‘I hope to be of some real assistance to your government’

The Extra-Judicial Activities of Sir William Flood Webb, 1942-1948

Peter Provis

Thesis submitted in total fulfilment of the requirement for the Degree Doctorate of Philosophy

History Discipline, School of International Studies,
Faculty of Social and Behavioural Sciences, Flinders University
April 2015

Contents

Abstract

Australian judges are frequently called upon to perform government services that are separate from their judicial function and, some would argue, are incompatible with the principles that underlie the separation of powers and the impartiality of the judiciary. With the rapid expansion and centralisation of government administration during the Second World War there was a growing need for legal expertise, resulting in additional demand for the services of judges to perform non-judicial roles. Moreover, the national emergency and wartime conditions did not remove the potential for conflict for judges between their judicial role on the one hand and their acceptance of government appointments on the other. This dissertation, through a case study centred on one judge, examines the role of the Australian judiciary in the political process and policy development while considering the potential negative impact these activities may have on the perceptions of judges' impartiality and their ability to fulfil their judicial functions.

The wartime extra-judicial activities of Sir William Flood Webb provide an insightful case study because he presided over a wide range of extra-judicial activities during the Second World War. The thesis examines Webb's extra-judicial activities performed during and immediately after the Second World War: as Chairman of the Industrial Relations Council; Chairman of three war crimes commissions; Chairman of the Commission of Inquiry into Censorship; and, finally, President of the International Military Tribunal for the Far East.

The dissertation, through the case study, illustrates that there are a number of potential 'hazards' judges can experience in participating in extra-judicial activities. Moreover, it

examines the criticism of Webb as a ‘political judge’ and argues that while filling these roles certainly brought Webb to the attention of the Commonwealth Government and earned him his appointment to the bench of the High Court, no evidence was found that he ever bowed to political pressure while performing these extra-judicial activities.

Declaration

I certify that this thesis does not incorporate without acknowledgment any material previously submitted for a degree or diploma in any university; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person except where due reference is made in the text. The thesis is less than 90,000 words in length, exclusive of tables, bibliographies and appendices.

Peter Provis

Acknowledgements

I am indebted to many people who have assisted and encouraged me throughout the years to complete the thesis.

I am grateful to the Commonwealth Government for payment of a Postgraduate Award and other financial support provided by Flinders University.

I am also appreciative for the support provided by the History Discipline of Flinders University, including that of my supervisor, Associate Professor Peter Monteath. I would like to also thank Dr Carol Fort for her support and assistance over my candidature. I have enjoyed our conversations and gained significant insight from our many discussions on wartime government in Australia.

Wherever I carried out my research I was aided by the assistance of the staff of the institutions who endeavor to answer every request and provide an essential guide to their collections. In particular the Australian War Memorial, the National Archives of Australia offices in Melbourne and Canberra, the Australian National Library and the Flinders University library staff in document delivery and special collections, in particular the Evatt Collection Committee who provided me with access to the papers of H.V. Evatt held by the Flinders University library.

I was fortunate to have been granted a summer scholarship with the Australian War Memorial during my candidature that provided an insight into the workings of archives and Australian military history. I am indebted to the staff who were willing to discuss various matters of their research and their profession, in particular, Dr Peter Stanley.

My family has been very supportive during the years of research and writing. In particular I owe a debt of gratitude to my wife, Chantal, and our children, Caleb, Abraham, Rani and Simeon as well as my parents, Mary and Trevor for their love, support and encouragement.

I also acknowledge the assistance in editing by the late Elise Wight, whose attention to detail was greatly appreciated. I am grateful to Dr Robert Wight for his support and assistance in editing. Paul Marks for his expertise in helping me resolve numerous Endnote and other IT issues. Additionally, I am sincerely appreciative for the editing of the final draft by Beverley Morey, Emeritus Professor Anthony Radford and Robin Radford. Lastly, I would like to thank the late Professor Francis Regan. I miss his encouragement that fueled my passion for research, his insights and his friendship.

Abbreviations

ACT	Australian Capital Territory
ALRC	Australian Law Reform Commission
AMIEU	Australian Meat Industry Employees' Union
ARU	Australian Railway Union
AWCC	Australian War Crimes Commission
AMF	Australian Military Force
AWU	Australian Workers' Union
BCOF	British Commonwealth Occupational Forces
C-in-C	Commander in Chief of the Australian Military Forces (General Thomas Blamey for the duration of the war)
CJ	Chief Justice
CLR	Commonwealth Law Reports
CPD	Commonwealth Parliamentary Debates (Australia)
CPP	Commonwealth Parliamentary Papers (Australia)
CSR	Colonial Sugar Refinery Company
Cth	Commonwealth
DPW & I	Department of Prisoners of War and Internees
FEC	Far Eastern Commission
HCA	High Court of Australia
HR	House of Representative (Commonwealth Government of Australia)
IPS	International Prosecution Section of the IMTFE
IMTFE	International Military Tribunal for the Far East
IRC	Industrial Relations Council
J	Justice/Judge

JCS	Joint Chiefs of Staff (USA)
MHR	Member of the House of Representatives
MI	Military Intelligence
MLC	Member of the Legislative Council
MP	Member of Parliament
NAA	National Archives of Australia
NLA	National Library of Australia
NSA	National Security Act
NSR	National Security Regulations
PM	Prime Minister
POLAD	The Acting United States Political Advisor to SCAP
QPD	Queensland Parliamentary Debates
SCAP	Supreme Commander of the Allied Powers (General MacArthur's title in Tokyo)
SACSEA	Supreme Allied Commander of the South East Asia (Lord Mountbatten's title 1943-1946)
SR	Statutory Rules (are always followed by numbers indicating sequence within a year).
SWPA	South West Pacific Area
UAP	United Australia Party
UNWC	United Nations War Crimes Commission
WEB	Women's Employment Board

A Chronology of the Life of Sir William Flood Webb
1887 – 1972

1887

Jan 21 William Flood Webb born in South Brisbane.

1891 (age 4)

Mother, Catherine Mary Webb (nee Geaney), died.

1892 (5)

Father, William Webb Senior married Bridget Geaney, sister of Catherine.

1894-97 (7-10)

Attended St Kilian's school, South Brisbane.

1898 - 1903 (11-16)

William Webb senior died, Bridget took children to her sister Margaret's and her husband Martin Crane's sheep-property near Warwick.

Webb attended St Mary's convent school run by the Sisters of Mercy where he received high achievements and a state scholarship.

1904 (17)

Feb 3 Entered the Queensland State Public Service, initially with the Commissioner of Police.

1908 (21)

March Selected to the Crown Solicitor's Office.

1913 (26)

May 20 Passed final bar examination with the high average of 71.5%

June 4 Admitted to the Bar

1914 (27)

Sept 1 Appointed chief legal assistant in the Crown Solicitor's Office.

1916 (29)

Feb 2 Selected as Official Solicitor to the Public Curator of Queensland .

Mar 31 Appointed State Public Defender for Queensland.

1917 (30)

Mar 17 Married Beatrice Agnew at the Sacred Heart Church, Sandgate.

June 1 Appointed crown solicitor of the State of Queensland.

Sept The Premier T.J. Ryan has Webb as crown solicitor to observe the proceedings of a Parliamentary Select Committee examining government spending on state-operated industries.

Oct Prepares the government case *Re McCawley* (1918) heard in the High Court. The case concerned the appointment of Thomas McCawley to the Industrial Court. The case was unsuccessful for the government.

1919 (32)

Visited England and represented the Queensland Government on the Privy Council appeal in *McCawley v The King* (1920) which overturned the High Court decision.

1922 (35)

April First solicitor-general for the state of Queensland, conducted crown cases in the courts and controlled crown legal work under the supervision of the attorney-general.

Sept Led H. D. Macrossan for the prosecution in the Brennan bribery case (*R v Connolly & Sleeman*).

1924 (37)

Feb Visited England on a Privy Council Appeal.

1925 (38)

Feb 26 W.N. Gillies became Premier of Queensland.

April 16 Thomas William McCawley died.

April 24 Appointment to the Supreme Court and Industrial Court of Queensland.

June 16 Chairman of the Court of Inquiry into the Traveston Railway Disaster.

Aug 19 Hearing in the Industrial Court of an application by the Australian Railway Union for a new award that included a wage increase was refused, causing a strike.

Industrial Court of Queensland abolished by 1925 Act and the Board of Trade and Arbitration was established with Webb appointed as the president.

1926 (39)

Nov 26 Appointed chairman of the Central Sugar Cane Prices Board.

1933 (46)

Feb 1 Appointed president of the Industrial Court of Queensland under the 1932 Act.

1936 (49)

July 23 Appointed chairman of the Royal Commission on Transport.

1937 (50)

Aug Royal Commission on Transport finished its report.

1938 (51)

Dec 15 Appointed chairman of the Royal Commission into the Sugar Peaks Scheme.

1940 (53)

Jun 27 Appointed Chief Justice of Queensland.

1942 (55)

Jan 1 Received Knighthood.

Appointed chairman of the Commonwealth Australian Industrial Relations Council.

Dec 11 Former state premier, William Forgan Smith replaced Webb as chairman of the Sugar Cane Prices Board.

1943 (56)

June 23 Appointed as Commissioner of Inquiry for Investigating Breaches of Rules of Warfare.

1944 (57)

Jan 18 The United Nations War Crimes Commission held its first official meeting.

March 15 First War Crimes Report handed to Dr Evatt.

June 8 Dr Evatt appointed Webb for a second commission into war crimes not covered by the first commission.

July 19 Dr Evatt, Minister for External Affairs, states in the Commonwealth Parliament that a second commission into war crimes had been given to Sir William Webb.

25 Appointed chairman of the Commission of Inquiry into Postal, Telegraphic and Telephonic Censorship.

Aug 11 Report of the Commissioner on Censorship of Postal, Telegraphic and Telephonic is completed.

Sep 13 Report on censorship tabled in parliament.

Oct 10 Asked by Evatt to visit England to present his findings before the UNWCC. Webb made an intermitted report on his findings for the second commission before leaving

Dec 6 Travelled by air to London to report to the UNWCC.

1945 (58)

Jan-Feb Presents Australian cases before the UNWCC and served on a Committee drafting instruction for the trials of suspected war criminals; this included consultation regarding rules of evidence.

Apr 27 Commissioned as deputy governor of Queensland in Sir Leslie Wilson's absence.

Sept 3 After Japan's acceptance of surrender, appointed Chairman of the Third War Crimes Commission, which is extended to cover 'any matter within the charter of the UN War Crimes'.

Became a member of the Senate of the University of Queensland.

1946 (59)

Jan 31 Third War Crimes Report completed and signed by Webb and Mansfield.

Feb 3 Left Australia for Tokyo.

15 MacArthur as Supreme Commander of the Allied Powers appointed Webb as President of the International Military Tribunal for the Far East (IMTFE).

Apr 12 Appointed to the High Court.

24 Resigns as chief justice of the Supreme Court and president of the Arbitration Court of Queensland, replaced the next day by Mr Justice B.H. Matthews.

29 IMTFE is convened.

Jun 27 Resigns from the Senate of the Queensland University.

1947 (60)

Nov 7 Announced to the IMTFE that he would be leaving for Australia to sit on the bench of the High Court.

1948 (51)

Mar 31 United Nations War Crimes Commission ceased to operate.

12 Nov The judgment of the IMTFE is handed down.

29 Webb returns from Tokyo to Australia.

1949 (52)

Oct Webb played a critical role in the *Whose Baby Case* (1949), when the outcome rested on Webb with a 2:2 divided court.

1954 (67)

Jan 1 Awarded a Knighthood of the British Empire (KBE).

1956 (69)

Dissented in the *Boilmakers' Case* (*R. v Kirby; Ex Parte Boilmakers' Society of Australia* (1956) 94 CLR 254; ALR 163).

1958 (71)

May 16 Retired from the High Court. Mr. Douglas Ian Menzies was appointed to replace.

Chairman of directors Australian Consolidated Press Ltd/ Chairman of the Queensland Television Ltd

Chairman of the Electric Power Transmission Pty. Ltd.

1960 (73)

Jul 15 Appointed chairperson of a board of inquiry into Queensland parliamentary salaries – reports on 5 August 1960.

1963 (76)

Appointed for the second time as chair of the committee inquiring into Queensland parliamentary salaries .

1967 (80)

University of Queensland conferred an Honorary Doctorate of Laws.

1972 (85)

Aug 11 Sir William Flood Webb died in Brisbane.[1]

[1] Majority of the dates cited can be found in the following sketch biographies: "Sir William Webb," *The Australian Law Journal* 20(1946): 15; "Sir William Webb," *The Australian Law Journal* 32(1958): 57; "Obituary. Sir William Webb," *The Australian Law Journal* 46(1972): 477; National Archives of Australia, "Fact Sheet 61-World War II War Crimes," National Archives of Australia, www.naa.gov.fsheets/fs61.html; Ian Callinan, "Sir William Webb," in *The Oxford Companion to the High Court*, ed. A. R. Blackshield, Michael Coper, and George Williams (South Melbourne: Oxford University Press, 2001), 706-08; Clem Lack, *Three decades of Queensland political history, 1929-1960* (Brisbane: Govt. Printer, 1962); H. A. Weld, "Webb, Sir William Flood (1887-1972)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://www.adb.online.anu.edu.au/biogs/A160612b.htm. Other dates and details drawn from other sources are cited in the body of the thesis.

Introduction

> To participate in public affairs is to attract attention and inevitable criticism. Webb's Career provides no exception to this general rule. Although he served as a Justice of the High Court… his many other public roles must have been a source of great or perhaps even greater – interest to him.[1]

This thesis examines the extra-judicial activities of Sir William Flood Webb during the Second World War and the immediate post-war period. It is an examination of a judge's involvement in the political process, such as policy development and review, during a national emergency, and whether even under exceptional circumstances such public duties remain incompatible with holding a position on a judicial bench. What is evident in the study of Webb is that even with carefully considered measures to ensure the protection of judicial integrity and independence, the acceptance of non-judicial posts have historically had the potential to bestow controversy upon a judge when embroiled in the political wrangling of the day. Moreover, even in the absence of political considerations, involvement in extra-judicial activities can have a negative impact on the functioning of the courts.

Extra-judicial activities refer to positions held by judges outside their usual judicial authority and the legal process. In other words, they refer to official positions outside of, and with no relation to, the courtroom. The focus of this dissertation is on the appointments

[1] Ian Callinan, "Sir William Webb," in *The Oxford Companion to the High Court*, ed. A. R. Blackshield, Michael Coper, and George Williams (South Melbourne: Oxford University Press, 2001), 706.

of judges made by the government, for example, to commissions of inquiries, boards and other advisory bodies, arbitration or investigative positions created during the war period. Only a cursory mention will be made of other duties and activities judges can perform and which are also considered extra-judicial, such as serving on boards of private and state institutions like universities, schools and charities, and engaging in legal discussions outside of the courtroom. The positions accepted by Sir William Webb that are the particular focus of analysis here are: the Industrial Relations Council (1942), the three war crimes commissions (1943-1945), the Royal Commission of Inquiry into Censorship (1944) and the presidency of the International Military Tribunal for the Far East (1946-1949).

The approach taken in the thesis is historical and socio-political, as opposed to a legal evaluation steeped in case and statutory law and legal philosophy. The thesis uses Webb as a biographical case study to examine how his wartime extra-judicial activities affected perceptions towards judicial independence at the time and historically. Webb has been selected as a case study due to the variety of extra-judicial activities he performed during the war, the public profile he attained, the nature of his judicial promotion, and the widespread commentary provoked by the course of his career. The thesis also fills an important gap in the literature of the Second World War, with the activities of judges often relegated to brief mentions within the histories of the period, often mentioned only in passing within the footnotes. Furthermore, the duties of Webb have not been examined together in detail, so that such an analysis can provide a greater appreciation of how he rose through the judicial ranks in Australia to become a chairperson of an international tribunal and be appointed to the High Court of Australia.

The involvement of judges in executive duties continues to be debated in contemporary discourse on judicial ethics. When judges act on royal commissions, statutory bodies or other positions for the government, they are said to sit uncomfortably within the doctrine of the separation of powers. The doctrine establishes that the three arms of government, the executive, legislature and judiciary, operate independently without the interference of the other branches providing a system of checks and balances in the system to protect the individual rights of citizens. Due to the nature of Australia's Constitution, the functions of the executive and legislative branches overlap, and the distinctions are not as clear as in the structure of, say, the United States. In Australia and other Westminster systems, the overlap occurs with members of the legislative branch forming the executive. The judiciary is required to remain independent to provide an impartial review of legislation and the exercise of power by the executive and is a key principle that underpins the separation of powers and upholds the rule of law.[2] Judicial independence is considered a cornerstone of democratic liberalism that has origins in the Glorious Revolution 1688 and was enshrined in the *Act of Settlement* 1701.[3] The *Act of Settlement* established the 'twin pillars of judicial independence' of tenure and security of remuneration which is applicable throughout the states of Australia.[4] At federal level, the independence of the judiciary is established through Chapter III of the Australian Constitution and the *Judiciary Act* 1903 (Cth).

---

[2] Cheryl Saunders, "The Separation of Powers," in *The Australian Federal Judicial System*, ed. Brian Opeskin and Fiona Wheeler (Carlton South, Victoria: Melbourne: Melbourne University Press, 2000), 10; A J Brown, "The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge," *Federal Law Review* 21(1992): 73-74; Michael Kirby, "Australia," in *Judicial Independence: The Contemporary Debate*, ed. Shimon Shetreet and Jules Deschênes (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1985), 12.

[3] Alex C Castles, "Now and Then," *Australian Law Journal* 62, no. 8 (1988): 71-75; Stephen Parker, "The Independence of the Judiciary," in *The Australian Judicial System*, ed. Brian Opeskin and Fiona Wheeler (Carlton South, Victoria: Melbourne: Melbourne University Press, 2000), 67.

[4] Terry Connolly, "Relations Between the Judicial and Executive Branches of Government," *Journal of Judicial Administration* 6, no. 4 (1997): 216.

Legislation in each of the states establishes independency of the superior courts through legislation, for example, in Queensland during the period of Webb it was the *Supreme Court Act* 1867 (QLD). The central quality or purpose of an independent judiciary is to provide public confidence that decisions in the courts are impartial and that the government is unable to influence outcomes. The point of contention in regards to extra-judicial activities discussed in the thesis is that they are established and are a function of the executive, which asks members of the judiciary to participate in and perform executive functions. Therefore, it is argued that these activities undermine the separation of powers and endanger judicial independence. This is particularly so, when judges are drawn into political concerns that often occur in non-judicial positions and the public's confidence of the judiciary's 'reputation for impartiality' is potentially put at risk. [5]

The Second World War created an interesting milieu for judges in Australia. Fuelled by patriotism and an overwhelming desire to serve in their nation's war efforts, many judges were motivated to accept extra-judicial positions. However, despite the national emergency, this thesis argues that the ethical dilemmas remained present, and that the appropriateness of judges participating in such activities was called into question at the time. Furthermore, the independence of some of the judges was continually questioned after the war. The conduct of members of the courts during this period has been raised as a concern recently by biographers and researchers which the Honourable James Thomas describes as 'painful' but recognises that since this period there has been a shift in the 'level of standards by which we now judge such conduct have been raised since they held

[5] "Judicial Impartiality - Extra Judicial Chores," *New Law Journal* 121(1971): 119-20; F. G. Brennan, "Limits on the Use of Judges," *Federal Law Review* 9(1978): 1-3.

office'.[6] It is also recognised that judges sitting on commissions of inquiry served an important role during the war in assisting in formulating appropriate government responses in a time of national crises. It must be remembered that both Houses of Parliament continued to sit regularly throughout the war and that fierce political debates and elections also continued. Also, the executive was granted, through the *National Security Act*, broad legislative authority to regulate in nearly all aspects of society without the consultation of Parliament and often beyond court review. Striking the balance between democratic rights and national security was often difficult, and therefore inquiries with a judicial air were a useful tool for the wartime government. Appointing judges as chairpersons to commissions and boards often assured that the investigations were carried out with discretion, were not encumbered with the politics of the day, and could be controlled by the government to prevent sensitive or controversial issues being discussed in a public forum during a period that required national solidarity.

Sir William Webb as a Case Study

Sir William Flood Webb provides an interesting and insightful case study due to his participation in a diverse range of extra-judicial activities during the period. Webb's most recognised and distinguished duties involved his work in the investigation and prosecution of war crimes committed by the Japanese armed forces in the Pacific during the Second World War. Motivated by the ill-treatment of its POWs, Australia became a passionate and parochial contributor to the international effort to prosecute war crimes that became an important aim of the Allied war effort. However, the overwhelming international attention

[6] James Burrows Thomas, *Judicial Ethics in Australia*, 3rd ed. (Chatswood, N.S.W.: LexisNexis Butterworths, 2009). 185.

focussed on the crimes perpetrated by the Nazi regime in Europe on minority groups, most notably the Jews. This led to the legal developments in international law of crimes against humanity and genocide. Unlike Australia, the Allies did not consider the prosecution of war crimes committed by the Japanese a priority.[7] Sir William Webb played a major role in Australia's efforts in seeking justice, firstly as an investigator with the three war crimes commissions conducted during the war, and later sitting in judgement as president of the International Military Tribunal of the Far East (IMTFE). Prior to his involvement in war crimes, Webb received the appointments by the Curtin government to chair the Industrial Relations Council and later as the Chairman for the Commission of Inquiry into Censorship. It was these appointments on domestic issues that drew Webb into controversy and led many to question his impartiality. As will be illustrated in the thesis, the role on the Industrial Relations Council and the Censorship Commission led many commentators to question whether Webb had political allegiances to the Australian Labor Party. This has been present in some commentaries on Webb in regards to his position on the High Court and the IMTFE. One of his fellow judges, B.V.A. Roling, on the IMTFE described him as a 'political figure'.[8] Eddy Neumann argues that Webb was the only justice to be appointed to the High Court that had a hint of partisanship:

> The fact remains however that governments of roughly the same political colouring have appointed High Court Justices with prior judicial experience to both the judicial posts these Justices have held. There has been only one

[7] D.C.S. Sissons, "War Crimes Trials," in *The Australian Encyclopaedia* (Terry Hills, NSW: Australian Geographic Society, 1988), 2980; Donald Cameron Watt, "Historical Introduction," in *Tokyo War Crimes Trial*, ed. R. John Pritchard and Sonia M. Zaide (New York: Garland Publishers, 1981), xi. For the British position on war crimes see John P. Fox, "The Jewish factor in British war crimes policy in 1942," *English Historical Review* 92, no. 1 (1977): 82-106.

[8] B. V. A. Roling and Antonio Cassese, *The Tokyo Trial and Beyond: reflections of a peacemonger* (Cambridge, UK: Polity Press, 1993). 29.

> case of a justice who was appointed to the High Court with prior judicial experience where there has been any hint of partisanship in the appointment. This is the appointment of Sir William Webb who, after a career in the Queensland government legal service, was appointed to the Queensland Supreme Court ultimately becoming Chief Justice. He had never been in politics but on being appointed Chairman of a Federal Industrial Relations Council in 1942, he was accused by members of pro-Labor sympathies. Sawer, who reports the above, goes on to say that these alleged pro-Labor sympathies 'never showed in his judgements'.[9]

This assertion was based on a slightly less colourful passage from Geoffrey Sawer:

> In May 1946, the government filled the seventh position on the High Court by appointing Sir William Flood Webb, who had been Chief Justice of Queensland since 1940 and was at the time Australian Judge on the International War Crimes Tribunal in Tokyo. Sir William's earlier career had been in the government legal service of Queensland. He had never been in politics, but on his appointment as Chairman of a federal Industrial Relations Council in 1942 had been accused by Opposition members of pro-Labor sympathies. They never showed in his judgments. He took up his High Court duties in 1948.[10]

It is critical to re-evaluate the views of Sawer as they reverberate through history and offer significant insight into the potential impact on the perception of independence for members of the judiciary should they engage in extra-judicial activities. As will be discussed in Chapter 3, the story of the Industrial Council is more complicated than it is represented in these passages, and it will be illustrated that Webb was quite conscious about maintaining his judicial reputation in this politically volatile position. Moreover, it is argued that Webb's appointment to the High Court was more likely based on practicality and other factors rather than any political allegiance to the Australian Labor Party.

