR 190 at 205; *National Research Development Corporation v Commissioner of Patents* (1959) 102 CLR 252 at 260—a joint judgment (with Dixon CJ and Windeyer J) but clearly bearing his imprint; *The Shell Co of Australia Ltd v Esso Standard Oil (Australia) Ltd* (1963) 109 CLR 407 at 420; *Bayer Pharma Pty Ltd v Farbenfabrieken Bayer AG* (1965) 120 CLR 285 at 287; *Re Carl Zeiss Pty Ltd's Application* (1969) 122 CLR 1. He also made a notable contribution to

Judge as citizen

It should not be thought from what I have said, that Kitto was a judicial recluse, happy only when writing his opinions. On the contrary, this work he described as "sheer toil", a "soul-searing tedium".[86] And yet it is the privilege of judges constantly to be solving, and then explaining, intricate and important legal puzzles.

During his service on the High Court, Kitto began his long association with the University of New England—first as Deputy Chancellor and later as Chancellor. After his retirement from the Court he served the community as first Chairman of the Press Council. It was in that capacity that I first came to know him well. I had by then been appointed as Chairman of the Australian the Law Reform Commission. The Commission was working on reform of the law of defamation and privacy. Kitto resisted, as Press Councils are wont to do, any laws on privacy which would "unnecessarily hamper the press in presenting the news and comment which the public desires and should be free to receive".[87] Kitto was, for me, a living legend of the law. He engaged in a vigorous, even swashbuckling, debate with the Law Reform Commission, and before the community. He proved a doughty defender of the media's privileges. A measure of his success can be found in the fact that, even to this day, we have not secured uniform laws on defamation and privacy in Australia. Except to the extent that the High Court has found implications in the Constitution which apply uniformly throughout the country,[88] the statute books still contain no significant national defamation reforms and no laws for privacy protection in the context of the media.

Kitto put his enormous experience and refined capacity in communication and persuasion to the service of the community in the University and the Press Council. He realised that a judge, during service and after retirement, has functions to perform as a citizen and community leader. True, this can be overdone in ways that would certainly have offended Kitto's sense of modesty, propriety and understatement. But I hope he would not have disapproved of this contribution by me, as a citizen and as a Justice, to remember him, his service to the Court and to our country. Drawing on his life as barrister, judge, University Chancellor and Press Council Chairman, we can still derive inspiration and instruction from what he achieved.

EXAMPLE AND GUIDE

For those of us who follow him, Kitto remains an example and a guide. In one of the courtrooms in Canberra counsel will reach a point in their argument. "And now I wish to refer the Court to what Justice Kitto said ...". The case is cited. The tipstaves lay the

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the law of taxation in Australia. Hill J of the Federal Court of Australia has suggested the following cases: *Clowes v FCT* (1954) 91 CLR 209 (significant in explaining profit making schemes); *NSW Associated Blue-Metal Quarries Limited v FCT* (1956) 94 CLR 509 (important in looking at mining operations and the vexed question of the distinction between law and fact); *Shepherd v FCT* (1965) 113 CLR 385; *FCT v Western Suburbs Cinemas Ltd* (1952) 5 AITR 300 (still a pivotal authority on the problem of deductibility of repairs).

86 Above n 5 at 792.

87 Press Council, Commentary on the Law Reform Commission's Discussion Paper noted "The Seventh Summer Judicial Conference 1978" (1978) 52 *ALJ* 113 at 115.

88 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 192; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

books before the Justices. Leaping from the page are the words which Kitto crafted—just as one day, when we have departed, our words may occasionally be read. Whenever Kitto's name is mentioned, the youthful memories of law school come flooding back for me. He is a judge to be respected and a citizen to be honoured. In times of great change in society, in its laws and in the composition of the High Court of Australia, it is inevitable that we should be conscious of the differences between our age and Kitto's time. But it is right to look back and remember him for his is an enduring legacy.