---

[9] Eddy Neumann, *The High Court of Australia: a collective portrait, 1903-1972*, ed. Sydney University of, Government Dept. of, and Administration Public, 2nd ed., Occasional monograph; no. 6 ([Sydney]: Dept. of Government and Public Administration University of Sydney, 1973). 101.

[10] Geoffrey Sawer, *Australian Federal Politics and Law 1929-1949*, vol. 2 (Melbourne: Univiversity Press, 1956). 182.

The thesis will also consider the implications that Webb's extensive absence had on the courts on which he served. This placed a greater burden on the court system and caused criticism from sections of the press and the bench. His absence from the High Court while serving on the IMTFE caused political tumult, with the precarious balance of decisions being made by the court on key legislative matters concerning the extent of the powers of the Commonwealth Government contained in the Constitution.

Each extra-judicial activity is unique in why and how it was formed, how it functioned, the outcomes it produced and how it is received politically and publicly. The literature on the topic is dispersed across many fields and disciplines; the following sections provide a review of studies relevant to this thesis. It is divided between material that concerns Webb and his extra-judicial activities, providing insight into the subject and Webb's background, and then summarises the literature on extra-judicial activities which provide the framework for analysis of Webb's activities.

Literature Review

There has not been an extensive biography written about Webb, despite the seemingly prestigious and distinguished roles he fulfilled in Australia's legal history, including Chief Justice of the Queensland Supreme Court and Justice of the High Court of Australia. It should be noted that very few of Australia's jurists have received extensive biographical attention.[11] H. A. Weld, Bruce H. McPherson, Graham Fricke, Ian Callinan and S. Ratnapala have all written short biographical sketches on Webb.[12] Webb's various roles in

[11] Philip Girard, "Judging Lives: Judicial Biography from Hale to Holmes," *Australian Journal of Legal History* 7(2003): 87; J.D. Heydon, "Outstanding Australian Judges," *The Judicial Review* 7, no. 3 (2005).

[12] Callinan, "Sir William Webb," 706-08; Graham Fricke, *Judges of the High Court* (Melbourne: Hutchinson of Australia, 1986). 153-58; Bruce Harvey McPherson, *The Supreme Court of Queensland, 1859-1960:*

the investigation and prosecution of war crimes are frequently raised in the literature. Nonetheless, there has not been a detailed examination of his extra-judicial roles, with most work being done on one aspect, typically his work with war crimes. Generally, Webb has been disparaged, receiving criticism for his abrasive temperament and manner on the IMTFE. Conversely, he has been criticised for a lack of colour on the domestic benches in Australia.[13]

Various aspects of Sir William Webb's life have been subject to inquiry in a diverse field of study. His activities in Queensland have been the subject of research on that state's legal and political history;[14] as discussed later in this section, there is a large body of work on his involvement with the International Military Tribunal of the Far East, and his period on the High Court has also been discussed in the literature on that institution.

Webb had a distinguished and demanding career in Queensland that brought him honours and criticism. Ross Johnston in his *History of the Queensland Bar* in a sketch of Webb states:

> Both as Crown Law Officer and Judge, Webb was the model of polite,

---

history, jurisdiction, procedure (Sydney: Butterworths, 1989). 326-27; H. A. Weld, "Webb, Sir William Flood (1887-1972)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://www.adb.online.anu.edu.au/biogs/A160612b.htm; Suri Ratnapala, "Sir William Webb - A Hobbesian Jurist?," in *Queensland Judges on the High Court*, ed. Michael White and Aladin Rahemtula (Brisbane: Supreme Court of Queensland Library, 2003).

[13] Callinan, "Sir William Webb."

[14] Clem Lack, *Three decades of Queensland political history, 1929-1960* (Brisbane: Govt. Printer, 1962); Denis Murphy, R. B. Joyce, and Margaret Cribb, *The Premiers of Queensland*, Rev. ed. (St. Lucia, Qld.: University of Queensland Press, 1990); Ross Fitzgerald, *From 1915 to the early 1980s : a history of Queensland* (St. Lucia, Qld.: University of Queensland Press, 1984); Denis Murphy, *The Big strikes : Queensland 1889-1965* (St. Lucia, Qld.: University of Queensland Press, 1983); Malcolm I. Thomis, *A place of light & learning : the University of Queensland's first seventy-five years* (St. Lucia, Qld.: University of Queensland Press, 1985); Ross Fitzgerald and Harold Thornton, *Labor in Queensland: from the 1880s to 1988* (St. Lucia, Qld.: University of Queensland Press, 1989); Ross Fitzgerald, Lyndon Megarrity, and David Symons, *Made in Queensland: a new history* (St Lucia, Qld.: University of Queensland Press, 2009).

> courteous behaviour; he was patient and understanding; he did not easily ruffle, but would sit coolly, unconcernedly through the heated argument, smiling gently, his brown eyes alert and at the end of the proceedings, give a calm reasoned answer to the problem, an answer freed from the temperamental, emotional involvement of the parties concerned.[15]

Bruce H. McPherson provides the other major contribution to the judicial literature of Queensland and has provided a perceptive overview of the legal history of that state and an insight into Webb's early judicial career. He holds that Webb 'was a competent but not an outstanding lawyer' and his 'period on the bench in Queensland revealed qualities of moral courage'.[16] In explaining Webb's attainment of judicial promotion, McPherson claims it was 'to some extent the result of a happy combination of timing, opportunity, and good fortune coupled with a proven ability to persuade sometimes difficult colleagues to work together in harmony'.[17] Webb's career in the public service coincides with a period of significant political and social change in the state of Queensland. Therefore, other historical studies on the state have also been consulted in the research to illustrate how these developments furthered Webb's career and the shadow that they cast over his judicial promotions. There are two extensive biographies of key political participants from Webb's time, Thomas James Ryan and Edward Granville Theodore, which provide insight into this intriguing period of change in the state and how Webb's career developed prior to his Commonwealth duties.[18]

---

[15] Ross Johnston, *History of the Queensland Bar* (Brisbane: Bar Association of Queensland, 1979). 82.

[16] McPherson, *Supreme Court of Queensland*: 327.

[17] Ibid.

[18] Denis Murphy, *T.J. Ryan: A Political Biography* (St Lucia, Qld.: University of Queensland Press, 1990); Murphy, Joyce, and Cribb, *The Premiers of Queensland*; Ross Fitzgerald, *Red Ted : the life of E. G. Theodore* (St. Lucia, Qld.: University of Queensland Press, 1994).

There is very little published work on Webb's wartime activities, the censorship commission and the Industrial Relations Council. Archival material, newspaper articles, parliamentary debates and the reports have been essential in obtaining information about those two bodies. These very interesting aspects of Australian wartime social and political history are largely missing from the literature. Due to the short duration of the Industrial Relations Commission which Webb chaired, there is very little literature on the topic. The Official History by Paul Hasluck provides a broad overview of the establishment and demise of the Council. A similar overview has been provided on the censorship commission. There has been some broader work conducted in the area of wartime censorship in Australia. However, most of the scholarship has focused on the censorship of the printed press and of published material. The terms of inquiry of Webb's commission into censorship were restricted to issues surrounding the censorship and surveillance of mail and telephone conversations. The work of Paul Hasluck, Brian Penton and John Hilvert has covered the press censorship controversy sufficiently. The Webb commission on censorship was not considered by the latter two and is only briefly mentioned in the Official History.[19]

Although the war crimes commissions have not been subject to a published study independently, most publications refer to the commissions when discussing the formulation of the Government's response to the atrocities committed against Australian soldiers by the

[19] Paul Hasluck, *The Government and the People, 1942-1945*, vol. 2 (Canberra: Australian War Memorial, 1970); John Hilvert, *Blue Pencil Warriors. Censorship and Propaganda in World War II* (St Lucia: University of Queensland, 1984); John Hilvert, "More on Australia's Curious War Censorship," *Media Information-Australia* 7(1978); Brian Penton, *Censored! Being a true account if a notable fight for your right to read and know, with some comment upon the plague of censorship in general* (Sydney: Shakespeare Head, 1947).

Japanese Imperial Army. This is true of the works by Alan Lyon, Philip Piccigallo and Yuki Tanaka.[20] Lyon's work focuses on the trial of the Naoetsu Camp guards but only refers to the third commission and the passing of the *War Crimes Act*. Tanaka's book explores specific events, like the Sandakan Death Marches and the Kavieng Massacre and general atrocities including rape, biological warfare and cannibalism. The Webb commission is discussed in relation to the latter, as Webb resisted having the issue raised in the IMTFE proceedings. There have been at least two theses written on the development and implementation of war crimes policy by the Australian government, both of which provide overviews of the Webb commissions.[21] Piccigallo's research is the earliest publication and remains one of the most thorough in the examination of the development and execution of Australian war crimes policy. It outlines the establishment of the commission after the political and public outcry in response to the atrocities committed against Australian service personnel and the shape of the trials after the war, noting Australia's reluctance to discontinue the trials after her allies had abandoned their pursuit of war criminals.[22] The work of David Sissons also provides a thorough overview of the development of Australia's war crimes policy and the trials.[23] The war crime commissions

---

[20] Alan B. Lyon, *Japanese War Crimes. The Trials of the Naoetsu Camp Guards* (Loftus, Australia: Australian Military Historical Publications, 2000); Yuki Tanaka, *Hidden Horrors. Japanese War Crimes in World War II* (Boulder, Colorado: Westview Press, 1996); Philip R. Piccigallo, *The Japanese on Trial. Allied war crime operations in the east, 1945-1951*. (Austin: University of Texas Press, 1979).

[21] Michael Carrel, "Australia's Prosecution of Japanese War Criminals: Stimuli and Constraints" (University of Melbourne, 2005), 45-52; Caroline Pappas, "Law and Politics: Australia's War Crimes Trials in the Pacific, 1943-1961" (University of New South Wales - Australian Defence Force Academy, 1998); Dean Michael Aszkielowicz, "After the Surrender: Australia and the Japanese B & C War Criminals, 1945 -1958 " (Murdoch University, 2012).

[22] Piccigallo, *The Japanese on Trial*.

[23] David Sissons, "Sources on Australian investigations into Japanese war crimes in the Pacific," *Journal of the Australian War Memorial*, no. 30 (1997); D.C.S. Sissons, "The Australian War Crimes Trials and Investigations (1942-51)," University of California at Berkeley - War Crimes Studies Centre, http://socrates.berkeley.edu/~warcrime/index.htm; Sissons, "War Crimes Trials."

have also been used by military historians writing about Australia's war efforts in the South West Pacific Area, for example Paul Ham's recent publication on the Kokoda campaign.[24] The Webb commissions were also cited in the submission for reparations to the United Nations Commission of Human Rights in 1990.[25] There are also a number of published works that deal with specific trials or series of trials conducted by Australian Tribunals, several of which refer to the Webb commissions.[26] Surprisingly, a majority of the numerous publications regarding Australian prisoner of war experiences do not refer to the Webb commissions, even though the last commission conducted a survey of the released prisoners and interviewed a large number to gather evidence for the war crime trials.[27] This may be due to the extended public suppression of the reports and the ready access to diaries

[24] Paul Ham, *Kokoda* (Pymble, N.S.W.: HarperCollins, 2004). See also: Peter Londey, "Remembering 1942. Milne Bay, 5 September 1942," Australian War Memorial, https://www.awm.gov.au/education/talks/1942-milne-bay/; David Jenkins and Peter Sullivan, *Battle surface: Japan's submarine war against Australia 1942-44* (Milsons Point, N.S.W.: Random House Australia, 1992); Alex Graeme-Evans, *Of Storms and Rainbows. The Story of the Men of the 2/12th Battalion A.I.F.*, vol. 2 (Hobart: 12th Battalion Association, 1991); Edward J. Drea, *In the Service of the Emperor. Essays on the Imperial Japanese Army* (Lincoln: University of Nebraska Press, 1998); Margaret Reeson, "Searching for Dad. Unsolved mysteries of the war," in *From a Hostile Shore. Australia and Japan at War in New Guinea*, ed. Steven Bullard and Kieko Tumura (Canberra: Australian War Memorial, 2004); Patsy Adam-Smith, *Prisoners of War. From Gallipoli to Korea* (Collingwood: Ken Fin Books, 1992).

[25] Queensland Ex-POW Reparation Committee, *Nippon Very Sorry-Many Men Must Die: Submission to the United Nations Commission of Human Rights (ECOSOC Resolution 1503)* (Bowen Hills, Brisbane: Boolarong Publications, 1990). 75-77.

[26] David Creed, Moira Rayner, and Sue Rickard, "'It will not be bound by the ordinary rules of evidence'," *Journal of the Australian War Memorial* 27(1995); George Dickinson, "Japanese War Trials," *The Australian Quarterly* 24(1952); George Dickinson, "Manus Trials. Japanese War Criminals Arraigned," *Royal Australian Historical Society* 38(1952); Gavan McCormack, "'Apportioning the blame: Australian trials for railway crimes," in *The Burma-Thailand Railway: memory and history*, ed. Gavan McCormack and Hank Nelson (St. Leonards, N.S.W.: Allen & Unwin, 1993); A. R. Moffitt and Australian Broadcasting Corporation., *Project Kingfisher* (Sydney: ABC Books for the Australian Broadcasting Corporation, 1995); Hank Nelson, "Blood Oath: A Reel History," *Australian Historical Studies* 24, no. 97 (1991); Ian Ward, *Snaring the other tiger* (Singapore: Media Masters, 1996); Emmi Okada, "The Australian Trials of Class B and C Japanese War Crimes Suspects, 1945-51," *Australian International Law Journal* 16(2009); Brenton Brooks, "The Carnival of Blood in Australian Mandated Territory," *Sabretache* 4, no. 4 (2013).

[27] For example, Don Wall, *Kill the Prisoners* (Mona Vale, New South Wales: Don Wall, 1996); Hank Nelson, *Prisoner of War. Australians Under Nippon* (Sydney: Australian Broadcasting Corporation, 1985); Cameron Forbes, *Hellfire : the story of Australia, Japan and the prisoners of war* (Sydney: Pan MacMillan Australia, 2005); Lynette Ramsay Silver, *The Bridge at Parit Sulong. An Investigation of Mass Murder. Malaya 1942* (Sydney: Watermark Press, 2004).

and interviews with survivors. In a recent review of publications on prisoners of war, Neville Wylie commented that 'we have probably reached the stage where claims for originality, on the basis of historiography lacunae can no longer be sustained'.[28] A similar case can be made for publications regarding the prosecutions of war crimes after the Second World War.

The literature on the IMTFE is the most voluminous of Webb's career and is the source of some of his harshest criticism. However, the literature on the Tokyo Trial is sparse when compared to its European counterpart, the Nuremberg trials. Historical research on the IMTFE became sparse after the 1950s. In 1979 John R. Lewis published a bibliography on war crimes trials which lists 1,290 entries on the Nuremberg trial and 231 on the IMTFE.[29] Furthermore, the judgements were not published until 1977, and the entire transcript not until 1981.[30] In the last twenty years there has been substantial growth in the literature concerning the Tokyo Trial with reappraisals of proceedings and the precedents that were established.

---

[28] Neville Wylie, "Prisoners of War in the Era of Total War," *War in History* 13, no. 2 (2006).

[29] John R. Lewis, *Uncertain judgment : a bibliography of war crimes trials*, The War/Peace bibliography series ; 8 (Santa Barbara, Calif.: ABC-Clio, 1979). Cited in Arnold C. Brackman, *The Other Nuremberg. The Untold Story of the Tokyo War Crimes Trials* (New York: Quill-William Morrow, 1987). 9. There have been 'relatively few books' written concerning the trial. Lewis also contained 143 entries on Vietnam. The reasons given by Brackman why the IMTFE has been shunned include disagreement 'with the concept of criminal responsibility for war', difficulties in access due to the length and volume of the trial and the 'language problem' with multiple translations and the view that the trial 'was poorly conducted and badly organised', 22-24.

[30] The first organisation to publicise the judgements was the University of Amsterdam, with the introduction written by Netherlands representative, B.V.A. Roling entitled *Judgement of the International Tribunal for the Far East.* Only Pal's judgement had been published prior and that was in an Indian Law journal. The transcripts were reproduced in International Military Tribunal for the Far East. et al., *The Tokyo War Crimes Trial*, 22 vols. (New York: Garland Pub., 1981).

A number of participants of the trial, including members of the prosecution and defence teams, have published accounts of proceedings.[31] These accounts were written in the first few years following the trial and tended to be descriptive and uncritical of the events. The first academic articles written by non-participants were written in the 1950s by Gordon Ireland and Alan Appleman. Both were extremely critical of the proceedings of the IMTFE and placed much of the blame for the Tribunal's insufficiencies on the president.[32] Later studies of the Tokyo trial echo the accusations of Webb's inadequacies as president to ensure a fair trial for the Japanese accused.

Richard Minear's thesis, *Victor's Justice*, was the first publication of book proportions on the trial and has since been referred to in nearly every publication on the IMTFE.[33] Minear contends that the trial was 'barely disguised as revenge' and that it was at least a travesty of justice 'because a lofty aim was pursued by ignoble means'.[34] Minear raised many issues of concern relating to the procedure of the IMTFE, including problems in international law as it stood at the time. Minear is also critical of Sir William Webb as president, citing Ireland and Appleman as sources.

---

[31]This included: Joseph Keenan, Chief Counsel for the United States and Brendan Brown, juridical consultant; Solis Horwitz, a lawyer from the United States who worked on the prosecution team ; Elton H. Hyder, Associate Counsel for the United States Prosecution; Major Ben Bruce Blakeney, Counsel for General Umerzo and; Flight-Lieutenant Harold Evans, Secretary to Justice Northcroft of New Zealand. Elton M. Jr. Hyder, "The Tokyo Trial," *Texas Bar Journal* 10(1947): 136-37 & 66-67; Harold Evans, "The Trial of Major Japanese War Criminals. The International and Military Tribunal for the Far East," *New Zealand Law Journal* 23(1947): 8-10; Ben Bruce Blakeney, "International Military Tribunal. Argument for Motions to Dismiss," *American Bar Association Journal* 32(1946): 475-77, 523; Joseph Berry Keenan and Brendan Francis Brown, *Crimes Against International Law* (Washington D.C.: Public Affairs Press, 1950); Solis Horwitz, "The Tokyo Trial," *International Conciliation* 465(1950).

[32] John Alan Appleman, *Military Tribunals and International Crimes* (Indianapolis: Bobbs-Merill Company, 1954); Gordon Ireland, "Uncommon Law in Martial Tokyo," *The Year Book of World Affairs* 4(1950).

[33] Richard H. Minear, *Victor's Justice. The Tokyo War Crimes Trial* (Princeton, New Jersey: Princeton University Press, 1972).

[34] Ibid., 19.

Only two of the judges on the bench have published their views on the trial, Webb and B.V.A. Röling. Röling, the representative for the Netherlands on the IMTFE, has made several contributions to the literature. He dissented from the majority and was outspoken towards the functioning of the IMTFE in his publications.[35] Another dissenting judge, Radhabinod Pal, published his separate opinion and views on international law and the shortcomings of the tribunal during the 1950s.[36] The only work to feature Sir William Webb's views on the trial is the introduction written by Webb himself in Bergamini's *Japan's Imperial Conspiracy*.[37] In this short introduction, Webb reflects on the outcome of the trial and readdresses some of his contentions of the time regarding the Emperor, Japan's guilt for aggression and the sentences he handed down in the name of the IMTFE. Moreover, Webb supports Bergamini's thesis of Hirohito's war guilt. However, Bergamini's research has been described as 'spasmodically organised and crammed with gossip' as it attempts to establish a thesis of the Emperor's war guilt.[38] *Japan's Imperial Conspiracy* caused a wave of literature concerning the Emperor and his role in the war which criticised Bergamini's findings until Herbert P Bix's study on Emperor Hirohito which provided new insight into his active role in shaping Japanese war strategy.[39]

---

[35] See: C. Hosoya et al., *The Tokyo War Crime Trial. An International Symposium* (Tokyo: Kodansha, 1986); Roling and Cassese, *The Tokyo Trial and Beyond*. B. V. A. Roling, "The Nuremberg and Tokyo Trials in Retrospect," in *A Treatise on International Law. Crimes and Punishment*, ed. M. Cherif Bassiouni and Ved P. Nanda (Springfield, Illinois: Charles C Thomas, 1973).

[36] R. Pal, *International Military Tribunal for the Far East. Dissentient Judgment of Justice R.B. Pal* (Calcutta, 1953); R. Pal, *Crimes in international relations* (University of Calcutta, 1955). Ashis Nandy has provided an illuminating critique of these publications, Ashis Nandy, "The Other Within: The Strange Case of Radhabinod Pal's Judgment on Culpability," *New Literary History* 23, no. 1 (1992): 45-67.

[37] David Bergamini, *Japan's Imperial Conspiracy* (London: Heinemann, 1971).

[38] Alvin D Coox, "Japan's Imperial Conspiracy [Book Review]," *American Historical Review* 77, no. 4 (1972): 1170.

[39] Edward Behr, *Hirohito: Behind the Myth* (London: Hamish Hamilton, 1989); Robert J. C. Butow, "[Review] The Dual-Image of the Emperor," *Journal of Japanese Studies* 16, no. 1 (1990): 178-84; Ben-Ami

Arnold C. Brackman's *The Other Nuremberg*, published in 1987 is the result of his concern regarding the paucity of published material on the IMTFE and the recent revisionist history that absolved or diminished the responsibility of the defendants for the events that occurred in the Pacific War.[40] The 'victor's justice' thesis held sway until the turn of the century; however, there has been a growth in revisionist history over the last decade and a half. Van Poelgeest argues in an article published in the early 1990s that the relationship between the members of the tribunal deteriorated rapidly during the proceedings, and the most important factor was probably 'the incapacity of Sir William Webb […] to get his way as president of the Tribunal. The justices did not allow Webb to bully them in chambers as he bullied prosecutors, defence counsel and witnesses in Court. His aggressive behaviour was only counterproductive'.[41] Dayle Smith's *MacArthur's Kangaroo Court* argues that the defendant Baron Hirota Koki should not have been tried or convicted.[42] Furthermore, he holds that the IMTFE 'was so constrained by the terms of its charter as to be little more than an investigating body of MacArthur. It was a group of men to whom MacArthur might safely leave the task of advising him of what they thought might be appropriate

---

Shillony, "[Review] Dual Image of the Japanese Emperor," *Monumenta Nipponica* 44, no. 3 (1989): 375-77; Charles D. Sheldon, "Scapegoat or Instigator of Japanese Aggression? Inoue Kiyoshi's Case Against the Emperor," *Modern Asian Studies* 12, no. 1 (1978): 1-40. Herbert P. Bix, "Emperor Hirohito's War," *History Today* 41(1991): 12-19; Herbert P Bix, "The Showa Emperor's "Monologue" and the Problem of War Responsibility," *Journal of Japanese Studies* 16, no. 2 (1992): 295-363; Herbert P Bix, *Hirohito and the Making of Modern Japan* (New York: Harper-Collins, 2000).

[40] Brackman was a United Press staff correspondent who was present for most of the trial. Brackman, *The Other Nuremberg*: 64.

[41] L. van Poelgeest, "The Netherlands and the Tokyo Tribunal," in *Aspects of the Allied Occupation of Japan*, ed. Ian Nish (London: Suntory-Toyota International Centre for Economics and Related Disciplines, 1991), 23.

[42] Hirota held the positions of ambassador to the Soviet Union (1928-31), foreign minister (1933-37) and premier (1936-37). He was found guilty under count 1, overall conspiracy to wage wars of aggression, count 27, waging war against China and count 55, disregard of duty to secure observance of and prevent breaches of the laws of war.

sentences'.[43] Conversely, Timothy Maga's *Judgement at Tokyo* has led a different approach to re-examining the trial, which while acknowledging the shortcomings and other negative aspects, recognise the contributions it made. He argues that the war crime trials were an important aspect of the occupation in that prosecuting the militarist past allowed the Japanese as a nation to move forward democratically. Furthermore, he believes that Webb and Keenan were extraordinarily aware of the historical importance of the trial and were defensive to the charge that convictions had been predetermined before the proceedings had commenced.[44] Similarly, several publications were released around the time of the 70th anniversary of the trial between 2006 and 2008.[45] The recent works provide a revisionist history of the trial that contest the 'victor's justice' thesis and re-assess the contribution made by the proceedings in international law. The recent body of work also provides further detail and different interpretations of Webb's role on the bench.

There is only limited research on Webb's post-war domestic judicial career on the High Court of Australia. Sketch biographies of all the justices who have served on the High Court bench are included in the *Australian Dictionary of Biography* and the *Oxford Companion to the High Court*. Brian Galligan's *Politics of the High Court* and Eddy

[43] Dayle Smith, *MacArthur's Kangaroo Court. The Tokyo War Crimes Trial* (Brisbane: Envale Press, 2000). 107.

[44] Tim Maga, *Judgement at Tokyo* (Lexington, Kentucky: The University Press of Kentucky, 2001). 43.

[45] Yuki Takatori, "America's' War Crime Trial? Commonwealth Leadership at the International Military Tribunal for the Far East, 1946-48," *The Journal of Imperial and Commonwealth History* 35, no. 4 (2007); Madoka Futamura, *War Crimes Tribunals and Transitional Justice: the Tokyo trial and the Nuremberg legacy* (London: Routledge, 2008); James Orr, "Review: Yuma Totani. The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II," *The American Historical Review* 115, no. 3 (2010); Yuki Tanaka, Timothy L.H. McCormack, and Gerry Simpson, *Beyond Victor's Justice: The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff, Biggleswade: Leiden, 2011); Yuma Totani, *The Tokyo War Crimes Trail: The Pursuit of Justice in the Wake of World War II* (Massachusetts: Cambridge, 2008); Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: a reappraisal* (Oxford; New York: Oxford University Press, 2008).

Neumann's *The High Court of Australia* provide insightful overviews of the personalities and power struggles within the court.[46] This is supported by biographies of the Chief Justices of Webb's period on the Bench, Owen Dixon and John Latham, although the latter has no true full length biography at this stage.[47]

Fiona Wheeler has published two significant articles regarding Dixon, Latham and other High Court Justices regarding their extra-judicial activities during the Second World War where she considers the question of whether their behaviour that deviates from contemporary standards can be justified by wartime necessity.[48] There are a number of works regarding key cases on which Webb sat which includes the 'Communism' and the 'Whose Baby?' cases.[49]

There is a large volume of literature produced by the disciplines of law and politics with diverse opinions on the merits of extra-judicial activities, however, the focus has been on judicial involvement with royal commissions of inquiry. Brian Galligan divides the literature into the following categories: studies on specific inquiries, legal and procedural analysis, discussion on appropriateness of judges acting as commissioners and the

---

[46] Brian Galligan, *Politics of the High Court: a study of the judicial branch of government in Australia* (St. Lucia, Qld.: University of Queensland Press, 1987); Neumann, *The High Court of Australia: a collective portrait, 1903-1972*.

[47] Zelman Cowen, *Sir John Latham and other papers* (Melbourne: Oxford University Press, 1965); Philip Ayres, *Owen Dixon* (Carlton, Victoria: Miegunyah Press, 2003).

[48] Fiona Wheeler, "Parachuting In: War and Extra-Judicial Activity by High Court Judges," *Federal Law Review* 38, no. 3 (2010); Fiona Wheeler, "Sir John Latham's Extra-Judicial Advising," *Melbourne University Law Review* 35(2011).

[49] James R Roach, "Australia Moves to Outlaw Communist," *Far Eastern Review* 19, no. 16 (1950); Colin Duck and Martin Thomas, *Whose Baby?* (Sydney: Collins, 1984); H. P. Lee and George Winterton, *Australian Constitutional Landmarks* (Cambridge: Cambridge University Press, 2003); Roger Douglas, "A Smallish Blow for Liberty? The Significance of the Communist Party Case," *Monash University Law Review* 27, no. 2 (2001): 253-89.

examination of the 'nexus' between royal commissions, politics and policy.[50] Legal and procedural aspects are the focus of commentators such as Murray McInerney, Ronald Sackville, Stephen Donoghue and George Winterton, who have also contributed to the debate concerning the propriety of judicial involvement in the inquiries.[51] Public policy and political analysis, for example by Scott Prasser, Patrick Weller and Harold Gosnell, has focused on the role the inquiries have in the making of public policy, with some consideration of the issues surrounding judicial involvement.[52]

There are some distinguished lawyers who have recorded their support for judges acting as royal commissioners, for example, Douglas G. McGregor and D.I. Menzies. There are also a number of studies of individual commissions that provide insight into the workings of inquiries and issues that can arise when judges investigate politically charged matters.[53] It

---

[50] George Gilligan, "Royal Commissions of Inquiry," *Australian and New Zealand Journal of Criminology* 35, no. 3 (2002): 292.

[51] Stephen Donaghue, *Royal commissions and permanent commissions of inquiry* (Chatswood, N.S.W.: Butterworths, 2001); Leonard Arthur Hallett, "Royal Commissions: do they still have a place?," *Law Institute Journal* 69, no. 12 (1982); Murray McInerney, "The Appointment of Judges to Commissions of Inquiry and Other Extra-Judicial Activities," *The Australian Law Journal* 52(1978); Murray McInerney, "Procedural Aspects of a Royal Commission Part 2," *The Australian Law Journal* 24(1951); Murray McInerney, "Procedural Aspects of a Royal Commission part 1," *The Australian Law Journal* 24(1951); Murray McInerney and Garrie J. Moloney, "The Case Against," in *Judges as Royal Commissioners and Chairman of Non-Judicial Tribunal. Two Views presented at the Fourth Annual Seminar of the Australian Institute of Judicial Administration*, ed. G. Fraser (Adelaide: Australian Institute of Judicial Administration Incorporated, 1986); Ronald Sackville, "Royal Commissions in Australia. What Price Truth?," *Current Affairs Bulletin* 60, no. 12 (1984); George Winterton, "Judges as Royal Commissioners," *University of New South Wales Law Journal* 10(1987).

[52] Patrick Weller, ed. *Royal Commissions and the Making of Public Policy* (South Melbourne: McMillan Education Australia, 1994); Scott Prasser, "Royal Commissions and Public Inquiries: Scope and Uses," in *Royal Commissions and the Making of Public Policy*, ed. Patrick Weller (South Melbourne: McMillan Education Australia, 1994); Scott Prasser, "Public Inquiries in Australia: An Overview," *Australian Journal of Public Administration* 44, no. 1 (1985); Harold F Gosnell, "British Royal Commissions of Inquiry," *Political Science Quarterly* 49(1934); Scott Prasser, *Royal commissions and public inquiries in Australia* (Chatswood, N.S.W.: LexisNexis Butterworths, 2006); Fiona Wheeler, "Federal Judges as Holders of Non-judicial Office," in *The Australian Judicial System*, ed. Brian Opeskin and Fiona Wheeler (Carlton South, Vic: Melbourne University Press, 2000).

[53] Kate Murphy, ""Very Decidedly Decadent". Elite Responses to Modernity in the Royal Commission on the Decline of the Birth Rate in New South Wales, 1903-04," *Australian Historical Studies* 126(2005); Brian Thompson, "Conclusion: Judges as Trouble-Shooters," *Parliamentary Affairs* 50, no. 1 (1997): 182-89.The

is important to be cautious in placing contemporary values upon situations when examining past events. However, judicial involvement in extra-judicial activities prior to the Second World War has been discussed.[54] The extensive use of judges in non-judicial roles during this conflict and the reordering that occurred after the war resulted in a number of publications assessing judicial involvement in extra-judicial activities in western democracies, particularly in the United States. In the last ten years with the accessibility of records and a growing interest in biography there have been a number of studies into the activities of judges from this time and consideration of what standards should be applied when assessing their behaviour due to the differences in expectations due to the practices of the time and the additional pressure of wartime.[55] The use of comments made by judges of the period about their extra-judicial activities and other judicial biographies also establishes the attitudes and conflict that observers held about the role of judges on executive bodies.[56]

---

entire edition of this journal was dedicated to the Scott Commission 1996 (UK); John Benyon, ed. *Scarman and After. Essays reflecting on Lord Scarman's Report, the riots and their aftermath* (Pergamon Press: Potts Point, NSW, 1984); Mavis Maclean, "How Does an Inquiry Inquire? A Brief Note on the Working Methods of the Bristol Royal Infirmary Inquiry," *Journal of Law and Society* 28, no. 4 (2001): 590-601; Lee Bridges, "The Lawrence Inquiry - Incompetence,Corruption, and Institutional Racism," *Journal of Law and Society* 26, no. 3 (1999): 298; Mark Finnane and Jonathon Richards, ""You'll get nothing out of it"? The Inquest, Police and Aboriginal Deaths in Colonial Queensland," *Australian Historical Studies* 123(2004); Claudius O. Johnson, "The State of Victoria Investigates Communism," *The Western Political Quarterly* 8, no. 3 (1955); Greg McCarthy, "The HIH Royal Commission and the Tangled Web of Truth," *Australian Journal of Public Administration* 60, no. 3 (2001); Scott Prasser, "The Queensland Health Royal Commissions," *The Australian Journal of Public Administration* 69, no. 1 (2010); Troy Whitford and Don Boadle, "Australia's Rural Reconstruction Commission, 1943-46: A Reassessment," *Australian Journal of Politics and History* 54, no. 4 (2008): 525.

[54] For Example, W. Harrison Moore, "Executive Commissions of Inquiry," *Columbia Law Review* 13(1913); Gosnell, "British Royal Commissions of Inquiry."

[55] Brown, "The Wig of the Sword."; Laurence W. Maher, "Tales of the Overt and the Covert: Judges and Politics in Early Cold War Australia," *Federal Law Review* 21, no. 2 (1993); Wheeler, "Parachuting In: War and Extra-Judicial Activity by High Court Judges."; Wheeler, "Sir John Latham's Extra-Judicial Advising."; Fiona Wheeler, ""Anomalous occurences in unusual circumstances"? Extra-judicial activity by High Court justices: 1903-1945," *Public Law Review* 2, no. 2 (2013); Thomas, *Judicial Ethics in Australia*.

[56] Ayres, *Owen Dixon*; John J. McCloy, "Owen J Roberts' Extra Curiam Activities," *University of Pennsylvania Law Review* 104(1955); Newman Rosenthal, *Sir Charles Lowe. A Biographical Memoir* (Melbourne: Robertson and Mullens, 1968).

Thesis and Methodology

This thesis examines the extra-judicial activities of Sir William Flood Webb in Australia, 1942-1948. It raises the question whether the wartime necessities negated the criticism usually levelled at judges who participate in official duties outside of the courtroom. Was the question of judicial independence irrelevant in wartime conditions? Sir William Webb has been chosen as a case study due to the variety of duties he performed, the profile he raised and promotions he achieved during the period. The period in question begins with Webb's appointment to the Industrial Relations Council in 1942 to the conclusion of the Tokyo Tribunal in 1949. The thesis also considers his earlier career in Queensland and draws upon his period on the High Court for a final analysis of the effect on his judicial career. The keystone question is whether judges should engage in extra-judicial activities and what are the hazards in accepting these posts. The thesis examines whether his wartime duties ultimately facilitated his appointment to the High Court and the following questions are asked of Webb's wartime duties. Why were the bodies on which Webb served established and for what purpose? How did they function and perform? Was a judge suitable to chair the body? What were the results of the commission or board; did it shape public policy or provide the information to quell public alarm? Finally, how did participation in the commission or board reflect on Webb's judicial career, and did it lead to the questioning of his impartiality? Robert McKay's three hazards of extra-judicial activities have been used as a model to answer the last question of these questions.[57]

[57] Robert B. McKay, "The Judiciary and Non-Judicial Activities," *Law and Contemporary Problems* 35(1970): 9-36.

McKay's hazards and the literature concerning extra-judicial activities is elaborated upon in the next chapter.

The research has been primarily based on official governmental records held by the National Archives of Australia and the Australian War Memorial. The relevant material held by the National Archives is dispersed between Melbourne and Canberra offices. This is due to the Commonwealth departments not being centralised in Canberra before the start of the war. The Department of the Army was still located in Melbourne, and therefore many of the files created by that department have been retained by that state office. Most of the material used for research was produced by the Attorney-General's Department, the Departments of the Army, External Affairs and the Office of the Prime Minister.

The Australian War Memorial (AWM) holds the reports, transcripts and copies of the correspondence for the war crimes commissions.[58] The AWM also holds the papers of Webb while he was on the IMTFE.[59] Further, the National Archives series M1417 contains the records accumulated by Webb's legal secretary and associate to the tribunal, and series M1418 contains the personal correspondence of Webb during his tenure as president. The former series contains exhibits presented at the Tribunal, draft judgments and case notes. The latter series contains files of correspondence between Webb and the Australian government, the Supreme Commander of the Allied Powers (SCAP), the other member of the IMTFE, his family and friends. The material provides an insight into the thinking of

[58] AWM 226, 'Record of war crimes enquiries and trials, 1939-1945 war'.

[59] AWM Private Records, 3DRL/2481, 'Papers of Sir William Webb', 1946-1948.

Webb while he served on the tribunal and the political and personal relationships and pressures he experienced in exercising his duties.

The Sissons Collection held by the National Library of Australia has also been consulted in researching the war crimes commission. David Sissons was the leading researcher in this field and Australian and Japanese relations. The Evatt Papers held by the Flinders University Library have been consulted and provided material on Webb's involvement with the Commonwealth government, in particular, the war crimes commissions.

The print media were a primary tool of communication between the government and the people, providing an awareness of government policy. Although the press was heavily censored through the period, many of the controversies of the day still appeared in print, provoking public discussion and concern that required to be addressed by the government. The newspapers that have been selected for closer examination are some of the major metropolitan press during the war. The Queensland newspaper, the *Courier-Mail* is used regularly throughout the thesis, as the publication followed Webb's career closely due to his Brisbane origins. The Catholic press also frequently printed stories on Webb due to his devotion and active association with the diocese in Brisbane. The *Sydney Morning Herald, Argus* and *Daily Telegraph* were used more in reference to his national and international duties. The *Daily Telegraph* was an instigator of the challenge to the government's censorship regulations and therefore had a vested interest in Webb's inquiry into censorship.

Parliamentary debates were consulted to provide insight into the political backgrounds and motivations of the establishment commissions and other bodies. Often these bodies were

initiated after a problem was identified in the parliamentary debates, and the government felt compelled to respond to criticism of the opposition to quell the public unrest that would occur. Furthermore, Webb's appointment to the High Court and his return from the IMTFE were discussed extensively in the Commonwealth Parliament.

As mentioned previously the case study is in part a biography of Webb, but the focus of the thesis is on the subject's extra-judicial activities and the effect this has had on the perceptions of his judicial independence and other impacts it had on his judicial function. The discipline of biographical studies has lacked academic credibility in the past and has been criticised for subjectivity and being deficient in contributing to scholarly historical discourse.[60] A similar aversion to biography has been evident in legal scholarship where in the past it has been received with circumspection or derision. R. Gwynedd Parry explains that this has contributed to the tension that is prevalent in the discipline of legal history between internal (those who practice law) and external (non-legally trained scholars) legal analysis. In the last decade there has been a growing interest in biographical study in the disciplines of history and legal scholarship.[61] The use of a biographical case study is useful for this dissertation to analyse the appropriateness and the controversy that may arise due to extra-judicial activities, however, it is not the intent of the author to recount the broader aspects outside of Webb's experience while serving on extra-judicial duties. Nevertheless, it is useful to consider the use of biography in academic scholarship.

---

[60] Richard Holmes, "The Proper Study?," in *Mapping Lives. The Uses of Biography*, ed. Peter France and William St Clair (Oxford: Oxford University Press for the British Academy, 2002), 7 - 8; Richard A. Posner, "Judicial Biography," *N. Y. U. L. Rev.* 70(1995): 502.

[61] R Gwynedd Parry, "Is legal biography really legal scholarship?," *Legal Studies* 30, no. 2 (2010): 208-09; Holmes, "The Proper Study?."

Parry distinguishes two methodological traditions for legal biographies: empirical and intellectual. An empirical biographer 'presents a narrative that is principally a historical account of his subject's life and a portrayal of his character'.[62] The focus is on events and characteristics of the subject through a study of the primary sources to examine what shaped the motivation and direction of the subject and to provide an insight into historical events. The intellectual biographer's 'objective is to analyse their subject's contribution and output within the broader intellectual and legal tradition... the individual is a medium through which wider movements, ideas and processes can be assessed'.[63] This study of Webb fits into the intellectual methodology as his experiences are used to explore the wider issues surrounding judges accepting non-judicial positions. It is not the intent of the thesis to examine the subject's contribution to the development of law through an analysis of his court room decisions, although this may be an insightful angle for future research on Webb along the lines of Scott Guy, Tony McKinnon, and Barbara Hocking's work on Thomas McCawley.[64] In further support for the use of biography in legal historical scholarship J. Woodford Howard argues:

> The most rewarding "scientific" biographies to me are life histories written substantially as case studies in law making and judicial process. Generally speaking, these narratives link individual judges to courts as institutions, the governing process, and larger society.[65]

[62] Parry, "Is legal biography really legal scholarship?," 213.

[63] Ibid., 217.

[64] Scott Guy, Tony McKinnon, and Barbara Hocking, "Thomas McCawley's Tenure on the Queensland Supreme Court and Industrial Court: A Political Appointment," *Legal History* 12(2008).

[65] J. Woodford Howard, "Commentary," *N. Y. U. L. Rev.* 70, no. 3 (1995): 534.

This sentiment is echoed by Sarah Burnisde who argues that the method is a valuable research tool to 'shed light on the workings of judicial power'.[66] Biographical studies are a product of legal realism, where law is viewed as being shaped, developed and expressed by the choices of individuals.

Stuart Macintyre recently reflected that 'judicial biography is an undeveloped branch of scholarship in Australia' and tended to fit into two categories.[67] Firstly, there are biographies that narrowly focus on the subject's expression of law in their function as a judge in court and research is reliant on judicial records. The second approach is to focus on the personality and the public career of their subject, with a cursory analysis of the subject's development of law.[68] This thesis certainly fits into the latter category, but it also addresses a key concern regarding Webb's tenure on the bench and how he expressed himself in the law during this time.

Biography has received further criticism academically due to the focus on an individual as too narrow to be an effective historical study.[69] The 'spotlight effect' is avoided in the dissertation by surveying the extra-judicial activities of other justices during the period to ensure that Webb's experience is contextualised.

---

[66] Sarah Burnside, "Griffith, Isaacs and Australian Judicial Biography. An Evolutionary Development?," *Griffith Law Review* 18, no. 1 (2009): 151-52.

[67] Stuart MacIntyre, "What Makes A Good Biography," *Adelaide Law Review* 32, no. 1 (2011): 16.

[68] Ibid. The concern about judicial biography being too focussed on personality and outside activities over their impact on the development of law through their decisions, see for example, Richard A. Posner, "The Learned Hand Biography and the Questions of Judicial Greatness," *Yale Law Journal* 104(1994): 513; G. Edward White, "The Renaissance of Judicial Biography," *Reviews in American History* 23, no. 4 (1995): 716-22.

[69] Parry, "Is legal biography really legal scholarship?," 219.

There also has been a resurgence of interest in biography amongst academic historians during the last decade. Barbara Caine argues that:

> …biography can be seen as the archetypal 'contingent narrative' and the best able to show the great importance of particular locations and circumstances and the multiple layers of historical change and experience.[70]

The dissertation offers a micro-history of the period of the Second World War and is a means to explore the experience of judges during this conflict in Australia with the competing roles of providing services for the government and maintaining the image of their judicial independence.

Structure of the Thesis

The chapter plan is as follows. Chapter One examines the legal foundation and the function of commissions of inquiry and other extra-judicial activities in the legal and political system. The chapter provides a historical background to judges acting in executive positions and the challenges to the development of the principles contained in the doctrine of the separation of powers as they were formed over centuries in the English legal system. The chapter also examines the debate regarding the propriety of members of the judiciary acting on inquiries and performing other duties outside their usual courtroom activities. Furthermore, the chapter provides a brief overview of other judges' extra-judicial activities for the Commonwealth government during the war. Thus, it provides a broader analysis before focussing on Sir William Webb.

[70] Jeremy D. Popkin, "Review: Barbara Caine, *Biography and History*," *Biography* 34, no. 2 (2011).

Chapter Two provides a brief sketch of Webb's life prior to the appointment to his first Commonwealth post. Webb had a humble childhood and was able to rise rapidly to a judicial post on the Queensland Supreme Court through a distinguished career in the state's public service. This chapter illustrates that Webb's career was controversial from the beginning. This may have been due to the promotions and honours being bestowed upon him by the Queensland branch of the Australian Labor Party. The extra-judicial activities that Webb performed for the Queensland government are discussed in relation to the impact they had on the perceptions of his impartiality and partisanship.

Chapter Three examines Webb's first wartime extra-judicial activity for the Commonwealth government, the Industrial Relations Council. The background to the establishment of the council, its activities and prompt collapse will be discussed. Webb's appointment provides insight into his consciousness of his independence as a judge from any appearance of executive influence by setting conditions on his acceptance of the position which changed the format of the board members and consequently the functioning of the body. Furthermore, the chapter analyses Webb's role as chairperson in aggravating the collapse and the repercussions it had when he returned to Queensland to preside over the state's Arbitration Court.

Chapter Four discusses the important role of Webb's inquiries into war crimes perpetrated by the Japanese in the South-West Pacific and the formulation of Australia's war crimes policy. The chapter focusses on the first two inquiries conducted in 1943 and 1944. The chapter provides a brief background to the development of international law in relation to war crimes and how the Allies responded to revelations regarding the atrocities that were occurring in Europe during the Second World War. The focus then shifts to examining how

the Australian government became aware of the atrocities occurring in the Pacific theatre, the motivation for forming an inquiry headed by a member of the judiciary and the key findings that were made by Webb. The shift from being a national to an international concern, which resulted in Webb reporting to the United Nations Committee on War Crimes in London, shaped the direction of the inquiry and placed additional demands on Webb which continued to grow under the third commission which is followed through in Chapter Six as the Chief Justice's brief, but controversial, interlude with a separate commission on censorship.

Chapter Five provides an example of a controversial commission of inquiry and how judges can be drawn into political controversy. The chapter examines the appointment of Webb to chair a commission of inquiry under the national security regulation into alleged misuse of the censorship powers by government departments. Censorship had been a contentious issue from the beginning of the war. The printed press were in conflict with the government over the suppression certain news items and whether this was for national security or political purposes. The commission assigned to Webb focused on how communication censorship powers, such as mail, telegram and telephone services were being monitored. The commission uncovered a number of concerning matters that were promptly addressed by the government; it drew harsh criticism for not examining a number of matters in greater detail. The divisiveness of the matter was heightened due to the inquiry firstly being appointed to replace a parliamentary committee and moreover, it being conducted during the heat of a referendum campaign in which the Labor government was seeking an expansion of Commonwealth powers. Webb's findings in his report led to criticism from the press and questions being raised by the opposition, which had long-term

repercussions on Webb's judicial image. Some commentators at the time alleged that the inquiry was an attempt to whitewash the government. Therefore, this commission provides an example of how involvement in non-judicial positions can shape the perceptions of a judge's impartiality and undermine the principle of judicial independence.

The thesis returns to Webb's work with the war crimes commission in Chapter Six as the third commission illustrates the hazards that can arise when participating in extra-judicial activities. Firstly, the Queensland government resisted the request for Webb to be used by the Commonwealth due to the impact his absence was having on the Queensland Supreme Court and Industrial Court. Secondly, he came into conflict with a fellow commissioner when he was reappointed with additional judges to assist. This was in relation to the Chief Justice attempting to retain a central role for the commission in the trials after the war. The power struggle with the Army that occurred illustrates that Webb had been drawn deep into the realm of government policy and beyond where a judge should rightfully tread. The legacy of the commissions closes the chapter and concerns the use of the reports as evidence at the trials and the publicity to the findings. The war crimes commissions have been described as a personal crescendo for Webb and illustrate how non-judicial positions may further the career of an individual judge which is a key concern of critics of extra-judicial activities. It was his involvement with the war crimes commissions and the IMTFE that most likely provided Webb with the political contacts and leverage to be appointed to the High Court of Australia.

Chapter Seven is concerned with Webb's last extra-judicial activity related to the war before he returned to take his seat on the High Court. Although the International Military Tribunal for the Far East appears to be *prima facie* a judicial body, its establishment and

function have been argued to be political in practice and its independence questioned. The focus of the chapter is limited to the questions surrounding judges serving in an extra-judicial capacity as opposed to an analysis of international law and the propriety of placing the major war criminals on trial after hostilities end. Webb held an interesting position as president of the IMTFE, as sole spokesperson for the court he also is often portrayed as the primary cause of the inadequacies of the proceedings. The chapter illustrates the difficulty Webb faced with the conflicting objectives of individuals playing against each other with the resulting mixed outcomes. Webb himself held differing ideas during the prolonged proceedings between providing a fair trial for the accused and attempting to find methods to speed up the process to enable him to return to Australia. Another area of conflict revolved around Webb's controversial view, which was shared by the Australian Government, regarding Emperor Hirohito guilt as a war criminal. Lastly, Webb's absence from Tokyo while he returned to Australia to sit on the High Court is considered in context of the impact that it had on his position with the IMTFE. The problem of competing demands for judges is inherent with non-judicial posts. It significantly impacted the functioning of the IMTFE and resulted in a power shift on the court away from Webb and to the American representative. Furthermore, Webb's absence is a point of criticism regarding the fairness of the trial for the defendants. The highly political nature of post war trials of government leaders and the subsequent analysis of the fairness of the procedures that were followed casts a shadow on Webb's integrity as a judge and illustrates the dangers of members of the judiciary accepting positions outside of their courts even when they appear to be closely aligned to judicial function.

Webb's appointment and career on the High Court are analysed in Chapter Eight. Due to his absence with the Tokyo Tribunal, Webb missed the opportunity to play a role in most of the landmark constitutional cases of the immediate post-war era that re-interpreted the scope of the defence power of the Commonwealth government. Furthermore, the government's attempt to secure the return of Webb for the *Bank Nationalisation Case*, which continues to be a controversy in Australian history, raises important questions regarding the appropriateness of judges being absent while acting on bodies that are outside of the courtroom. The aim of the chapter is to examine Webb's appointment to the court and how his extra-judicial activities played a critical role in his selection on the bench over more prominent and what many consider qualified candidates. Therefore, a brief analysis of Webb's final years as a judge is undertaken and the impact he had on the Australian legal system while he served on the highest judicial authority of the land. The chapter draws upon the work of Russell Smyth and other secondary material to analyse Webb's period on the High Court bench. The *Boilermakers Decision* is also examined as it provides insight into Webb's ideology in regards to the independence of the judiciary. Furthermore, the chapter will draw upon the opinions of Webb in the historiography of the court. Finally, the activities that he became involved in after retirement are briefly discussed due to judges retaining their titles of justice beyond their tenure on the bench.

With the focus on Webb's career in the period of 1942-1948, this thesis will show that the contention and hazards surrounding extra-judicial positions do not diminish during wartime. Due to the maintenance of Australia's democratic practices, judges were still prone to be caught in the political wrangling of the day and experienced the hazards of participating on executive posts. Judges still have to give consideration as to whether extra-

judicial appointments will affect their image of political independence in wartime conditions and the impact that these positions may have on their judicial function.

Chapter One:
Extra-Judicial Activities

The business of judges is and should remain judging.[1]

Extra-judicial activities are positions held by judges outside normal judicial authority or court processes. The practice of using judges in non-judicial roles has been a matter of wide discussion in legal and public policy commentary in many countries from early constitutional development and was a concern during the period being examined. For instance, the *American Bar Association Journal* commented in 1947: '[T]he propriety of taking men from the bench to fill Executive posts is governed almost wholly by judicial ethics and public policy', adding that a judge 'cannot be divided in fact or in spirit so that at one time he [she] sit as judge and another as a public official of non-judicial character'.[2] In Australia, judges have been called upon to fill various roles for governments since colonisation and continue to perform important functions for the executive. This was no different during the Second World War, and some judges reflected after the war that the military threat to their nation was an additional motivating factor behind their decision to accept extra-judicial posts.

[1] Alexander Wiley and United States Senate Committee on the Judiciary, "Nominations of Hon. Marvin Jones and Hon. John Caskie Collett: Report on the Use of Judges in Nonjudicial Offices in the Federal Government," in *Executive Report of the United States Senate No. 7* (1947), 5.

[2] ABA, "Independence of Judges: Should They Be Used for Non-Judicial Work?," *American Bar Association Journal* 33(1947): 792 & 94.

Official activities of judges outside the courtroom can be divided into the two categories of quasi-judicial and extra-judicial. The former includes activities that are not proscribed to a judge 'but are related to judicial function', which includes lecturing, teaching and writing about the law and involvement in law reform advocacy. The latter are generally not considered to be activities related to the functioning of the judiciary and are the subject of this thesis.[3]

This chapter discusses the nature of extra-judicial activities in the legal system and the literature concerning the propriety of judges participating in positions beyond their usual judicial duties. The most visible extra-judicial activities in which judges engage are royal commissions of inquiry. However, there are a number of other activities that are considered to be beyond a judge's normal duties, such as offering personal advice to governments and political leaders or participating on boards of institutions and charities. Even positions on industrial relations courts, tribunals and boards have been considered extra-judicial. At the beginning of the 20th century industrial relation bodies were novel institutions, and, as discussed in Chapter Two, the establishment of the Industrial Court in Queensland presided over by a Supreme Court justice was politically and legally controversial, with its creation resulting in an appeal to the Privy Council. The dual function of industrial courts as arbitrators and policy makers was not satisfactorily resolved until the *Boilermakers Case* in 1956.[4]

[3] Robert B. McKay, "The Judiciary and Non-Judicial Activities," *Law and Contemporary Problems* 35(1970): 20-22.

[4] *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

As discussed in the introduction, Webb served on four commissions of inquiry during the war, three on war crimes and one on censorship. Webb also undertook two other functions that were beyond his judicial functions, chairman of the Industrial Relations Council and president of the Tokyo War Crimes Tribunal. Although both positions were independent of the government, they were still not related to his position as justice on either benches of the Supreme Court of Queensland or the High Court of Australia.

This chapter provides a discursive framework to analyse Sir William Webb's extra-judicial activities and why executive use of judges for official duties outside the courtroom has been a contentious issue. Commentators have raised concerns regarding the potential controversy and suggested that such positions may raise questions about a judge's impartiality. This is largely due to the typically political nature of the issues that are being referred to the judge, as governments attempt to borrow judicial authority for political gain. The model of analysis will provide insight into how the extra-judicial activities undertaken by Webb during his judicial career shaped the perceptions of him being a political judge.

The first section of the chapter examines the history, development and legal basis of royal commissions. This is followed by a discussion of other types of extra-judicial activities in which judges are typically engaged, in particular official posts and other duties carried out on behalf of the executive. The final section outlines the debate surrounding the appropriateness of judicial involvement in extra-judicial activities. There has been little uniformity between the states and the High Court regarding the use of judges for extra-judicial activities and it is generally dependant on the attitude of the presiding chief justice of each court. This is similar to other jurisdictions which are considered in the chapter, with the Supreme Court of the United States and the United Kingdom judiciary being included.

The chapter draws on various examples of extra-judicial activities in which Australian judges participated during the Second World War with particular focus on the impact of national crisis and the demands placed on the government. What is evident is that during this period many judges were drawn into the service of the executive, some of whom would have normally resisted such appointments. Moreover, it is evident that the prevailing criticisms and concerns of judges acting in executive positions are not diminished by a national emergency.

Historical Development of Royal Commissions of Inquiry

Sir William Webb's involvement in commissions of inquiry during the Second World War provides an insightful case study concerning the propriety of judges acting on behalf of the executive in extra-judicial activities. This section discusses the historical development of royal commissions in Britain and Australia, the development and role of commissions in providing governments with policy advice and the propriety of judicial participation.

Royal commissions have been a common part of the British political system since the 16th century. The earliest known royal commission of inquiry was in 1068 for the preparation of the Domesday (Doomsday) Book. H. P. Herbert comments that the 'Royal Commission is no new joke. An historian of the Tudor age wrote: "From this time (1517) the idea of a Royal Commission was never absent from the minds of politicians"'.[5] Royal commissions remain an integral part of the British system of government, though they are considered an 'extraordinary' or 'irregular' procedure.[6] Hugh Clokie and Joseph Robertson's *Royal*

[5] H. P. Herbert, "Anything But Action? A study of the uses and abuses of committees of inquiry," in *Radical Reaction. Essays in Competition and Affluence*, ed. Ralph Harris (London: Hutchinson & Co, 1961), 269.

[6] Recently there has been a review of the effectiveness of government inquiries in the United Kingdom. The Select Committee held reservations on the *Inquiries Bill 2004* (which was passed and came into effect on 7

Commissions of Inquiry provides a thorough history of the development and fluctuation in the use of royal commissions in the British legal system throughout history and the decline of their use in favour of parliamentary bodies during the 20th century.[7] A similar decline in their use has occurred in New Zealand and Canada, however, Australian governments have continued to refer matters to royal commissions frequently.[8] They retain popular support in the Australian legal and political system and are perceived to be held in high esteem with the public as an institution that can conduct independent inquiries.[9]

In Australia, royal commissions have been frequently used since early colonial times and proliferated in the later part of the 20th century.[10] George Gilligan argues that the colonial heritage provides an explanation of how royal commissions have developed in Australia

---

June 2005) as it limited parliamentary scrutiny of public inquiries and rested power entirely with ministers of the government. House of Commons Public Administration Select Committee, "Government by Inquiry," (United Kingdom2005).

[7] Hugh McDowall Clokie and Joseph William Robinson, *Royal commissions of inquiry. The significance of investigations in British politics* (New York: Octagon Books, 1969). Most writers refer to this text to summarise the early development of Royal Commissions, for example, Ronald Sackville, "Law Reform Agencies and Royal Commissions," in *The Promise of Law Reform*, ed. Brian R. Opeskin and David Weisbrot (Annandale, NSW: Federation Press, 2005).

[8] It was suggested in the late 1990s that the Canadian Government were indicating an intention to avoid appointing Royal Commissions as there was delay in appointing a retiring bureaucrat whose position was to appoint staff to federal inquiries. This was seen as a response to the spiralling costs of commissions. George Gilligan, "Royal Commissions of Inquiry," *Australian and New Zealand Journal of Criminology* 35, no. 3 (2002): 290. "Enough Inquiries?," *Maclean's* 111, no. 3 (1998). However, there are currently four commissions being conducted by the Federal Government which suggest that this format of public inquiry is still popular in Canada, Privy Council Office, "Commission of Inquiry. Current Commissions," http://www.pco-bcp.gc.ca/index.asp?lang=eng&Page=information&Sub=commissions.

[9] The Australian Law Reform Commission was requested by the Commonwealth Attorney-General's Department to review the operation of the *Royal Commissions Act 1901* (Cth) and to consider other forms of inquiry that would be suitable and more economical for the government. The ALRC proposed a new statutory framework for inquiries in which the *Royal Commissions Act* be replaced with an *Inquiries Act* which would establish two tiers of public inquiries; Royal Commissions and Public Inquiries. The ALRC position is that Royal Commissions should be kept as an institution within the Australian political system as an important mechanism to ensure public accountability. ALRC, "Royal Commissions and Official Inquiries. Discussion Paper," (Canberra: Australian Law Reform Commission, 2009).

[10] Herbert, "Anything but action," 269; Ronald Sackville, "Royal Commissions in Australia. What Price Truth?," *Current Affairs Bulletin* 60, no. 12 (1984): 5.

and why they remain a popular tool used by contemporary governments. He argues that the state has had an important interventionist role due to the necessary military administration during the establishment as a penal colony and the small vulnerable domestic market that required protection. Therefore, the use of commissions was an important facet in governmental development in Australia, which has continued since federation.[11]

Legal Basis and Procedures of Royal Commissions in Australia

Commissions of inquiry are not directly related to judicial work, although they are typically chaired by members of the judiciary, who act 'as agents of the executive'.[12] The title of 'Royal Commission' is somewhat misused, as it merely refers to the document signed by the representative of the Monarchy to appoint individuals to a position. The appointment of royal commissions is an executive power, independent of the parliament excepting the approval of expenditure, which is usually the subject of the budget after the commission had been established and often completed. Fittingly described as a 'most unusual institution of government', royal commissions are temporary bodies that are independent after they are appointed and dissolve as soon as the report is delivered.[13] The prerogative power to appoint royal commissions does not confer any powers or authority to the commissioner or

[11] Gilligan, "Royal Commissions of Inquiry," 291-2. In colonial Queensland there were thirty royal commissions in the period after the separation from New South Wales in 1859 until federation in 1901. Claire Clark noted that under the conservative governments that dominated the period, the commissions appointed were characteristically used for a 'political manoeuvre', and therefore of the thirty royal commissions, only eleven were established with an intention to achieve a specific purpose to assist the government's policy and only nine had any of the recommendations made in the reports put into effect, Claire Skerman Clark, "The Royal Commissions of Queensland," *The Australian Law Journal* 36(1961): 131-37.

[12] Enid Campbell and H.P. Lee, *The Australian Judiciary* (Cambridge: Cambridge University Press, 2001). 169.

[13] Leonard Arthur Hallett, *Royal Commissions and Boards of Inquiry. Some Legal and Procedural Aspects* (Sydney: The Law Book Company, 1982). 1-9; Harold F Gosnell, "British Royal Commissions of Inquiry," *Political Science Quarterly* 49(1934).

chairperson that are held by a court, as it has traditionally been viewed as 'usurping the jurisdiction of legal tribunals'.[14] The powers of commissions are conferred by legislation, for example in the *Royal Commissions Act* 1902 (Cth), which provides powers for compulsion of testimony, contempt proceedings and issue of search warrants.[15] Common law only recognises contempt of court and contempt of parliament, which does not extend to other governmental or quasi-judicial bodies. Thus, the protection for contempt for royal commissions must be provided through statute, which all jurisdictions in Australia have enacted.[16] Furthermore, the lack of uniformity in Australia between state and Commonwealth legislation covering the establishment, powers and procedures of royal commissions should be noted.[17] The statutory powers provided to royal commissions in Australia are an aspect that sets them apart from their counterparts in Britain and makes them a more useful tool for governments.[18]

Royal commissions can investigate any matters that are established in the terms of reference provided by the government that appoints them. Dixon J in *McGuinness v*

[14] Sackville, "Royal Commissions," 6; McClemens, "The Legal Position and Procedure Before a Royal Commissioner," *The Australian Law Journal* 35(1961): 271; W. Harrison Moore, "Executive Commissions of Inquiry," *Columbia Law Review* 13(1913): 506-7; J.D. Holmes, "Royal Commissions," *The Australian Law Journal* 29(1955): 253.

[15] The *Royal Commissions Act* was been amended in 1912, 1933, 1966 and 1982. Prior to the 1982 amendment to the *Royal Commissions Act* it was held by the High Court that compulsion to answer was subject to common law privilege. Patrick Weller, ed. *Royal Commissions and the Making of Public Policy* (South Melbourne: McMillan Education Australia, 1994), ix; Janet Ransley, "The Powers of Royal Commissions and Controls Over Them," in *Royal Commissions and the Making of Public Policy*, ed. Patrick Weller (Melbourne: McMillan Education Australia, 1994), 23-24; Edward Woodward, "An Insight into Royal Commissions," *Law Institute Journal* (1984): 1459-60.

[16] Enid Campbell, *Contempt of Royal Commissions. Contemporary Legal Issues - No. 3* (Clayton, Victoria: Faculty of Law Monash University, 1984).

[17] R.A S. and Enid Campbell, "Contempt of Royal Commissions (Book Review)," *Australian Law Journal* 60, no. 6 (1986): 361.

[18] Gilligan, "Royal Commissions of Inquiry," 292.

Attorney- General (Vic) held that the 'purpose for which a Royal Commission may be held does not seem to have any effectual limitation'.[19] A grey area in law is if the matter of inquiry is in the process of being tried before a court, and investigation may result in an 'interference with the course of justice'. This occurred in Victoria when a royal commission was abandoned after the allegations of bribery that had been made in parliament and which were being investigated became the subject of a libel case. However, it must be stressed that this does not preclude royal commissions from investigating criminal matters.[20]

The question of parliamentary privilege and royal commissions to inquire into matters of Cabinet proceedings and the truth of parliamentary statements is a matter that has yet to be clarified in law.[21] It was certainly successfully used by Edward Ward to avoid Commissioner Lowe's inquire of the statements the member made in the Commonwealth Parliament about the Brisbane Line allegations.

Royal commissioners also decide the format of the procedures of the inquiry and typically receive information through oral testimony. A common practice adopted is to require all witnesses to provide a summary of their evidence before they will be called. The chairperson directs the inquiry and usually takes the lead in the questioning, however, they are typically assisted by a secretary, who is usually appointed by the government. The

---

[19] *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73. Cited in Holmes, "Royal Commissions," 255.

[20] D.I. Menzies opinion cited in ibid., 262-3. Also see: ibid., 255; D.A. Mummery, "Due Process and Inquisitions," *Law Quarterly Review* 97(1981). The High Court of Australia considered the point in *Clough v Leahy*, (1905) 2 CLR 139; *McGuiness v Attorney-General* (1940) 63 CLR 73.

[21] Tim Carmody, "Royal Commissions, Parliamentary Privilege and Cabinet Secrecy," *Queensland University of Technology Law Journal* 11(1995): 602.

secretary holds an important position and, if named in the royal warrant, can only be removed with royal assent.[22] Relative procedural freedom allows departure from the adversarial proceedings, and the normal passive role of the judge in a courtroom can become a more inquisitorial and active role as a chairperson; this often raises the ire of legal commentators. Holmes argues that 'a judge who himself conducts the examination… descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation'.[23] The adversarial procedures naturally develop within inquiries that are inquisitorial and therefore need powers to secure information.[24] Edward Woodward, who has served on numerous commissions, writes that the adversary system was not suited to inquiries receiving undisputed fact and weighing expert opinions.[25] Furthermore, Scott Prasser argues that criticism of commissions using inquisitorial methods 'seems to miss the point' and that perhaps 'it is not the inquiry process out of kilter with Australia's needs, but the adversarial legal system'.[26] It has also been argued that the different approach of commissions is precisely their benefit to the system of government in providing policy advice.[27] Not being bound to normal rules of evidence has been cited as providing potential for lack of fairness and openness to prejudicing individual legal rights, especially as royal

[22] Gosnell, "British Royal Commissions of Inquiry," 98-102. Also refer to Chief Justice Street's summary of proceedings in Royal Commissions reported in "General Considerations Relating to and Procedures Followed by Royal Commissions," *Australian Law Journal* 57, no. 11 (1983).

[23] Holmes, "Royal Commissions," 259.

[24] Leonard Arthur Hallett, "Royal Commissions: do they still have a place?," *Law Institute Journal* 69, no. 12 (1982): 1243.

[25] Woodward, "An Insight into Royal Commissions," 1460-1.

[26] Scott Prasser, "Public Inquiries. Their Use and Abuse," *Current Affairs Bulletin* 68, no. 9 (1992): 11.

[27] Ibid., 12.

commissions are not responsible to ministers of government, and courts in Australia have been reserved in judicial review and reluctant to interfere with the findings of royal commissions. It has been argued in judgments that since the findings have no effect on legal rights, there is no scope for review. Therefore, the principles of natural justice have not traditionally been held to apply to executive inquiries. However, a person aggrieved by a commission's findings has no remedy in the courts, especially as legislation protects the commissioner from liability.[28]

National Security Inquiries

The wartime bodies chaired by Sir William Webb were established through national security regulations. While the Industrial Relations Council was established under a regulation of its own, the inquiries into war crimes and censorship were appointed under the *National Security (Inquiries) Regulations* which empowered the government to establish public inquiries that had equivalent legal status to royal commissions.[29] There has been limited research undertaken on inquires enacted under the *National Security (Inquiries) Regulations* or acknowledgement of the extensive use of these bodies by the Commonwealth Government during and immediately after the war.[30] For example, the

[28] Only recently has the High Court ruled that Royal Commissions could not infringe the rights of individuals or not observe the rules of procedural fairness. *Ainsworth v CJC* (1991) 175 CLR 564. Ransley, "The Powers of Royal Commissions and Controls Over Them," 23-24; Weller, *Royal Commissions and the Making of Public Policy*, xii; Murray McInerney, "Procedural Aspects of a Royal Commission part 1," *The Australian Law Journal* 24(1951); Moore, "Executive Commissions of Inquiry," 500; Sackville, "Royal Commissions," 10; J.G. Starke, "Royal Commissions - Review of order by Commissioner - Extent of Commissioner's duty to observe rules of natural justice," *Australian Law Journal* 58, no. 3 (1984): 169-70; Campbell, *Contempt of Royal Commissions*: 20-28.

[29] SR 1941, No 35.

[30] There is a brief mention of national security inquiries in Scott Prasser, *Royal commissions and public inquiries in Australia* (Chatswood, N.S.W.: LexisNexis Butterworths, 2006). 13. A national security inquiry has also been a subject of research in post-war policy development, Troy Whitford and Don Boadle, "Australia's Rural Reconstruction Commission, 1943-46: A Reassessment," *Australian Journal of Politics*

leader in research on public inquiries, Scott Prasser writes that there were 'some' public inquiries during the war undertaken under the regulations.[31] However, research undertaken for this thesis has found that there were at least 42 inquiries established, 28 of which were chaired by judges (see Appendix 2). Indeed, soon after the *National Security (Inquiries) Regulations* were enacted the Chief Reporter complained to the Attorney-General's Department that it was impossible to provide enough typists and typewriters due to the number of inquiries being undertaken by the government.[32] Consequently, there were only three Commonwealth royal commissions appointed during the war, all of which were chaired by a member of the judiciary (see Appendix 1). The key difference among these inquiries was that they directly involved a political figure at the centre of the allegation of government impropriety, which included the political interference in penalties given to an army contractor, the misuse of public monies by parliamentarians and the removal of official documents from government records by a minister.[33] Thus, these matters were seen to be more in the interest of domestic politics and justice rather than matters of defence and national security. The other pre-1941 judicial inquiry was conducted by Justice C.J. Lowe under the Air Force Courts of Inquiry Regulations into the Canberra air disaster in which members of Cabinet were killed in a plane crash.[34] The nation's Supreme Court justices

---

and History 54, no. 4 (2008). Also see, Scott Prasser, "Royal Commissions in Australia: When Should Governments Appoint Them," *Australian Journal of Public Administration* 65, no. 3 (2006): 32.

[31] Prasser, "Royal Commissions in Australia: When Should Governments Appoint Them," 32.

[32] NAA: A472, W2560, 'National Security (Inquiries) Regulations.

[33] The three inquiries mentioned here are the Royal Commission into Contracts for the Supply of Bread to the Department of the Army (Chaired by Mr Justice A.V. Maxwell; appointed 28 March 1941); the Royal Commission into Secret Funds (Chaired by Mr Justice P.H. Rogers; appointed 27 September 1941) and; the Royal Commission into a Missing Document from the Official Files on "The Brisbane Line" (Chaired by Mr Justice C.J. Lowe; appointed 29 June 1943).

[34] NAA: A432, 1940/729, 'Air Force Court of Inquiry to investigate the aircraft accident near Canberra on 13/8/40'.

also chaired another 14 royal commissions on behalf of the states, four of which were conducted by Queensland (Appendix 1).

The *National Security (Inquiries) Regulations* were a product of the intensification of the war economy, which began in earnest at the start of 1941. The Australian government dramatically shifted from its 'business as usual working rule' to telling the nation that a 'vital period' had begun and a greater war effort was needed to protect democracy.[35] The Acting Prime Minister, Arthur William Fadden, while Robert G. Menzies was in Britain, led the economic shift in consultation with the War Advisory Council. One of the concerns of the government had been improving economic efficiency and of considerable concern were incidents of corruption or ineptness of contractors and misuse of wartime powers that were being raised in parliament and the press, which continued throughout the war.[36] The regulations to establish inquiries was a direct result of the Treasurer (Arthur William Fadden) wanting to appoint a committee to investigate the question of hire purchases and cash orders with full investigative powers to call for evidence. From discussions between Walter Crowther Balmford (Commonwealth Actuary) and John Gilbert Buckly Castieau (Assistant Secretary, Attorney-General's Department) it was concluded that a regulation be published that enabled 'a minister, by Order, to invest a named Committee with the full powers granted to a Royal Commission'.[37] The regulation created the ability for the government to promptly appoint inquiries in a variety of forms that bestowed effective

[35] See Paul Hasluck, *The Government and the People, 1939-1941*, vol. 1 (Canberra: Australian War Memorial, 1952). 315-20. and; 'Vital Period for Australia', *Argus*, 6 February 1941, 1.

[36] Refer to appendix 2 'List of inquiries under the National Security (Inquiries) Regulations.

[37] 6 February 1941, W.C. Bamford to Secretary of Attorney-General's Department, NAA: A472, W2560, 'National Security (Inquiries) Regulations'.

powers to gather information quickly and when required, to conduct inquiries discreetly in the national interest.

The provisions in the regulation were similar to those that were contained in the Commonwealth's *Royal Commissions Act*, with the major differences contained in Section 3 (1) of the National Security version that provided:

> A Minister may appoint a Board of Inquiry or any person to inquire into, and report to that Minister on, any matter in relation to the public safety or defence of the Commonwealth and the Territories of the Commonwealth which is specified in the instrument of appointment.

Thus, under the regulations the appointments were no longer made by the Governor-General acting under letters patent under the Great Seal of the Commonwealth. Other traditional legal forms were also abandoned in Section 5 of the *National Security Regulations* which provided the following provision:

> A Board or Commission shall make a thorough investigation without regard to legal forms and solemnities and shall not be bound by any rules of evidence, but may inform itself or himself on any matter in such manner as it or he thinks fit.

The two deviations in the legislation are quite critical and reflective of the wartime circumstances in which the regulation was produced. As a result, ministers were empowered to appoint without royal assent and the commissioner only required to report to the appointing minister. Therefore, many of the inquiries were able to be conducted in secrecy with the reports not being required to be tabled in Parliament. The second deviation had the potential to impinge upon civil liberties. This became an issue in the war crimes investigation when some of the evidence collected was not allowed to be used in trials

before military tribunals and other evidence accepted has since been criticised for breaching procedural fairness, as discussed in Chapter Four.

Under both pieces of legislation the chairperson of the commission had the 'same protection and immunity as a justice of the High Court' (s4); witnesses could be compelled to provide evidence and the commissioner could summon witnesses and documents (s8.1, s10.1, s10.2. s11). Judge Stretton expressed his concerns while he was chairing an inquiry in 1942 in regards to his power as a chairman of an inquiry to summon or penalise hostile witnesses for contempt. Writing to the Attorney-General's Department he was concerned that other inquiries under these regulations would have their legal authority challenged.[38] Although this was dismissed at the time, during an inquiry two years later a witness refused to give further oral evidence unless the board could state that it had the power to subpoena witnesses.[39] This illustrates that a judge appointed under the *National Security (Inquiries) Regulations* could result in them having their authority openly challenged while filling their role on behalf of the government without the protection afforded to judges in their normal judicial roles in a court.

The inquiries regulation also included protection for witnesses, such as exemption from the use of evidence in civil and criminal proceedings (s12 and s14), and the right to be represented by counsel (s7). There were also provisions for remuneration and allowances for witness attendance (s17).

[38] NAA: A472, W2560 ,'National Security (Inquiries) Regulations'.

[39] 'Town Planner Refuses Oral Evidence', *The West Australian*, 25 November 1943, 4.

Appointment and Functions of Commissions of Inquiry

Governments call royal commissions for numerous reasons, and they are considered an important and influential part of public policy and government in Australia. A former Senator of the Commonwealth Parliament commented that a 'government never holds an inquiry unless it knows what it is going to find', leading Gilligan to conclude that: 'There is little doubt that political considerations are a major influence upon the establishment of royal commissions of inquiry'.[40] There are two basic reasons why royal commissions are appointed and for the functions they serve for governments. The first is the pragmatic or investigative inquiries designed to investigate matters and produce a report and recommendations for the purpose of policy and legislation. The second is the political, ideological or inquisitorial inquiry, enacted to investigate alleged injustice or corruption within executive administration or for crisis management in response to disaster.[41] Prasser has broken the two broad categories into ten, as summarized by Gilligan:

> to provide a perceived independent response to a crisis situation; to investigate allegations of impropriety; to obtain information; to define policy problems; to provide government with policy options; to review policies, programs or organisations; to resolve public controversy; to help governments determine what to do about previous promises.[42]

There are no guidelines for when royal commissions are to be appointed. Governments can and often do resist public demands for them. Prasser provides a theoretical framework of when royal commissions are appointed, arguing 'that certain types of policy issues

---

[40] Gilligan, "Royal Commissions of Inquiry," 295.

[41] Ibid., 289-90; Hallett, "Royal Commissions," 1242.

[42] Gilligan, "Royal Commissions of Inquiry," 293-94; Scott Prasser, "Royal Commissions and Public Inquiries: Scope and Uses," in *Royal Commissions and the Making of Public Policy*, ed. Patrick Weller (South Melbourne: McMillan Education Australia, 1994), 6-8.

involving certain categories of interest groups are key triggers in the use of inquiries' and that politicians' primary aim in appointing is gaining electoral support, especially in areas of 'special interest' rather than the broader 'public interest' sphere.[43] Hallet argues the first question to ask in considering the appointment of a commission is whether the traditional or usual government mechanisms for investigation should be implemented. Once this has been established, questions as to what powers and procedures should be followed need to be answered on an individual basis.[44] This relates to another problem that can arise with royal commissions investigating matters that an ordinary mechanism or body is addressing concurrently, for example, the coronial system or an auditor-general. The result of 'dual investigations' can undermine the process of finding truth and establishing accountability.[45]

The contemporary rational and cost-benefit analysis of government has led the discourse to focus on examining whether royal commissions are an appropriate response. It is generally agreed that governments always require information to enable them to react or formulate a response to the needs of society. Weller describes the 'use of commissions…as the ultimate "contracting out" of policy advice' and suggests that they 'reflect the limitations and incapacities of governments'.[46] Herbert argues that the use of royal commissions was '*prima facie* evidence of a failure of government' unless 'good cause' could be shown why it was necessary.[47] Cynical observers argue that the inquiries are just another political tool

[43] Prasser writing on the research of McEachern Prasser, "Royal Commissions and Public Inquiries: Scope and Uses," 16-19.

[44] Hallett, "Royal Commissions," 1242.

[45] Greg McCarthy, "The HIH Royal Commission and the Tangled Web of Truth," *Australian Journal of Public Administration* 60, no. 3 (2001): 110.

[46] Weller, *Royal Commissions and the Making of Public Policy*, xii & 259.

[47] Herbert, "Anything but action," 265-8, 97.

of government to be used as a smoke screen, a delay mechanism, a deflector of criticism from opposition parties, or to diffuse public agitation.[48] Weller and Prasser contend that even these functions serve an important role in the political process to relieve pressure. Prasser adds that the use of royal commissions 'reflects a tension and sometime suspicion between government and public service'.[49] Furthermore, Weller believes that they act to serve accountability where there would otherwise be none.[50] Accountability is a component of Clokie and Robinson's support for the use of royal commissions. They argue that:

> …every democratic parliamentary system finds it necessary to establish some form of supplementary institution to aid in the preparation of legislation, to investigate maladministration on the part of the executive, and protect the citizens at large from unintentional invasion by governmental agencies.[51]

Furthermore, Clokie and Robinson argue that the independent inquiries serve as a 'practical device' to address Parliament's defects, which they list as: lack of expertise, inadequate representation of minority interests due to geographical constituencies, partisan politics that decide issues on likely electoral success and the logistical constraints, especially in regards to time that does not allow detailed debate within Parliament.[52] Gilligan argues that the truth lies between the two extremes of explanation provided by Herbert and Clokie and

[48] Gavin Drewry, "Judicial inquiries and public reassurance," *Public Law* (1998): 368-72.

[49] Scott Prasser, "Public Inquiries in Australia: An Overview," *Australian Journal of Public Administration* 44, no. 1 (1985): 3-4.

[50] Weller, *Royal Commissions and the Making of Public Policy*, 265.

[51] Clokie and Robinson, *Royal Commissions of Inquiry*: 22.

[52] Ibid., 2-6.

Robinson, as both approaches have ignored the 'intrinsically political nature of many of these inquiries'.[53]

The romanticised conception of royal commissions as independent inquiries and the bastions of truth are still widely held in democracies. For example, there have been recent calls in Britain and Canada for the reform of royal commissions and to increase their use in the political system.[54] As evident in Australia, there are no shortages of matters of concern highlighted in the media with the demand for an independent inquiry in the form of a judicial inquiry. Gilligan furthermore concedes that within the Australian federal system, royal commissions are very useful in coordinating policies between the Commonwealth and the states.[55] This is an important point that will be elaborated later when discussing the government and civil administration in wartime Australia. Maureen O'Neil and Sandra L. Resodohardjo independently outline in a very similar manner, three reasons behind successful royal commissions which influence policy and reform: timing (the public must be interested in matter), leadership (especially that of the chairperson) and citizen participation, either directly or through the coverage provided from the media. The last is most critical and is a unique attribute of commissions of inquiry, as they are typically a public forum, especially compared to bureaucratic or parliamentary committees that do not

[53] Gilligan, "Royal Commissions of Inquiry," 292-3.

[54] Maureen O'Neil, "Why We Need More Royal Commissions," *Herizons* Fall(2001); T. W. and A. G., "Commentary: Reinventing Royal Commissions," *Political Quarterly* (2001).

[55] Gilligan, "Royal Commissions of Inquiry," 304.

excite media coverage or public interest. Furthermore, the inquiry can provide a scaffold for discourse on its subject.[56]

The discourse regarding the appointment and functions of royal commissions within government and the state highlights the diverse reasons for the employment and the success – or failure - of inquiries. Individual inquiries can result in being either propagandist tools for partisan politics or a useful mechanism in the democratic process. This contributes significantly to the controversy surrounding judicial involvement in a mechanism that is inherently a component of the political process. The chapters of this thesis regarding Sir William Webb's inquiries certainly illustrate both extremities and the importance of judges being selective in accepting extra-judicial activities on behalf of the executive.

Other Extra-Judicial Activities

Commissions of inquiry are the most visible extra-judicial activity that judges become involved with and for which they receive the most scrutiny. However, there are a number of other extra-judicial activities with which judges have and continue to be engaged. These activities include: public speaking and commentary, academic teaching and writing, community involvement, and roles within public, private, educational and charitable organisations. As stated earlier in the chapter, these activities that are 'quasi-judicial' fall outside the scope of the dissertation; although Webb performed a number of non-judicial public duties as a judge, particularly after becoming Chief Justice of the Supreme Court. Throughout his time on the bench he opened buildings and events, attended functions for

[56] O'Neil, "Why We Need More Royal Commissions," 14-16. Sandra L. Resodihardjo, "Wielding a Double-Edged Sword: The Use of Inquiries at Times of Crisis," *The Journal of Contingencies and Crisis Management* 14, no. 4 (2006): 203.

visiting dignitaries, and partook in public ceremonies.[57] Webb occasionally engaged in public speaking. In 1942, he made a speech in the opening of a St Vincent De Paul fete stressing the importance of support required for released prisoners and other vulnerable members of the community.[58] He chaired the inaugural Aquinas Memorial Lecture in March 1944 and addressed the Royal Geographical Society in 1945.[59] Near the end of the war he spoke about war crimes in relation to the development of international law to audiences outside of the legal profession.[60] Webb was also a member of the Senate for the Queensland University alongside representatives from the government from 1944 until his appointment to the High Court.[61] These incidents are rather benign in assessing the

---

[57] 'New Stuartholme Convent Opened', *Courier-Mail*, 1 March 1943, 4; 'Big American Centre Opened', *Courier-Mail*, 5 July 1943, 3; 'Round About with Penelope', *Sunday Mail* (Brisbane), 26 August 1951, 10 (opening of Marodian Gallery's George Colville exhibition which depicted post war Japan).

Webb and the other Catholic Justices of the Supreme Court attended a function to welcome the visiting Apostolic Delegate, Rev. Dr John Panico, 'Garden Party', *The Australasian*, 24 April 1937, 14-15; As Chief Justice he called upon the Duke and Duchess of Gloucester at Government House during their visit to the state, 'Air Force Set Tempo of Great Reception', *Courier-Mail*, 8 June 1945, 3.

Webb played roles in wreath laying ceremonies and was a member of official parties at a number of public events, for example at Empire Day celebrations, 'Audience's Tribute of Song to Flag', *Courier-Mail*, 26 May 1942, 3. As well as military commemorative ceremonies and wreath laying, 'Large Crowds Take Part in City Services on Intercession', *Courier-Mail*, 4 September 1942, 5 and; 'Large Crowd of 170,000 See War's Reality in City ANZAC Parade', *Courier-Mail*, 26 April 1943, 3. He was also an invitee at the celebration of milestones, 'History of Queensland Ambulance Transport Brigade', *Morning Bulletin*, 21 August 1950, 5.

[58] 'Function Raises Funds to Assist Gaol Prisoners', *Courier-Mail*, 10 May 1942, 7.

[59] Webb praised Governor Leslie Wilson's dedication to develop his understanding of the people of Queensland and the important economic role of the Royal Geographical Society for the state, 'High Honour on Governor by Royal Geographical Society', *Courier-Mail*, 26 May 1945, 3.

[60] 'Today's Radio', *The Advertiser*, 7 September 1945, 16; Webb was a guest on radio and spoke before the Motion Picture Industry Club, 'Personal', *Courier-Mail*, 8 June 1945, 5.

[61] 'Unionist on Uni. Senate', *Courier-Mail*, 26 February 1944, 3; 'Personal', *Courier-Mail*, 28 June 1946, 2. Former premier and the then current Lieutenant Governor, F.A. Cooper replaced Webb, however, there have been other Supreme Court justices on the Senate. Presently Justice Martin Daubney of the Supreme Court is a member on the Senate since 2010, http://www.sclqld.org.au/judicial-papers/judicial-profiles/profiles/index.php?name=mdaubney. The practice of judges being involved in university administration was also practiced in other states at the time, for example Justice Ernest David Roper of the Supreme Court of NSW was a fellow on a the Senate of the University of Sydney from 1942 before becoming the deputy-chancellor in 1946 until 1952, R. Else-Mitchell, "'Roper, Ernest David (1901–1958)'," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/roper-ernest-david-11559/text20629. Sir John Latham was Chancellor of the Melbourne University while being the Chief Justice of the High Court between 1939 and 1941, Stuart

perceptions of Webb's judicial independence and are generally considered acceptable and expected activities for a judge in their public position. Furthermore, such activities, although not immune from creating controversy, maintain a judge's connections to the community in which they preside over legal disputes of their citizens.[62]

Justices of the superior courts in Australia have also been required to act in the capacity of deputy or lieutenant governors of states and deputy Governor-General for the Commonwealth in their absence which is common practice from colonial times.[63] Webb performed this role in Queensland and federally. In April 1945 Webb was commissioned as Deputy Governor in the absence of Sir Leslie Wilson as there had not been a successor appointed to Lieutenant Governor after the passing of Sir James Blair.[64] While acting as Deputy Governor, Webb presided over the Executive Council on at least two occasions and approved the appointment of Edward James Droughton Stanley as an acting judge on the Supreme Court.[65] In 1953 as a Justice on the High Court Webb acted as Deputy Governor-General during the swearing in of newly elected Commonwealth Senators.[66] Chief justices have had a close relationship with state governors socially and provided legal advice during colonial times which continued after Federation and the practice continued at the

---

MacIntyre, "Latham, Sir John Greig (1877-1964)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/latham-sir-john-greig-7104.

[62] David Wood, "Judges and Community Involvement," *Journal of Judicial Administration* 7(1998): 229.

[63] Robert French, "The Chief Justice and the Governor-General," in *Melbourne University Law Review Annual Dinner* (Melbourne2009); Alex C Castles, "Now and Then," *Australian Law Journal* 62, no. 8 (1988): 473.

[64] 'Chief Justice as Deputy Governor', *Courier-Mail*, 27 April 1945, 3 and; 'Personal', *Courier-Mail*, 1 September 1945, 2.

[65] 'Personal', *Courier-Mail*, 13 July 1945, 5; 'Personal', *Courier-Mail,* 14 September 1945, 2. Edward James Droughton Stanley was Webb's counsel on the War Crimes Commission. 'Mr E.J.D. Stanley to be Acting Judge', *Courier-Mail*, 21 September 1945, 3.

[66] 'Parliament to Re-Assemble', *Townsville Daily Bulletin*, 8 September 1953, 2.

Commonwealth level with the Governor-General and the Chief Justice of the High Court until very recently.[67]

An extra-judicial activity that is examined in the thesis is judicial membership on other statutory bodies established by a government. These bodies may exercise legal authority in the arbitration and adjudication of disputes, such as industrial courts. In Queensland, the legislation that established the state's Industrial Court required that the presidency was to be held by a judge of the Supreme Court. Sir William Webb held the presidency for the record period of twenty years between 1925 and 1945.[68] Webb also held the chairmanship of the Central Sugar Cane Prices Board, which was another statutory tribunal similar to the Industrial Court, between the years of 1926 and 1942.[69]

There were increased opportunities during the Second World War for judges to participate in official positions outside of the court led by a demand for expertise with the phenomenal expansion of the Commonwealth government. Seventeen new ministerial departments were created; there were a total of ten before the war and a number of those were dramatically expanded during this period. Several of the departments were created to address areas specific to the war, for example Aircraft Production, while others were retained post-war due to the expansion of Commonwealth responsibilities.[70] Hasluck comments that the

[67] The current (2015) Chief Justice of the High Court, Robert French, has outlined that there is no formal convention for justices of the High Court to provide legal advice to the Governor-General and that the development of the separation of powers and the understanding of Chapter III of the *Constitution* means that it is not 'necessary or appropriate for the Chief Justice to provide legal advice to the Governor-General', French, "The Chief Justice and the Governor-General," 13-14.

[68] Bruce Harvey McPherson, *The Supreme Court of Queensland, 1859-1960: history, jurisdiction, procedure* (Sydney: Butterworths, 1989). 370-71.

[69] Ibid., 372.

[70] Hasluck, *Government and the People*, 1: 435.

Commonwealth required expansion before the war due to internal pressures and areas that required to be placed under national control in peacetime, such as industrial relations, which became more urgent with the outbreak of war.[71]

The proliferation of boards, committees, panels, councils and commissions was another key feature of the Commonwealth government's expansion. The *War Book* foresaw some of the bodies to be established to enable coordination between departments, for example, Shipping Control Board, War Railways Executive Committee and Economic Warfare Committee. Boards tended to be semi-permanent bodies with the legal authority to execute executive functions. Committees, otherwise entitled as a panel, councils or commissions, tended to be established, often temporarily, in response to a particular problem and were more consultative in nature. These bodies also allowed outside experts and interested parties, to be brought in to provide specialist knowledge and advice, a voice for the people and be a liaison between government bodies. The Power Alcohol Committee formed in 1940 is a good example. It was established by Federal Cabinet to investigate viable fuel options and its membership was made up of representatives from a diverse range of interest groups that included Commonwealth and state ministers, industry and primary producer representatives.[72] Although it was an investigatory body, it was quite different in form and legality to inquiries that are established under the *Royal Commissions Act* or *National Security (Inquires) Regulations*. Eventually committees and boards were viewed as an inefficient method to coordinate the war effort and with the growth of expertise in the

[71] Ibid., 415.

[72] NAA: CP12/4, 45, Power Alcohol Committee of Enquiry – Report – 17th May 1941 and; D.P. Mellor, *The Role of Science and Industry*, Australia in the War of 1939-45 (Canberra: Australian War Memorial, 1958). 213-14.

public service many of the committees petered out. Those that survived tended to be those with executive functions with the support of an existing government body.[73] Hasluck argues that by early 1942 the Australian public service 'had turned into a rather exuberant giant blown up with its own importance, obsessed with committees, enamoured of regulations and insulated in its own paper'.[74]

The number of bodies established by the Commonwealth created a demand for qualified or distinguished men to preside or chair a committee or board which members of the judiciary were aptly fit and willing to fulfil. A post-war review on extra-judicial activities in the United States expounds that for judges it was 'difficult to refuse the executive when the request is placed on the plane of patriotism in time of war'.[75] This was certainly the case for judges in Australia. It is also clear that it was not only the government approaching members of the judiciary seeking their services, but many judges acted on their own initiative, many of whom quickly offered their services to the government after the outbreak of war. Sir John Latham and Owen Dixon wrote to the Prime Minister, Sir Robert Menzies, soon after the outbreak of the war. Both Justices expressed after the war that their acceptance of positions was motivated by the dire outlook in the first years of the war and

[73] Hasluck, *Government and the People*, 1: 437-42.

[74] Ibid., 415.

[75] Wiley and United States Senate Committee on the Judiciary, "Nominations of Hon. Marvin Jones and Hon. John Caskie Collett: Report on the Use of Judges in Nonjudicial Offices in the Federal Government," 7.

found it difficult to sit idly on the bench.[76] Other judges and former judges also offered their services in any capacity with the outbreak of war.[77]

The Menzies and Curtin governments readily accepted these offers for service and sought the service of other judges throughout the war to serve proxy-executive functions. Herbert Vere Evatt as Minister of External Affairs typically drew members form the legal community to fill diplomatic positions and other appointments.[78] Justice Owen Dixon of the High Court accepted a number of wartime posts at the bequest of the government, including Chairmanship of the following boards: Allied Consultative Shipping Council, Commonwealth Marine Salvage Board, Commonwealth Transport Advisory Board, Marine War Risks Insurance Board, Australian Coastal Shipping Control Board and Central Wool Committee.[79] Dixon's chairmanships on these boards were taken over by two judges when he left Australia in 1942 on another executive position discussed below. Justice William Francis Langer Owen, Supreme Court of New South Wales, chaired the Central Wool Committee and Justice Thomas Stuart Clyne, Federal Bankruptcy Court, chaired the Shipping Control Board and several other posts vacated by Dixon in 1942. Judges served

[76] Philip Ayres, *Owen Dixon* (Carlton, Victoria: Miegunyah Press, 2003). 115 and 17; Fiona Wheeler, "Parachuting In: War and Extra-Judicial Activity by High Court Judges," *Federal Law Review* 38, no. 3 (2010): 487; Fiona Wheeler, "Sir John Latham's Extra-Judicial Advising," *Melbourne University Law Review* 35(2011); Holmes, "Royal Commissions," 272.

[77] The Department of Defence Coordination received offers of service from active members of the judiciary who included Justice Fred Russel Beauchamp Martin (Victorian Supreme Court 1934-1957) , NAA: A663, 0130/2/1040, 'Mr Justice Martin – Offer of services'; Justice Wilfred Hutchins (Tasmanian Supreme Court, 1938-1950), NAA: A663, 0130/2/1221, 'Justice Hutchins – Offer of services'. Justice Hutchins eventually served as Chairman on the Inquiry into the Release of Overseas Internees established under the National Security Inquiries Regulations in 1946. Former justices David John Davies Bevan (Northern Territory Supreme Court, 1912-1920), NAA: A663, 0130/2/328, 'Judge DD Bevan – offer of services' and Justice George Herbert Pike (New South Wales Land Valuation Court, 1922-1936), NAA: A663, 0130/2/570, 'Offer of services Justice Pike'.

[78] M. Finnane and J. Myrtle, *J V Barry: A Life* (Sydney: UNSW Press, 2007). 98-100.

[79] Ayres, *Owen Dixon*: 119-35.

on industrial bodies established to assist the war effort, for example, Judge Edmund Alfred Drake-Brockman (Commonwealth Court of Conciliation and Arbitration) chaired a central reference board for the coal industry; Judge Harord Bayard Piper (Commonwealth Court of Conciliation and Arbitration) was chairman of the Stevedoring Industry Commission (1942-1945) and Judge Alfred William Foster (County Court of Victoria) was Chairman of the Women's Employment Board (1942-1945).[80] These bodies were not without controversy for the judges, for instance the Central Coal Reference Board was re-constituted as the Central Reference Authority with a new chairman after pressure from Miners' Federation demanded the removal of Drake-Brockman who continued to chair the Board which did not deal with the Miners' Federation.[81] Judicial participation on bodies established to administer the internment of citizens and aliens was more compatible with judicial functions. Colin George Watt Davidson was the chairman of the advisory committee to hear internee appeals and was an official visitor of internment camps.[82] Justice Roslyn Foster Bowie Philp chaired the Queensland Advisory Committee on

[80] Ian G. Sharp, "Drake-Brockman, Edmund Alfred (1884–1949)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/drake-brockman-edmund-alfred-6014; P. A. Selth, "Piper, Harold Bayard (1894–1953)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/piper-harold-bayard-11430; Constance Larmour, "Foster, Alfred William (1886-1962)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/foster-alfred-william-6217. See also, 'Coalmining Industry. Board Members Appointed', *Mercury*, 23 December 1940, p. 2; 'Coalmining Board. List of Members. Chairman to be Judge Drake-Brockman', *Sydney Morning Herald*, 23 December 1940, 9.

[81] Ian G. Sharp, "Drake-Brockman, Edmund Alfred (1884–1949)"; Paul Hasluck, *The Government and the People, 1942-1945*, vol. 2 (Canberra: Australian War Memorial, 1970). 392.; 'Central Coal Board. Mr A.C. Willis is Chairman', *Sydney Morning Herald*, 24 November 1943, 9.

[82] Martha Rutledge, "Davidson, Sir Colin George Watt (1878-1954)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/davidson-sir-colin-george-watt-5896. MP508/1, 255/702/1091, Justice C Davidson re hearing of appeals of aliens in States where arrested.

Aliens.[83] Justice Norman O'Bryan, Supreme Court of Victoria, and Justice Neal William Macrossan, Supreme Court of Queensland, were official visitors to internment camps in their respective states. [84] O'Bryan also was the Legal Advisor to the Minister for the Army and in 1942 wrote a report for the government outlining the legal position of Australian POWs in Japanese hands.[85] Justice Ernest David Roper, Supreme Court of New South Wales, was a member of the Prime Minister's Committee of National Morale.[86] Thus, a number of judges throughout Australia took the opportunity to fill a variety of executive positions that were outside of their traditional courtroom function. The Industrial Relations Commission which Webb chaired in 1942 serves as a prime example of a legislative body chaired by a member of the judiciary and is examined in chapter 3. Likewise, the IMTFE, although judicial in character, is considered extra-judicial as it was a temporary body which required Webb to be absent from his judicial duties with the High Court.

Historically it has been common for prominent members of the judiciary offering extra-judicial advice to members of the government on legal and policy matters. It has been a matter of debate regarding the appropriateness and nature of counselling which a judge should provide to the executive. Generally, judges of Webb's era were wary of offering

[83] James B Thomas, "Philp, Sir Roslyn Foster Bowie (1895-1965)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/philp-sir-roslyn-foster-ross-11389.

[84] J. Mcl. Young, "O'Bryan, Sir Norman John (1894-1968)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/obryan-sir-norman-john-11279; P.D. Connolly, "Macrossan, Neal William (1889-1955)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/macrossan-neal-william-11028.

[85] NAA: MP742/1, 255/1/101, Australian Prisoners of War in Japanese hands – Mr Justice O'Bryan's report.

[86] R. Else-Mitchell, "Roper, Ernest David (1901-1958)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/roper-ernest-david-11559. NAA: A1608, AK29/1/2, War Records Committee on National Morale Main File.

advice that was considered political or related to policy, however, the provision of legal advice was often provided, in particular to Governors and the Governor-General. Furthermore, a number of biographers of notable Australian judges have found that there is significant number of instances of their subject communicating with the executive and offering legal and policy advice. Sir Owen Dixon maintained a close relationship with Robert G. Menzies when they were Chief Justice of the High Court and Prime Minister respectively.[87] Furthermore, Fiona Wheeler has written on Sir John Latham's political advising of both sides of politics throughout his tenure on the High Court.[88] Both Wheeler and James Thomas contemplate whether such behaviour which is intolerable by contemporary standards could be excused due to shifting expectations and perceptions on judicial independence corresponding to the time period and the nature of the war.[89] It is evident in Latham's case that he did show an awareness of the inappropriateness of providing advice to members of the executive in that it was done privately and often with a request for discretion, while exuding political impartiality publicly.[90] Although, not examined in the work of Wheeler or Thomas, Latham's extra-judicial involvement with executive matters was also raised in 1944 during the censorship controversy. Latham's intervention and leading role in negotiations between representatives of the press and the government led to criticism in parliament and the press as having gone beyond his judicial authority. The events and issues regarding Latham's actions are discussed in relation to

[87] See, Ayres, *Owen Dixon*; Wheeler, "Sir John Latham's Extra-Judicial Advising."; James Burrows Thomas, *Judicial Ethics in Australia*, 3rd ed. (Chatswood, N.S.W.: LexisNexis Butterworths, 2009).

[88] Wheeler, "Parachuting In: War and Extra-Judicial Activity by High Court Judges."; Wheeler, "Sir John Latham's Extra-Judicial Advising."

[89] Thomas, *Judicial Ethics in Australia*; Wheeler, "Parachuting In: War and Extra-Judicial Activity by High Court Judges."; Wheeler, "Sir John Latham's Extra-Judicial Advising."

[90] Wheeler, "Sir John Latham's Extra-Judicial Advising."

Webb's involvement in the censorship controversy in Chapter Five. There is no evidence uncovered in my research of Webb engaging with key members of the executive as Latham and Dixon did during this period outside and in relation to the official positions he held. In 1942 he wrote a letter to the Prime Minister, John Curtin, concerning his inability to purchase war bonds and the de-ranking of his son serving in the AIF.[91] This was not exceptional at the time either, for example, Justice Hayden Starke of the High Court of Australia, wrote to a cabinet minister complaining that his daughter who was serving overseas was not receiving a newspaper subscription.[92]However, during the third war crimes commission, Webb was in constant communication with ministers providing policy advice on war crime trials; sometimes it was sought and others times it was unsolicited. In Chapter Six, it is argued that Webb crossed the line of proper judicial conduct in his role as war crimes commissioner as he attempted to direct and shape government policy. Advice to the executive in this era has also been raised as a concern in the United States. Robert B. McKay and others have found that it was quite common until sometime after the Second World War for judges to be active participants 'in the affairs of the day' by offering advice to presidents and engaging in other partisan political activity. Furthermore, this was an accepted practice, and although considered unethical by contemporary standards, there is no evidence to suggest the offering of such advice influenced judicial rulings. However,

[91] M1415, 198, various correspondence between Sir William Webb, CJ of Supreme Court of Qld and John Curtin, Prime Minister of Australia.

[92] After investigation of the matter it was found that Starke's daughter was in an operational area under strict censorship. MP742/1, 254/2/273, [Complaint by Mr Justice Starke re Non-delivery of "Bulletin" to his daughter, 2/11 Australian General Hospital].

McKay concludes that such provision of counselling and advice by members of the judiciary to the executive should not be tolerated to avoid the allegation of 'cronyism'.[93]

The case study of Sir William further illustrates the precarious nature of the position that judges found themselves in during the war. In a number of incidents discussed below, Webb would become entangled or find himself too close to the core of the executive and would take actions or make declarations to remove himself from political controversy and attempt to maintain healthy perceptions of his judicial impartiality.

The Debate Regarding Judicial Involvement in Extra-Judicial Activities

Most of the literature examining the appropriateness of extra-judicial duties concerns judges acting on royal commissions. The issues that are raised form the basis of the analysis for the thesis as four of the duties undertaken by Webb were inquiries similar to royal commissions. Furthermore, the issues raised in regards to judges acting on commissions of inquiry are applicable to other extra-judicial activities judges perform including those that Webb undertook with the Industrial Relations Council and the IMTFE. The arguments on either side discussing the appropriateness of extra-judicial activities largely revolve around the issue of independence of the judiciary, while a judge's impartiality can be seen as beneficial to providing legitimacy to a body, non-judicial positions have the potential to undermine the reputation of a judge and therefore destabilise the independence of the judiciary. There are a number of other issues that are raised in the literature that are applicable in analysing Webb's wartime positions. This section

[93] McKay, "The Judiciary and Non-Judicial Activities," 12-13, 26.

summarises the key arguments supporting the use of judges in extra-judicial activities and then outlines the concerns raised regarding the appropriateness of judges accepting executive appointments. An outline of the differing attitudes between jurisdictions within Australia taken by the courts and overseas closes the chapter.

The arguments put forward in support for the use of judges for government inquiries and other executive bodies focus on a judge's distinct skill set and the benefits of having a chairperson that is held in high regard by the community due to their impartiality and being separate from politics. The first argument is that the ability to understand legal complexities that often arise in these positions, as well as shifting through evidence to find fact, is best suited to someone with a strong background in law.[94] This could be argued in regards to the positions that Webb filled during the war. His ability to understand industrial laws in Australia was beneficial in chairing the Industrial Relations Council. A trained legal mind of high repute was required on the war crimes commissions and the IMTFE to enable adequate representation of the nation and provide for the development of international law. Likewise, the censorship inquiry required the shifting and balancing of conflicting evidence to determine whether there had been any government impropriety.

It is also argued that many of the non-judicial positions that judges fill are important to the government process. The operational characteristics of these functions are seen as a benefit for policy development for which judges are equipped to make the most effective use in gathering information and drawing conclusions to provide direction to governments. This is

[94] F. G. Brennan, "Limits on the Use of Judges," *Federal Law Review* 9(1978): 4; Holmes, "Royal Commissions," 256; George Winterton, "Judges as Royal Commissioners," *University of New South Wales Law Journal* 10(1987): 112; Neville Owen, "Royal Commissions - The Practicalities" (paper presented at the JCA Colloquium, Sydney, 11 October 2013), 2.

supported by these bodies not being confined to the adversarial process; therefore judges are not as restricted, in comparison to court proceedings and being limited to specific points of disputed facts. This allows a wide number of issues to be investigated through the use of inquisitorial methods. They can also be seen as fulfilling other important functions, such as providing a platform for interested parties to contribute to an issue, find a compromised approach to a contentious policy matter and to serve as an official record that can provide insight into issues and reflect the response of society at the time.[95] This is applicable not only to inquiries, but to statutory boards such as the Industrial Relations Council that sought to gather information and propose policy options for the government. The war crimes commissions were critical in formulating a policy response to a perturbing problem during the war, and the findings continue to be a source for historians to consult in examining the atrocities that occurred in the Pacific during the Second World War.

Lastly, it is argued that judges provide legitimacy to these bodies due to their integrity and impartiality which reassures the public that processes are being followed without political persuasion.[96] Judges are considered to be above party politics, independent of considering how policy is received by the electorate and are bound by the principles of fairness and equality. In fact, some commentators have argued that a prominent purpose of governments resorting to commissions of inquiry is not to find fact but to provide 'social harmony', as the proceedings are conducted on an open stage with the formality and appearance of a court proceeding and typically receive immense publicity in the media. Thus, politicians

[95] Charles J. Hanser, *Guide to decision : the Royal Commission* (Totowa, N.J.,: Bedminister Press, 1965). 27-30; Prasser, *Royal commissions and public inquiries in Australia*: 100-15.

[96] Holmes, "Royal Commissions," 256.

who are widely distrusted by the public can use the impartial and objective image of a judge to provide public reassurance or, as Gavin Drewy argues, to seek 'shelter behind the shield of borrowed judicial authority'.[97] Douglas G. McGregor adds that 'in some circumstances the selection of an inquirer other than a judge may not satisfy the Australian people'.[98] It is also argued that the prestige of the judiciary would deflect criticism levelled at the findings of an inquiry without impairing the standing of the judge concerned.[99] This is particularly true in matters concerning government impropriety, national defence and security. Furthermore, even the commentators who argue that judges should not accept appointments agree that if the matter of inquiry involves reform in the area of the administration of justice then an exception should be made.[100] It is also argued that a judge's standing in the community protects them from overt public criticism. Woodward writes: 'So far as findings of fact are concerned, if the tribunal has done its work with care, and without apparent bias, it should have little difficulty in having those findings accepted. They will have authority, on their face, which it will be difficult for critics to combat'.[101] However, Raanan Sulitzeanu-Kenan found in a study of inquiries in the UK that reports

[97] Drewry, "Judicial inquiries and public reassurance," 368-72; Prasser, "Royal Commissions and Public Inquiries: Scope and Uses," 15; Prasser, "Public Inquiries."; Gavin Drewry, "Judges and Political Inquiries: Harnessing a Myth," *Political Studies* 23, no. 1 (1976); Hanser, *Guide to decision : the Royal Commission*: 24-26, 42 and 58.

[98] Douglas G. McGregor, "The Case For," in *Judges as Royal Commissioners and Chairman of Non-Judicial Tribunal. Two Views presented at the Fourth Annual Seminar of the Australian Institue of Judicial Administration,* ed. G. Fraser (Adelaide: Australian Insititute of Judicial Administration Incorporated, 1986), 101.

[99] Sackville, "Royal Commissions," 8.

[100] Winterton, "Judges as Royal Commissioners," 111.

[101] However, Woodward concedes that acceptance of the recommendations are a different matter, being subject to political, social and media pressure. Adding that reports are most influential within the first few months of their release, within six to nine months the report will be largely forgotten, thus an earlier consensus is required. Woodward, "An Insight into Royal Commissions," 1461.

have ‘conditional credibility’ with the public and interested parties and that the findings are more likely to be accepted if they are critical of the government.[102]

Judicial reputation consisting of integrity and impartiality is also central in the arguments against judges accepting extra-judicial positions. The concerns revolve around the blurring of the separation of powers and the threat posed to judicial independence in regards to the potential of a judge’s impartiality being questioned due to the positions requiring involvement in the realms of politics, policy development and other areas that are beyond traditional judicial tasks. The functionary blur is heightened when commissions of inquiry investigate matters of corruption and organised crime or any other matter that may come before the courts including civil cases.[103] A number of the inquiries undertaken during the Second World War resulted in criminal prosecutions, some of which were before the courts on which the chairing judge sat.[104] Furthermore, the war crimes commissions conducted by Webb are an example of the potential for such conflict to arise as concerns were raised regarding Webb’s impartiality on the IMTFE at the time and by commentators since, which is discussed in chapter six.

[102] Raanan Sulitzeanu-Kenan, "If They Get It Right: An Experimental Test of the Effects of the Appointment and Reports of UK Public Inquiries," *Public Administration* 84, no. 3 (2006).

[103] Ransley, "The Powers of Royal Commissions and Controls Over Them," 22.

[104] Royal Commission into Contracts for the Supply of Bread to the Department of the Army (Chairman: Mr Justice A.V. Maxwell; appointed 28 March 1941); Royal Commission into Secret Funds (Chairman: Mr Justice P.H. Rogers; appointed 27 September 1941); Certain Trading Operation in Connection with the Sale or Disposal of Apples on Behalf of the Australian Apple and Pear Marketing Board (Chairman: Horace Francis Markell, District Court of New South Wales; appointed: 27 August 1942); Affairs of Pyrmont Laboratory (Chairman: Justice Edward Aloysius McTiernan, High Court of Australia; appointed: 25 February 1943); Administration of Rowville POW Control Hostel and Circumstances Resulting in the Death of Italian POW (Chairman: Justice William Ballantyne Simpson; appointed: 8 April 1946)

The main concern that most commentators focus upon is that judicial involvement in extra-judicial activities diminishes the prestige and independence of individual judges or their courts, especially when the duty draws criticism, resulting in what Murray McInerney and Garrie J. Moloney term the 'debasing of judicial currency'. They add that it is a source of irritation when judges are referred to as justices while serving on a commission, as they are not exercising their judicial role but acting for the executive.[105] When a commission is seen to whitewash a government impropriety or blunder it has the potential to undermine public confidence in the judiciary. Inquiries and other statutory bodies can also be accused of pushing a government's political ideology or be seen as a product of a political agenda. Prasser concedes that political involvement is inevitable: 'Inquiries do not exist in a vacuum. They are part of the political environment. They are appointed by governments and can be accordingly closed down or ignored by governments…you cannot and should not take the politics out of politics'.[106] A key tenet of judicial independence lies in public confidence and respect of judges:

> It is obvious that any impairment of public confidence in the impartiality of judges who are deciding cases would result in a diminution of public acceptance of the law and loss of confidence in the courts as dispute-resolving mechanisms which, in the end, would threaten the stability, and eventually, the existence of our society.[107]

---

[105] Murray McInerney and Garrie J. Moloney, "The Case Against," in *Judges as Royal Commissioners and Chairman of Non-Judicial Tribunal. Two Views presented at the Fourth Annual Seminar of the Australian Institute of Judicial Administration*, ed. G. Fraser (Adelaide: Australian Institute of Judicial Administration Incorporated, 1986).

[106] Prasser, "Public Inquiries," 11.

[107] Guy Green, "The Rationale and Some Aspects of Judicial Independence," *Australian Law Journal* 59, no. 3 (1985): 135. See also, "Current Topics: Royal Commissions," *Australian Law Journal* 28, no. 5 (1954): 229; Brennan, "Limits on the Use of Judges," 1-2.

Alex C. Castles expresses concern that judges would be subjected to public criticism on commissions that they would not receive on the bench.[108] This also applies for other bodies on which judges may preside and is keenly illustrated with Webb's role on the Industrial Relations Council and the IMTFE. Therefore, this strikes at a key aspect of judicial independence in that the public needs confidence in their perceptions of judges being impartial and not engaging in political concerns.

Another criticism of judges accepting extra-judicial position that involves judicial independence is that the powers and protection that judges usually enjoy on the bench are not necessarily available to them in the functions they perform for the government. A member of the judiciary chairing an extra-judicial body does not typically exercise normal judicial power. For instance, despite the proceedings of inquiries having an appearance of a court, the findings do not establish law or apportion penalties, and the government is under no legal obligation to respond to the report or implement recommendations:

> It cannot be too strongly stressed that where a Supreme Court Judge has issued to him a Royal Commission he exercises those powers as a person holding an Executive Commission of Inquiry and not as performing judicial duties in a sense, because, though the activities and reports of a Royal Commission may, in a loose sense, affect subjects detrimentally, they have no effect on their legal rights and duties.[109]

In an address the Chief Justice of the Victorian Supreme Court, the Honourable Sir Henry Winneke, expressed his objection to the press and the general public referring to royal commissions as 'Judicial Inquiries' declaring: 'No two offices could be more dissimilar in

[108] Alex C Castles, "Executive References to a Court of Criminal Appeal," *Australian Law Journal* 34, no. 6 (1960): 163.

[109] McClemens, "The Legal Position and Procedure Before a Royal Commissioner," 271.

nature or effect'.[110] Unlike normal court proceedings, judges are not protected by the traditions and practices that have developed throughout centuries where unfavourable or controversial decisions do not reflect on the individual judge, rather the criticism is directed at the system.[111] For example, contempt for criticism is not clearly defined for many non-judicial positions:

> Under English and Australian law it is permissible for lawyers and laymen alike to criticize the judgments and verdicts of courts of law and also the workings of the judicial process as a whole. However, where the criticism tends or is calculated to bring the courts into disrepute or to lower their dignity or authority, any person publishing such criticism leaves himself [sic] open to criminal liability for constructive contempt of court, or as it is alternatively known, the offence of scandalizing the court.[112]

The laws and customs for protecting the courts against overt criticism were effective in the period under examination with comments on major decisions being restrained in comparison to those in the United States and contemporary times in Australia.[113] Furthermore, judges are susceptible to receiving public criticism for their reports or actions undertaken in these positions which has the potential to undermine the perceptions of their impartiality. As illustrated in the thesis, Webb received criticism performing executive functions, most notably in response to his censorship inquiry and the Industrial Relations Council, however, there were concerns raised in relation to the war crimes commissions

---

[110] Murray McInerney, "The Appointment of Judges to Commissions of Inquiry and Other Extra-Judicial Activities," *The Australian Law Journal* 52(1978): 553.

[111] Tony Black, "Judges and Royal Commissions," *New Zealand Law Journal* (1982): 37.

[112] Enid Campbell, "Contemptuous Criticism of the Judiciary and the Judicial Process," *Australian Law Journal* 34(1960): 224.

[113] Ibid. For contemporary comment on the issue of public criticism of the court see: Michael Kirby, "Attacks on judges - a universal phenomenon," *Australian Law Journal* 72, no. 8 (1998); James Plunkett, "The role of the Attorney-General in defending the judiciary," *Journal of Judicial Administration* 19, no. 3 (2010).

and his presidency of the IMTFE has been criticised extensively. It has been noted that criticism of judges performing their judicial role has been quite rare until the last twenty years where criticism grew out of contentious constitutional cases that saw an erosion of the traditional restraint observed by politicians and the press. Typically, the attorney-general has a duty to defend judges from attacks. Difficulty arises in determining whether the criticism is fair and in the normal bounds of commentary or if it is capable of undermining public confidence in the judiciary.[114] Generally, an example of a criticism that would undermine public confidence is if it is inferred that a judge may be under the influence of political or sectional interests. What is evident in the study of Webb's extra-judicial activities is that the criticisms were directed at Webb personally and did not reflect generally on the courts. This illustrates the risk posed by judges accepting non-judicial positions.

The increased risk of drawing criticism is complicated by the fact that inquiries are established by the executive to inquire and report on specific matters established in the terms of reference which may not satisfy all interested parties. Sir Laurence Street, serving on a royal commission in the 1980s while Chief Justice of the Supreme Court of New South Wales, made the following observation on the terms of reference:

> It is important to emphasise that the Judiciary as such has no legitimate role to play either in calling originally for the setting up of a Royal Commission or, when ensconced in a Royal Commissioner's chair, in calling for an extension of the terms of reference. It is the exclusive constitutional prerogative and responsibility of the Executive Branch of Government to determine whether or not to appoint a Royal Commission of Inquiry; it is its exclusive prerogative and responsibility to formulate the terms of reference.

[114] Plunkett, "The role of the Attorney-General in defending the judiciary," 162-63; Kirby, "Attacks on judges - a universal phenomenon," 599-600.

> It is the Royal Commissioner's duty to fulfil the task set for him by the Executive Government. He is obliged to discharge that duty to the full. But he will be abusing his wide-ranging powers if he takes the opportunity to exercise them in matters extending beyond those that have been committed to his investigation. A Royal Commissioner does not, when appointed as such, take over from the Executive Branch of Government any responsibility or authority to decide to investigate matters lying outside the terms of reference notwithstanding that it might be in the public interest to do so. That responsibility and authority rests at all times with the Executive Government whose exclusive province it is to determine whether it requires further or other fields to be investigated.[115]

The limitations of terms of reference were experienced by Webb with the inquiry into censorship,as illustrated in Chapter Five of the thesis. This can reflect on the judge chairing the inquiry and lead to criticism which is beyond the judge's control if the public's expectations are not met due to being limited to the narrow confines of the terms of reference.

There are a number of ways a government can control the effectiveness of commissions, with methods such as narrowly defining the terms of reference, limiting resources (for example money, staff and facilities) and providing a short period of time before the report has to be delivered. As previously stated, as a commissioner has no power to implement its recommendations, the executive can fail to act by ignoring or openly criticizing the report itself or not defending it in the public sphere from criticism.[116] Therefore, if governments are seen to have the ability to control the outcome of the inquiry, it reflects on the members

[115] Cited in "General Considerations Relating to and Procedures Followed by Royal Commissions," 601.

[116] Gosnell adds that judges 'were too likely to accept compromises' if the proceedings appeared contentious. Weller, *Royal Commissions and the Making of Public Policy*, 264-5; Prasser, "Royal Commissions and Public Inquiries: Scope and Uses," 13-14; Woodward, "An Insight into Royal Commissions," 1461; Ransley, "The Powers of Royal Commissions and Controls Over Them," 25-26; Gosnell, "British Royal Commissions of Inquiry," 98.

of the judiciary who act on the inquiries, as they are viewed as tools of the executive and undermining the principle of judicial independence.

Security of tenure for judges is integral to judicial independence from the passing of the *Act of Settlement* 1701. Judges hold their positions on good behaviour and can only be removed after an address to both houses of parliament and confirmation of the governor or governor-general.[117] The same protection is not extended to judges while they are acting in extra-judicial activities and they may be removed from their commission or have the jurisdiction of the body altered or it may be dissolved. Judges being removed their position on a statutory body has been a concern in Australia since the 1970s with the remarkable growth of executive tribunals which have been commonly chaired by sitting members of the judiciary. The example most cited is that of Justice Staples who was not reappointed to the Australian Industrial Relations Commission which replaced the Commission he chaired.[118] These actions taken by the government compromise the principle of the security of tenure for judges and therefore undermine judicial independence. This is a theme that is examined in Chapter Three with Webb's role on the Industrial Relations Council, and it was not atypical of the time for a judge to be removed from his position for political expediency.

The effectiveness of judges in extra-judicial positions has also been questioned. It has been observed that those trained in law are not familiar with the role of advising government and formulating policy. Their typical role is at the other end of the process, interpreting and

[117] Green, "The Rationale and Some Aspects of Judicial Independence," 139-41; Susan Zeitz, "Security of Tenure and Judicial Independence," *Journal of Judicial Administration* 7, no. 3 (1998): 161.

[118] Zeitz, "Security of Tenure and Judicial Independence," 174.

judging the legislation created from policy. Furthermore, judges are trained in finding fact through adversarial proceedings and acting as impartial arbitrators, which as noted earlier, is not necessarily an efficient procedure to uncover information to provide policy advice. This inadequacy as advisors has been illustrated in numerous cases, with reports typically being strong on investigation and finding of facts, but limited in suggesting remedies to the problems. Moreover, the adversarial procedure focuses on finding a guilty party, which in a royal commission of inquiry is heightened by the frenzied media commentary that often accompanies it. The focus on finding guilt obscures the truth of matters, failing to appreciate wider causes, problems and remedies.[119]

Other arguments against the use of judges are forwarded, including logistical implications of judges absent from the bench increasing the workload on their fellow members of the court. It is argued that judges are highly trained in law and do a job that few are able to do, therefore, they should not be removed from their primary function, which is judging, especially as royal commissions can be accomplished adequately by other persons such as retired judges, lawyers, academics and public servants.[120] Whether the public would distinguish between a sitting judge and retired is debatable as they still retain their title as justice.[121] Overwork of justices on the Supreme Court of Queensland was raised by a sitting member of the bench who directly criticised Webb's absence due to the war crimes commissions with the airing of dissension regarding the perks that came with assisting the

[119] McCarthy, "HIH Royal Commission," 110.

[120] McKay, "The Judiciary and Non-Judicial Activities," 10-11; ABA, "Independence of Judges," 795; Winterton, "Judges as Royal Commissioners," 110; McInerney and Moloney, "The Case Against," 51-52; McInerney, "Appointment of Judges to Commissions," 550-2.

[121] Owen, "Royal Commissions - The Practicalities."

Commonwealth government.[122] As discussed in chapter 4, the workload of the court was addressed with the appointment of an additional judge. However, the use of appointing acting-judges has also raised concerns regarding judicial independence which has relevance to the extra-judicial debate due to the common practice of appointing acting judges to replace members while serving on executive positions. The concern is that judges appointed for a fixed term would be enticed to make decisions to obtain the favour of the government to obtain further appointment. Furthermore, if the acting judge hears a case in which the government is a party and then subsequently receives an appointment observers will likely see the two events being related.[123] This is discussed in Chapter Six when these concerns were raised after Webb and Justice Mansfield were appointed to the third war crimes commission and acting justices were appointed in their absence.

Another concern is that participation may induce promotional opportunities to higher courts. A senate committee in the United States reporting on judicial independence wrote: 'Ambition is a wholesome human trait and judges are human…This could take on an ugly political tinge if judges came to see in the Executive appointment a chance to aid the Chief Executive politically'.[124] McInerney and Moloney cynically comment on the 'personal gratification which such provisions achieve for the appointee, and no doubt his family, and the fact that they may ensure that, at formal dinners at Government House, the appointee will sit closer to the Governor-General than would otherwise be the case'.[125] The

[122] 'Judges Statement on Extra-Work', *Central Queensland Herald*, 19 October 1944, 17.

[123] Sackville, R., 'Acting Judges and Judicial Independence', *The Age*, 28 February 2005; Michael Kirby, "Acting Judges - A Non-Theoretical Danger" (paper presented at the New South Wales Young Lawyers' Conference: Young Lawyers and Hope, Sydney, 1998).

[124] ABA, "Independence of Judges," 793.

[125] McInerney and Moloney, "The Case Against," 4.

implication of a judge gaining the favouritism of the government of the day through extra-judicial posts is relevant in analysing Webb's judicial career. Selection based on merit rather than political preferment is critical to judicial integrity.[126] However, judges may be motivated to take positions to escape the mundane court life and routine for a more interesting and dramatic experience in the form of a royal commission.[127] Furthermore, under some circumstances a certain amount of notoriety accompanies royal commissioners. As previously mentioned, there is the risk that the matter may arise subsequently in the court where the judge sits, therefore, retention of judicial independence is extremely important.[128] This conflict occurred with the Nuremberg defendants' *habeas corpus* applications to the Supreme Court of the United States with Justice Jackson, who was the chief Prosecutor at Nuremberg, having to declare a conflict of interest and standing aside from the hearing. Similar arguments have been raised in objecting to Webb's participation on the International Military Tribunal for the Far East due to his investigation of war crimes as a royal commissioner.

There are differing practices by courts in Australia regarding the use of judges for extra-judicial activities. The Victorian practice of limiting the use of judges is the exception from the other states in Australia, although the High Court has outwardly disavowed justices participating in non-judicial activities. The following section discusses how in practice there have been many exceptions beyond the widely held view of its diversion occurring during the world wars.

---

[126] McKay, "The Judiciary and Non-Judicial Activities," 10.

[127] McInerney and Moloney, "The Case Against," 52-3.

[128] ABA, "Independence of Judges," 795; McInerney, "Appointment of Judges to Commissions," 550.

In Victoria, the Supreme Court has adopted a firm policy against members participating in royal commissions since the 1920s. This was encapsulated in the widely respected Irvine Memorandum of 14 August 1923, made by Sir William Irvine, Chief Justice of the Supreme Court of Victoria. The chief justice wrote the following to the attorney-general after being requested to chair a commission inquiring into the misappropriation of public funds:

> The duty of His Majesty's Judges is to hear and determine issues of fact and of law arising between King and subject, or between subject and subject, presented in a form enabling judgment to be passed upon them, and when passed to be enforced by process of law. There begins and ends the function of the judiciary.
>
> It is mainly due to the fact that, in modern times at least, the Judges in all British communities have, except in rare cases, confined themselves to this function, that they have attained, and still retain, the confidence of the people. Parliament, supported by a wise public opinion, has jealously guarded the Bench from the danger of being drawn into the region of political controversy.[129]

Therefore, in Victoria there has been a principle of allowing the use of justices for executive inquiries only when the matter will not lend itself to political controversy and is of great importance to the state. The Irvine Memorandum is cited by all of the literature opposing judicial participation on royal commissions. The Memorandum does not insist that all commissions should be rejected outright by judges, and it has not been strictly followed. For example, Sir Charles Lowe chaired four commissions on inquiry during and immediately after the Second World War while serving as a justice on the Victorian Supreme Court. Rosenthal's biography of Lowe asserts that the matters Sir Charles

[129] McInerney, "Appointment of Judges to Commissions," 541-42; McInerney and Moloney, "The Case Against," 10-12.

inquired into were all 'special cases', being the air disaster at Canberra in 1940 (in which members of the War Cabinet were killed), the bombing of Darwin in 1942, the Brisbane Line controversy in 1943 and the Victorian Communist Party in 1949.[130] However, the legitimacy of the Brisbane Line inquiry could be questioned and cited as an example of a royal commission engaging in political controversy, especially as Eddie Ward, the member of parliament who made the allegations, hid behind parliamentary privilege to avoid answering questions during the proceedings, which led Lowe to conclude that the allegations had been false.[131]

In comparison, the New South Wales judiciary has taken quite a liberal view of judges acting on royal commissions. Royal commissions were used infrequently in the first few years of responsible government, but by the end of the 19th Century they were called upon frequently. In 1897 nine royal commissions were appointed in what has been termed the "golden age of royal commissions".[132] The participation of the judiciary was rare in the 19th Century commissions, with membership being drawn from independent members of parliament. The development of partisan political parties made such members rare, which led to the increased use of members of the legal profession and judges. By the 1930s, the golden age was over, and royal commissions were appointed less frequently, but the use of judges was more prominent.[133] New South Wales has in past appointed more royal commissions than the Commonwealth or the other states. Sir Laurence Street, Chief Justice

[130] Newman Rosenthal, *Sir Charles Lowe. A Biographical Memoir* (Melbourne: Robertson and Mullens, 1968). 89-135.

[131] Ibid., 118-26; W.J. D., "Privilege of Parliament," *The Australian Law Journal* 18(1944).

[132] G.N. Hawker, *The Parliament of New South Wales. 1856-1965* (Ultimo, NSW: Victor C.N. Blight, 1971). 88.

[133] Ibid., 88-89, 284-85.

of the NSW Supreme Court, commenting in a commission, agreed that the role of judges 'is a topic of considerable debate', but his position was 'that in proper cases judges will accept offices as Royal Commissioners'.[134] As Webb's censorship inquiry illustrates, what constitute a 'proper case' to avoid political controversy can be difficult for a judge to predetermine.

The High Court since its establishment has 'maintained the position that judges ought not be Royal Commissioners' or hold other non-judicial positions. Justice Dixon argues that there have been numerous examples where 'embarrassments would have occurred' if executive appointments had been accepted.[135] In February 1935 the Prime Minister R.G. Menzies asked Dixon to chair the Royal Commission on Banking and Finance. Although the Justice was tempted by the offer to escape the mundane routine of the High Court, he declined, replying to Menzies that it would be 'contrary to proper judicial conduct' and that judges should avoid political controversy.[136] However, there have been exceptions, even with Dixon. During the First World War Justice Griffith accepted a Royal Commission to inquire into AIF reinforcements and Justice Rich into conditions in the Liverpool Military Camp. McInerney and Molony wrote that the Griffith Commission due to its short duration of inquiry appeared 'to have been set up for political reasons to obtain, from a distinguished Judge, a desired answer to a political problem'.[137] During the Second World War Chief Justice Latham accepted the position of Plenipotentiary to Japan, Justice Dixon held the same post in the United States as well as many other non-judicial positions, Justice

[134] "General Considerations Relating to and Procedures Followed by Royal Commissions," 601.

[135] Holmes, "Royal Commissions," 272.

[136] Ayres, *Owen Dixon*: 62-63.

[137] McInerney and Moloney, "The Case Against," 32.

McTiernan chaired an inquiry under national security regulations and Webb served on the IMTFE during the first three years of his High Court tenure.[138] Dixon remarked that he was motivated by patriotism, especially as in 1942 the outlook of the war did not look promising, and that he desired to play an active role in the war effort. Reflecting on his roles, Dixon stated: 'Looking back from this point of view, I am not sure that it was right. I do not wish it to be thought that looking in retrospect I altogether approve of what I did'. Latham reflected: 'I have been a Minister and I have been a judge, and an inquiry sometimes, in the view of a government, is imperatively demanded in the interests of the community'. However, he also conceded: 'Sometimes I think it is a mistake for judges to act as Royal Commissioners'.[139] Both Latham and Dixon declined to declare that all executive posts should be refused out of hand and that they should be examined case by case.[140] For example, Dixon refused Menzies' request for the Chief Justice to chair the Royal Commission on Espionage in 1954. McTiernan and Webb (both of whom had

[138] Latham's 'belated' appointment on 18 August 1940 by the Menzies government as Minister to Japan to 'temporise and gain time' for defence preparations. Latham had gone to Japan on a goodwill mission in 1934 as Minister of External Affairs and 'considered himself a connoisseur of Japanese culture'. He resisted the request of resigning from the High Court and Legislation, *Judiciary Act 1940* (Cwlth) was enacted to provide his leave from the bench. Latham left Japan temporarily in September 1941 for Singapore but due to illness was unable to return before the beginning of the Pacific War. Ayres, *Owen Dixon*: 111, 22-3; Hasluck, *Government and the People*, 1: 229; David Day, *The Politics of War* (Sydney: HarperCollins, 2003). 92-3; MacIntyre, "Latham" 5; A J Brown, "The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge," *Federal Law Review* 21(1992); Fiona Wheeler, "Federal Judges as Holders of Non-judicial Office," in *The Australian Judicial System*, ed. Brian Opeskin and Fiona Wheeler (Carlton South, Vic: Melbourne University Press, 2000); Wheeler, "Parachuting In: War and Extra-Judicial Activity by High Court Judges."; Thomas, *Judicial Ethics in Australia*.

[139] Cited in Holmes, "Royal Commissions," 267-8. In his later judicial career, Dixon began to even question the propriety of his relationship with members of the executive and attempted to restrict them in public, which he took as far as refusing an invitation to propose a toast at the wedding of a child of a member of Parliament. Dixon also refused a position with the Australian National University due to it being inconsistent with his judicial office, Ayres, *Owen Dixon*: 249-56.

[140] The Commonwealth government passed special legislation, the *Judiciary (Diplomatic Representation) Act* 1942, that provided legislative support for Dixon's appointment as 'Envoy Extraordinary and Minister Plenipotentiary' to avoid conflict with the provisions contained in the *Judiciary Act* 1903-1940 (Cwth) and retain his High Court seat. McInerney and Moloney, "The Case Against," 573; McInerney, "Appointment of Judges to Commissions," 272; Holmes, "Royal Commissions," 272.

accepted executive positions while on the Court) encouraged Dixon to accept. Other justices on Dixon's bench, especially Fullagar and Kitto, were opposed to his acceptance of the invitation.[141] It has been argued that as the High Court holds 'a special position' in Australia's constitution and legal system, it should follow that its judges should not be asked by the executive to fill non-judicial posts and if asked the justices should decline.[142] Recent publications have illustrated that this was not the case in the first forty years of the High Court and that there were continuous shifts in practices and perceptions of propriety in the Court's history which has had little acknowledgement in the literature.[143] As discussed later in the thesis, Webb's participation on the IMTFE and absence from the High Court caused some concern with the other members, but more particularly with members of the government and Webb himself. It also casts a long shadow on his image as a judge historically.

Summary

The use of judges for extra-judicial activities, particularly on inquiries, has had a long history in English law and has been prevalent in Australian government practices since colonial times. During the Second World War there was an increased demand for knowledgeable and prestigious individuals, such as judges, to chair new bodies that were created to assist the war effort. It is evident that members of the judiciary were quite eager to fill these positions for a number of motivating factors. As a result, a number of our most

[141] Ayres, *Owen Dixon*: 244.

[142] McInerney and Moloney, "The Case Against," 32-33.

[143] Fiona Wheeler, ""Anomalous occurences in unusual circumstances"? Extra-judicial activity by High Court justices: 1903-1945," *Public Law Review* 2, no. 2 (2013): 125-41; Laurence W. Maher, "Tales of the Overt and the Covert: Judges and Politics in Early Cold War Australia," *Federal Law Review* 21, no. 2 (1993): 151-201.

prominent jurists of the period engaged in multiple non-judicial duties during the war. Although there has been a long history of judges accepting such posts that continues to today there are a number of concerns that have been raised regarding this practice and it remains a contentious issue in the fields of jurisprudence and political science. The concerns largely revolve around the possible impact that non-judicial activities could have on the perceptions held towards particular judges which can ultimately undermine the independence of the judiciary. This can be particularly evident in contentious political matters where a judge may be seen to be whitewashing for the government of the day, or if the findings are considered inadequate and do not satisfy the interested parties. In non-judicial positions, the individual judge is often the target of such dissatisfaction, as opposed to when they are in court, the criticism is levelled at the judicial system. Therefore, this is seen as an attack on a judge's impartiality and subsequently undermines the perception of their independence. This can be heightened if it is seen that a judge is using non-judicial positions to further their career and seek advancement on the bench. There are a number of other issues that arise with judges partaking in extra-judicial activities, such as the potential to increase the workload of their own courts due to their absence, the potential for favoured preferment by the government and the possibility for favoured preferment by the government.

McKay identifies three 'hazards' for judges to avoid when engaging in extra-judicial activities:

1) participation in outside activities so extensive that the time and energy available for the primary obligation are measurably impaired.

2) participation in out-of-court activities that may lead to actual bias or the appearance of prejudgement of issues likely to come before the court; and

3) actions that impair the dignity and esteem in which the court should be held.[144]

It does not appear that the threat to the institution of judicial independence has support, however, the threat to the image of an individual judge who serves on executive inquires is a threat to that judge's image as a distinguished and independent member of the judiciary. A member of the judiciary who serves on contentious commissions risks being labelled a 'political judge', one who serves the interest of the executive, but this is reflected on the individual rather than the institutional level. Sir William Flood Webb offers an insightful case study of a judge acting on behalf of the government to investigate matters or represent the nation outside the court of membership. However, one must keep in mind that modern standards cannot always be applied and that some consideration need to be given to the notion that it 'is difficult for a judge to refuse the Executive when the request is placed on the plane of patriotism in time of war'.[145]

[144] McKay, "The Judiciary and Non-Judicial Activities," 12.

[145] ABA, "Independence of Judges," 793; McKay, "The Judiciary and Non-Judicial Activities," 12.

Chapter Two:
Webb's public life before the Second World War

> To-day, on assuming the highest judicial office in Queensland, you will receive from Bench and Bar and people a wealth of good wishes. Your meritorious career in the service to the State may well inspire and guide other young men of intelligence, character, and honourable ambition.[1]

This chapter outlines Sir William Webb's early life, his childhood, and most importantly his rise through the public service and the legal profession until his appointment to the Industrial Relations Council in 1942. This chapter will illustrate that, prior to his Commonwealth duties, controversy arouse frequently throughout Webb's career with allegations of political preferment being behind his appointments and promotions. Often this criticism was a result of his involvement with extra-judicial activities for the Queensland government. While he was on the bench of the Supreme Court, Webb held positions on the Industrial Relations Tribunal, the Sugar Prices Board, and he chaired three royal commissions of inquiry. The unique political setting of Queensland is discussed and how it facilitated Webb's meteoric rise in the political and legal system. This is important background to establish the argument to be presented later in the thesis.

Sir William Flood Webb was born in Brisbane on 21 January 1887 during an event to which he owed his middle name.[2] Webb spent most of his life in Brisbane, throughout his

[1] Premier Forgan Smith in a letter to Webb on his appointment as Chief Justice of the Supreme Court of Queensland, 'The Chief Justice's Varied Career', *Courier-Mail*, 3 August 1940, 4.

[2] The flood was one of the most severe in the city's history with over ten inches (254 mm) falling over the city in thirty-six hours and the low lying suburbs flooded quickly. The Bowen Bridge was submerged 5 feet under before it was swept away, the Steamer *Barrabool* ran aground with the loss of two sailors and there was widespread damage to property and loss of life, 'Heavy Gale and Floods', *Courier-Mail*, 22 January

tenure on the Supreme Court and it was the city to which he returned when he retired from the High Court on 11 August 1958 and died on 11 August 1972 at the age of 85.[3] Throughout his life he saw the growth of his home city and played a prominent role in the economic development of the state of Queensland.

There is a paucity of material on Webb's early life; B. H. McPherson describes it as 'reminiscent of [Charles Dickens'] David Copperfield'.[4] At the time of William's birth his Anglican father, William Webb, was an accountant in a drapery firm and later became a shopkeeper.[5] His mother, Catherine Mare (née Geaney) was a Roman Catholic from Ireland. Webb lost both of his parents when he was a child, his mother when he was four and his father when he was eleven years old. The young William was raised by his mother's parents and his aunt, they were a modest family engaged in agriculture. He was educated at Catholic schools in Queensland before he left at the age of 14 and worked as a tar-boy in the shearing sheds of his relatives until his adoptive parents thought a profession would be suitable for him.[6] The Rev. Mother Kevin advised him to study for the Civil Service Examination and after being coached by Sister Mary Vincent, he 'secured second place out of eight candidates'.[7] In the Queensland public service Webb met Thomas W.

1887, p 5; 'The Floods', *Brisbane Courier*, 24 January 1887, 5-6; 'Flood Reminiscences IV-1885-1887', *The Western Champion*, 10 February 1917, 9.

[3] Ian Callinan, "Sir William Webb," in *The Oxford Companion to the High Court*, ed. A. R. Blackshield, Michael Coper, and George Williams (South Melbourne: Oxford University Press, 2001), 706.

[4] Bruce Harvey McPherson, *The Supreme Court of Queensland, 1859-1960: history, jurisdiction, procedure* (Sydney: Butterworths, 1989).

[5] Eddy Neumann, *The High Court of Australia: a collective portrait, 1903-1972*, ed. Sydney University of, Government Dept. of, and Administration Public, 2nd ed., Occasional monograph; no. 6 ([Sydney]: Dept. of Government and Public Administration University of Sydney, 1973). 26.

[6] Ross Johnston, *History of the Queensland Bar* (Brisbane: Bar Association of Queensland, 1979). 81.

[7] 'From Rouseabout to Judgeship, How a Catholic Orphan Succeeded', *Freeman's Journal*, 6 March 1930, 35.

McCawley who recommended he study law. At the University of Queensland, Webb was one of the foundation students in Law when the institution was established in 1909.[8] He completed his Law degree in 1913 and later became active in the administration of the university.

On 17 March 1917 he married Beatrice Agnew, daughter of George Agnew, a former member of the Queensland Parliament who served three terms in government from 1888.[9] Agnew was also one of the founding members of the Farmers' Union that sought 'to watch over, encourage, and endeavour to develop agricultural interests generally'.[10] Beatrice was known for her 'natural and gracious hospitality' and being well trained in domestic arts. She was involved in many charities, most notably with the Catholic United Services Auxiliary and her parish.[11] Sir William and Beatrice Webb had six children, two sons and four daughters.[12] Webb was a 'devout Catholic' and 'remained attentive to the duties and teachings of his faith'.[13]

The Public Service Years (1904-1925)

In 1904, with his success in the civil service exam, William Webb at the age of seventeen took a position in the Home Secretary's Department and later in the office of the

[8] Michael Kirby, "The Five Queensland Justices of the High Court of Australia," *Australian Bar Review* 15(1996): 13.

[9] George Agnew (1853-1934) held his seat in the House of Assembly from 10 May 1888 to 21 March 1896 Johnston, *History of the Queensland Bar*: 191.

[10] Neumann, *The High Court of Australia: a collective portrait, 1903-1972*.

[11] Bawn, M., 'Social News and Gossip: A Happy Household', *Catholic Press*, 22 January 1942, 14-15.

[12] *Who's Who in Australia*, 1962; Graham Fricke, *Judges of the High Court* (Melbourne: Hutchinson of Australia, 1986). 154.

[13] H. A. Weld, "Webb, Sir William Flood (1887-1972)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://www.adb.online.anu.edu.au/biogs/A160612b.htm. and; 'From Rouseabout to Judgeship, How a Catholic Orphan Succeeded', *Freeman's Journal*, 6 March 1930, 35.

Commissioner of Police.[14] In March 1908, he was appointed to the Crown Solicitor's Office. He was encouraged to study law by a clerk in the Justice Department, Thomas William McCawley, who later became the crown solicitor and then Justice of the Supreme Court. Webb's career follows closely that of McCawley with Webb filling positions that McCawley vacated as he was promoted and after he died.[15] Both men rose quickly through the ranks of the Queensland public service, Webb replacing McCawley as crown solicitor in 1917 on the appointment of the latter to the Bench of the Supreme Court. Furthermore, Webb replaced McCawley on the Supreme Court Bench in 1925. McCawley was six years older than Webb and was also a devout Catholic. McCawley's and Webb's promotions under the Labor Government caused controversy and criticism from the members of the opposition, who argued that political favour lay behind the appointments of such young and inexperienced men to such important posts within the state.[16]

Webb was called to the Queensland Bar on 4 June 1913, and from this point his professional career flourished. In September of the following year he was appointed as the chief legal assistant to the crown solicitor and acted in that post whenever the crown solicitor was absent. Webb obtained the job on McCawley's recommendation to the Attorney-General, J.W. Blair.[17] In February 1916, he was selected as the Official Solicitor to the newly-established office of the Public Curator of Queensland and the following year

[14] 'The Chief Justice's Varied Career', *Courier-Mail*, 3 August 1940, 4; 'Sketches of the Official Careers', *Courier-Mail*, 15 June 1917, 6; Callinan, "Sir William Webb," 706.

[15] Weld, "Webb, Sir William Flood (1887-1972)".

[16] Malcom Cope, "McCawley, Thomas William (1881-1925)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://www.adb.online.anu.edu.au/biogs/A100214b.htm; Weld, "Webb, Sir William Flood (1887-1972)".

[17] 'From Rouseabout to Judgeship, How a Catholic Orphan Succeeded', *Freeman's Journal*, 6 March 1930, 35.

became Public Defender of Accused Persons. This office was established by the Ryan Labor Government to provide legal defence to poor prisoners and was to be separate from and independent of the Crown Solicitor's office. Webb was also an examiner of the positions of Police Magistrates. On 14 June 1917 Webb was described as a 'rising young barrister', was appointed crown solicitor and Secretary to the Attorney-General's Department, following the elevation of Justice McCawley to the bench of the Arbitration Court.[18]

Webb rose to serve as crown solicitor under one of Australia's most radical reformist governments of its time. On 1 June 1915 the Labor Party of Queensland was elected into government under the leadership of Thomas J. Ryan, a lawyer from Rockhampton, who had been leader of the party since 1912, with Edward G. Theodore, a prominent leader of industrial organization in the state, as Deputy Premier. This marked the beginning of a long period of Labor rule in Queensland, which was only interrupted by the single term of the Moore Government (1929-1931), until the party split in 1957. On taking power, Ryan also assumed the position of attorney-general in the government. The Ryan Labor Government embarked on a wide range of radical social and economic reforms that affected all sections of the state. Major reforms were made in the sugar industry and the Ryan Government also nationalised the Workers' Compensation Insurance Scheme and established a multitude of state-owned enterprises. The reforms were contested by the conservative forces of the state and the nation, often resulting in lengthy litigation that on occasion led to appeals to the Privy Council. The main obstacle that the government faced

[18] 'Sketches of the Official Careers', *Courier-Mail,* 15 June 1917, 6.

was passing legislation through the Upper House (the Legislative Council) which was made up of life-time appointed conservative and business representatives, who continually blocked or radically amended the legislation initiated by the Labor Party. Furthermore, Ryan came to clash with Prime Minister William Morris Hughes, due to the former's successful opposition to the conscription referenda, which became an almost personal issue between the two leaders. In 1918 Webb was engaged in negotiating through the Commonwealth crown solicitor to reach a settlement on the litigation pending in the courts between Ryan and Hughes over allegations the latter had made about the Queensland premier.[19] Hughes was also frequently involved in contesting the validity of legislation passed by the Queensland Labor Government. The opposition of the Legislative Council, Hughes and conservative forces in the state resulted in a high number of appeals to the Privy Council, which has also been attributed to Ryan's desire to appear before the highest judicial body of the Empire.[20] Thus, the legalistic nature of the Ryan government was an ideal medium for an ambitious young lawyer like Webb to gain promotion through the ranks of the Public Service.

Some commentators at the time, and indeed since, have suggested that Webb and McCawley received preferment to the Bench because they were Catholic. The Labor Party had a strong Catholic presence in the Cabinet and wide electoral support among Roman Catholics. Prior to the First World War sectarian divisions which were common in the other states were not so prevalent in Queensland because Catholic settlers were dispersed

[19] Denis Murphy, *T.J. Ryan: A Political Biography* (St Lucia, Qld.: University of Queensland Press, 1990). 366.

[20] Between the years of 1903 and 1915 there were only four appeals that appeared before the Privy Council. During Ryan's leadership there were 9 appeals between the years of 1915 and 1920. During the period of 1920-1930 there was only one. McPherson, *Supreme Court of Queensland*: 248.

throughout the whole state. The early establishment of a proficient Catholic school system that also attracted non-Catholics provided for greater integration in the 19th century.[21] However, sectarian divisions that arose in Australia during the First World War had an impact and changed attitudes in Queensland. The Queensland Labor Party was the only Labor government to stay in power after the Federal Party split over the conscription referendum and caused deep divisions in Australian society. Sectarian discord was also inflamed with the Easter Rising in Ireland and through the provocative actions of the outspoken and controversial Archbishop of Melbourne, Daniel Mannix. In the view of many Australians at the time two sides were formed after 1915:'[o]n one side were the loyalists – Protestants, British and conscriptionists – on the other the disloyalists – Irish Catholics, trade unions and anti-conscriptionists'.[22]

Furthermore, in some spheres these attitudes lasted long after the war had ended. During the 1920s, Catholics in New South Wales had difficulties in 'attaining preferment in the public service'.[23] However, in Queensland, during Webb's climb through the public service, accusations were commonly made that the Ryan Government had a preference for selecting Catholics, and some commentators went to the extent of suggesting a Catholic conspiracy.[24] For example, in 1917 Henry Frewen Le Fanu, Anglican Bishop in Brisbane,

---

[21] Michael Hogan, *The Sectarian Strand : religion in Australian history* (Ringwood, Vic.: Penguin Books, 1987). 110.

[22] Murphy, *T.J. Ryan: A Political Biography*: 197.

[23] Hogan, *The Sectarian Strand : religion in Australian history*: 192.

[24] Ibid., 194; Murphy, *T.J. Ryan: A Political Biography*: 407, 65-66; Douglas Blackmur, *Strikes: Causes, Conduct & Consequences* (Sydney: Federation Press, 1993). 30; Malcom Cope, "The Political Appointment of T.W. McCawley as President of the Court of Industrial Arbitration, Justice of the Supreme Court and Chief Justice of Queensland," *The Univerisity of Queensland Law Journal* 9, no. 2 (1976): 226; Scott Guy, Tony McKinnon, and Barbara Hocking, "Thomas McCawley's Tenure on the Queensland Supreme Court and Industrial Court: A Political Appointment," *Legal History* 12(2008): 202.

charged that McCawley had been selected for the Industrial and Supreme Courts on the basis of his Catholic loyalties.[25] M.H. Ellis saw a Catholic plot evident in Webb and J.D. O'Hagan (Ryan's private secretary and a Catholic) accompanying Ryan to England via the United States in 1918.[26] Thus, Webb's career was shrouded in sectarian controversies from a very early point.

Members of the Opposition raised their objections to Webb's appointment as crown solicitor during the debate on the Supply Bill in October 1917. Criticism of the appointment was made by members of the opposition when fees paid to Attorney-General Ryan were called into question. During the debate Edward Henry Macartney attacked the attorney-general for rebuking the justices of the Supreme Court for their public criticism of Crown-Solicitor Webb.[27] Macartney, as a member of the opposition and a solicitor, had a 'personal and professional dislike' of Ryan.[28] In this instance, Macartney argued that the 'rebuke which was delivered to the crown-solicitor by a judge of the Supreme Court was absolutely justifiable', as '[s]imilar rebukes had been administered to private

[25] Reported in the *Daily Standard*, 8 January 1917 cited in Murphy, *T.J. Ryan: A Political Biography*: 223.

[26] Ibid., 407.

[27] Webb had been criticised in the Supreme Court during a Farleigh Sugar Mill appeal case regarding telegrams that had gone 'astray' from the Crown Solicitor's Office. The Chief Justice, Pope Alexander Cooper and Justice Lukin said that 'it showed very loose conduct' and 'an extraordinary lack of memory on part of the Crown Solicitor, 'Missing Telegrams, Crown Solicitor Wigged', *Maryborough Chronicle*, 20 September 1918, 2. The Assistant Minister for Justice, W.N. Gillies then made a statement defending Webb in which he argued that failure to remember correspondence was not a shortcoming of the Crown Solicitor and that the Justices had a limited knowledge of the demands of the office, 'Crown Solicitor Defended', *Queensland Times*, 21 September 1918, 7.

[28] Sir Edward Henry Macartney (1863-1956), solicitor and politician, elected in the Assembly in 1900 and held his seat until he stood down in 1920. He was opposition leader in 1915 and between 1918 and 1920. Ross Johnston, "Sir Edward Henry Macartney (1863-1956)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://www.adb.online.anu.edu.au/biogs/A100193b.htm?hilite=Macartney.

practitioners'.[29] However, Webb became embroiled in the fiery debates and the disparagement of the crown solicitor became personal, with Macartney dismissing Webb as being 'only a youngster', to which the Premier replied, 'Youth is a defect which can be easily cured'. MacCartney continued, criticising Webb's lack of experience and the increase of pay for the position:

> The young man had passed his examination for admission to the bar, but he had not had any practice as an ordinary solicitor; yet he had been appointed Crown Solicitor, and this year he was to get an increase of £200.[30]

Macartney added that there were other solicitors more qualified and experienced who were overlooked in favour of someone he believed was favoured by the Minister:

> Yet this young man – not much more apparently than out of his "teens" – who passed his examination as a barrister, on the basis of theory, was appointed to this position, and it was now proposed to increase his salary, while these men with years of experience were in receipt of less salaries… It was the old complaint over again. Men who were closely associated with the Minister – the man who did what the Minister wanted him to do – was the preferred man. Seeing that more consideration was not extended to other members of the service, it was no wonder there was this dissatisfaction in the service.[31]

The premier, T.J. Ryan, responded that the Government looked within the service for someone suitable for the role before looking externally and that Webb had 'considerable experience in the office of crown solicitor,' adding that the 'mere fact that he was a barrister did not make him less fitted to do the work… it made him all the more

[29] *QPD*, Vol. 131, 4 October 1918, 2834.

[30] *QPD*, Vol. 131, 4 October 1918, 2834.

[31] *QPD*, Vol. 131, 4 October 1918, 2855.

competent'.[32] Furthermore, Ryan stressed that the increase in pay for the position was a reflection that Queensland had the lowest paid crown solicitor in Australia, except in Western Australia where the role was split with the solicitor-general. Macartney disagreed, arguing that a solicitor would have been better able to do the work of a solicitor as opposed to a barrister filling the role. Ryan replied:

> Yes, but put a barrister in a solicitor's office and give him experience and he would probably make a better solicitor than a solicitor himself would make. That was proved in the case of the late Crown Solicitor, who is now President of the Court of Industrial Arbitration.[33]

This did not satisfy Macartney who replied: 'I am afraid that he was a very favoured officer, too. He was near to the Attorney-General'.[34] Macartney also raised the issue of Webb not serving in the AIF:

> He was a young man who went into camp, and an appeal was made to get him out of camp on the ground that his ability was such that there was no one in the service who could perform the duty he was performing. When he enlisted he was legal adviser to the Public Curator, and it was alleged that the duties he performed in that position were so responsible that he could not be done without. Yet, when Mr McCawley went to the Arbitration Court bench, that same young man could be immediately spared for the higher-paid post of Crown Solicitor.[35]

It is recorded elsewhere that Webb was suffering a permanent back injury and was not fit for service in the military services.[36] The Government did not clear Webb's name from this

[32] *QPD*, Vol. 131, 4 October 1918, 2855.

[33] *QPD*, Vol. 131, 4 October 1918, 2855.

[34] *QPD*, Vol. 131, 4 October 1918, 2855.

[35] *QPD*, Vol. 131, 4 October 1918, 2834.

[36] Johnston, *History of the Queensland Bar*: 81.

damning allegation during the debate, and his lack of military service raised questions later about the appropriateness of his appointment as a war crimes commissioner.

Webb held the position of crown solicitor until he was appointed solicitor-general in 1922, the most senior officer of the government after the attorney-general. In 1922 he led H. D. Macrossan for the prosecution in the Brennan bribery case where two journalists were convicted for attempting to bribe a Labor member, F. T. Brennan, to cross the floor in support of the opposition's motion of No Confidence against the Theodore Government, which held a precarious majority in Parliament. Both journalists received three months imprisonment and a £500 fine.[37]

Webb was involved in a number of important cases for the state of Queensland while serving as crown solicitor. In 1919 and 1924 he visited England for Privy Council appeals. During the 1919 trip he worked closely with and assisted the Premier and Attorney-General Ryan in the appeals for the Mooraberree, McCawley and Sugar Cases that were of constitutional importance for the British Empire.[38] During his return to the Privy Council in 1924 he directed the Brisbane Tramway and Mount Morgan cases. The leader of the litigation team, who later became a Lord Chancellor of England, praised Webb for his administrative skills and grasp of legal principles.[39] It was his presentation and dedication in these cases that aided his appointment to the Supreme Court, although some critics at the time and since have seen other motivating factors behind the appointment.

---

[37] McPherson, *Supreme Court of Queensland*: 293 & 326.

[38] Johnston, *History of the Queensland Bar*. For the McCawley Case refer to, Nicholas Aroney, "Politics, Law and the Constitution in McCawley's Case," *Melbourne University Law Review* 21(2006).

[39] 'The Chief Justice's Varied Career', *Courier-Mail*, 3 August 1940, 4.

The Supreme Court (1925-1946)

Although described as a 'competent but not an outstanding lawyer', in 1925 Webb became a Justice of the Supreme Court and president of the newly-established Board of Trade and Arbitration Court.[40] McPherson explains the appointment of Webb as a suitable replacement due to his resemblance to the former Chief Justice McCawley, in regard to his experience in the public service.[41] There was some discussion at the time about a solicitor with no experience at the bar being appointed to the court. H.D. Macrossan called it a 'doubtful experiment'.[42]

The court that Webb entered was far different from that which his predecessor, MacCawley, had controversially entered seven years earlier. With the passing of the *Judges' Retirement Act* of 1921, three senior judges of the Court were forced into retirement, including the Chief Justice, Pope Alexander Cooper. The retirements of these three justices marked an end of a period of remarkable hostility between the court and the executive which was led by Cooper as Chief Justice.[43] Only Lionel Lukin, William Shand and A. W. Macnaughton had been appointed before Labor took power in 1915. Lukin and Shand reached retirement age within Webb's first year of sitting on the Bench. The Country and Progressive National Party Government, headed by Arthur Edward Moore, was unable to appoint a member to the bench during its short interlude. Thus, the court

[40] McPherson, *Supreme Court of Queensland*: 327.

[41] Ibid.

[42] Ibid., 327.

[43] J.B. Thomas argues that this was marked by regular public comments and criticism of the government from the bench, which had initially been directed at the conservative government and increased toward the Labor governments after they came to power. The animosity between the executive and the bench inevitably led to the passing of the *Judges Retirement Act* 1921 (Qld). J.B. Thomas, "The Time of Cooper," *Journal of the Royal Historical Society of Queensland* 14, no. 3 (1990): 61-78.

consisted entirely of Labor appointees during Webb's tenure in the court (refer to Appendix 4). Many of his fellow judges were considered political appointments due to their previous experience with the government. Most notably, a former member of parliament, Frank Tennison Brennan, was appointed in 1925. By the end of Webb's tenure on the Bench three of the judges were lawyers who defended E.G. Theodore and William McCormack on the *Mungana Case* that concerned accusations of impropriety by those members of government. Furthermore, lawyers with distinguished careers at the bar were often overlooked for judicial promotion by the Labor Government because of their involvement in opposing legislation such as the *Judges' Retirement Act*. The appointment of Stumm in 1929 was seen as a gesture by the Government in support of an independent judiciary.[44] However, despite the nature of the appointments, McPherson comments that the court post-1921 adopted an 'attitude of political neutrality' and public statements made by judges criticising the executive were rare.[45]

On 17 May 1940 Webb was appointed Senior Puisne Judge. The position holds little function but has been subject to controversy and attention from members of the judiciary, parliament and the government in the state's history. The Senior Puisne Judge acts in the absence of the Chief Justice, and does not preclude succession to that position. However, the position of Senior Puisne Judge is a sought-after promotion amongst the judiciary and an objective of members of the legal profession.[46] Chief Justice Hugh Denis Macrossan declared at Webb's swearing-in as Senior Puisne Judge:

---

[44] McPherson, *Supreme Court of Queensland*.

[45] Ibid., 339.

[46] Ibid., 252-53.

> I fully rest upon your proved ability and capacity as an able judge, and shall summon your most robust resources of mind, backed as they fortunately are by your physical endurance, which is by no means a negligible factor in a judge's work.[47]

In 1940, Webb became the eighth Chief Justice of the Queensland Supreme Court after the death of Justice Macrossan, who only served in the position for five weeks. The Premier Forgan Smith stated at the swearing-in ceremony: "Your meritorious career in the service of the State may well inspire and guide other young men of intelligence, character, and honourable ambition".[48] The *Courier-Mail* wrote warmly about the new Chief Justice in 1940 in a special feature article:

> The new Chief Justice is a man of cool temperament. He does not spend words. He is always patient and courteous. Young counsel like to appear before him. He listens to long arguments with an appraising mind continuously alert, because he is imbued with a love of justice.
>
> He thinks quickly, but does not arrive hastily at conclusions, for he is ever anxious to glean all relevant matter. He gives judgments with marked clarity. He is merciful in the Criminal Court. In the past he has always taken his share of work in the Appeal Courts. Some of his best judgments are enshrined in the reports of constitutional cases.[49]

The article also stressed that Webb had an 'experience as varied as any of his predecessors'. These experiences occurred while serving in extra-judicial activities for the Queensland government where Webb's most notable work in the state was conducted.

[47] 'The Chief Justice's Varied Career', *Courier-Mail*, 3 August 1940, 4.

[48] Ibid.

[49] Ibid.

Extra-Judicial Activities for the Queensland Government

The position of a Supreme Court judge in Queensland often requires duties beyond the court, including a number of statutory tribunals and boards established which require positions to be held by members of the State's judiciary. Webb served as Chairman on two of these permanent bodies during his tenure on the court; the Industrial Court and the Central Sugar Cane Prices Board. Furthermore, the Queensland Labor Government selected Webb to serve on two Inquiries on Transport in 1936 and one regarding the Sugar Industry in 1939.[50] Within two months of his appointment, Webb was requested to investigate a train disaster at Traveston on a board of inquiry.

McPherson defines two types of extra-judicial activities: optional, where members of the judiciary are requested by the Government to act on their behalf, and obligatory, where a judge is required by legislation to act on a statutory tribunal.[51] Two such bodies that Webb served were the Industrial Relations Court under its various forms and the Central Sugar Prices Board. He was also required as Chief Justice to act as the Lieutenant Governor in the absence of the state's Governor, which he did in 1945.[52] The Royal Commissions and Board of Inquiry on which Webb served are considered optional extra-judicial activities by McPherson's criteria.

---

[50] Clem Lack, *Three decades of Queensland political history, 1929-1960* (Brisbane: Govt. Printer, 1962). 729; Fricke, *Judges of the High Court*: 154.

[51] McPherson, *Supreme Court of Queensland*: 370.

[52] 'Chief Justice as Deputy Governor', *Courier-Mail*, 27 April 1945, 3 and; 'Personal', *Courier-Mail*, 1 September 1945, 2. This practice of members of the judiciary acting in this capacity is discussed in Chapter One.

Industrial Relations under Webb (1925-1946)

William Webb provided an enduring and stabilising influence in industrial relations during his time in the office of president from 1925 to 1946. Webb remained as president of the court in its various forms under legislative and government change until 25 April 1946, when he became a justice of the High Court.[53]

During the first half of the century the Industrial Court developed along with the changes in Government. The first such court was established in 1912 in response to the Tramway Strike of that year and supported the Wages Boards that had been in operation since 1908. The Ryan Government radically changed the system with the *Industrial Arbitration Act* of 1916, which established the Court of Industrial Arbitration. The court and judges were provided with the same powers and jurisdiction as the Supreme Court. In 1925 an amendment abolished the Court of Industrial Arbitration and replaced it with the Board of Trade and Arbitration. The Board had the same powers and functions as its predecessor, with the addition of two laymen appointed to assist, the former State Premier Gillies and W. J. Dunstan, who had been State Secretary of the AWU. Murphy wrote that the 1925 reforms set the pattern for the industrial court until 1960:

> The judge chosen to be president was one known by the government to be reasonably disposed towards the worker (though not a member of the Labor Party) while one of the two lay commissioners was the AWU secretary who resigned his union office to take up the position. The other lay commissioner was to have a non-union background.[54]

[53] Lack, *Three decades of Queensland political history, 1929-1960*: 725-26.

[54] Denis Murphy, R. B. Joyce, and Colin A. Hughes, *Labor in power: the Labor Party and governments in Queensland, 1915-57* (St. Lucia, Q.: University of Queensland Press, 1980). 251.

The conservative Moore Government came to power in 1929 and enacted the *Industrial Conciliation and Arbitration Act* 1934. This act abolished the Board and replaced it with the Industrial Court. It provided that the Court could have additional judges who were qualified to serve on the Supreme Court. Webb continued as a judge with the Court. When the Labor Government was restored in 1932, the Moore industrial legislation was repealed, while most of the parts of 1916 Act were re-enacted, the subsequent amendments were retained as well as the title, Industrial Court. Membership was made up of three, one being a judge of the Supreme Court, which was Webb. This Act remained in force until 1961 when industrial law in Queensland was radically reformed.[55]

The role of the Industrial Court was quite political in nature. The Labor Party established the Court to satisfy the demands of the unions and the Labor movement, but the government needed the continued support of farmers and small businesses, therefore the Industrial Court had an important role in making sure that the vying interests did not clash.[56] The court's first president, McCawley, was described by Theodore as being 'temperamentally fitted' for the role, having drafted the legislation which established the court while he was crown solicitor. Furthermore, he was aware of the Government's intentions and the legislative function of the court, for which reason McNaughton, the judge of the original Industrial Court, refused the post when it was offered to him. Webb was considered a 'suitable replacement' to McCawley due to his similar experience in defending government legislation before the court as the crown solicitor and his role as

[55] B.H. Matthews, "A History of Industrial Law in Queensland with a Summary of the Provisions of the Various Statutes," *Royal Historical Society of Queensland* 4, no. 2 (1949); Lack, *Three decades of Queensland political history, 1929-1960*.

[56] Blackmur, *Strikes*: 21.

solicitor in the McCawley cases. The role of president of the Industrial Court often placed the judges of the court in the fray of the political squabbling of the day, which often led to questions about judicial independence. The following two examples in 1925 and 1942 illustrate the difficulties Webb, as a member of the judiciary, experienced in the sphere of industrial relations policy and arbitration.

Webb's first year on the Industrial Court was eventful, with a change of leadership in the Government and the militant elements in the unions heading towards an ideological clash with the political wing of the Labor movement in the state. On 24 February, W.N. Gillies replaced Theodore as Premier when the latter pursued a seat in the Federal Parliament. Theodore had recently been clashing with the leaders of the Australian Railways Union (ARU), notably George Raymer, with the situation building to an industrial clash.[57] In its annual review, the Industrial Court ruled on 5 May that there would be no increase in the weekly basic wage of £4, which incensed the more militant members of the ARU who were advocating for at least a restoration of the amount reduced in 1922. The Union's claim was heard in the Industrial Court on 19 August with Webb presiding, and the application for a new award was refused on the basis that the Court was bound to the decision made in May.[58] This decision was a major contributing factor that caused the state-wide strike by the railway workers. However, other events followed, pushing the unions towards direct action which involved Webb. The O'Conner case in August concerned a ganger who was sacked by the Commissioner of Railways in what the union proclaimed was an act to find a

[57] Anne Smith, "The Railway Strike, 1925," in *The Big Strikes: Queensland 1889-1965*, ed. Denis Murphy (St Lucia: University of Queensland Press, 1983), 163-65.

[58] Ibid., 166.

scapegoat in response to the Traveston (railway crash) Inquiry. The Industrial Court ordered the reinstatement of O'Conner in a compulsory conference, which bolstered the ARU's confidence to push for a restoration of the 1922 award.[59] After the ARU refused to attend a conference convened to resolve the issue, the matter was referred by the premier to the Full Bench of the Industrial Court which stated that the court would revise its decision. However, Webb, in response to Gillies' statements, declared on 31 August that the matter would be 'determined judicially after full investigation in open Court' and that nobody could 'claim to know what conclusion would be reached' by the judges.[60] This drew criticism from the members of the opposition during the no-confidence motion on 9 September. The leader of the opposition, Arthur Edward Moore, believed that Webb's declaration of independence recanted his statement after the first hearing, in which he suggested that he had made a mistake in the decision but was bound to that course of action and that if the unions appealed to the Full Court the decision would be revised. Moore believed he was responding to the objections of the other judges being pressured to decide the matter in a certain way. Furthermore, Webb was seen to have gone beyond his duty in making statements to the press and should have kept his 'mouth shut'.[61] In 1924 another member of the opposition, Thomas Kerr, also made comment on the judges on the Industrial Court, referring to Justice McCawley serving on the court:

> Personally, I realise that, when the Government go into the Arbitration Court before a judge of their own creation, they are in a stronger position to demand greater attention to their desires and arguments than the average

[59] Ibid., 167.

[60] Ibid., 168-69. *QPD*, Vol 145, 9 September 1925, 470.

[61] *QPD*, Vol 145, 9 September 1925, 447

employer.[62]

The member of parliament was not concerned that this was a reflection upon the judge but added: 'I noticed that Mr Justice Webb said that his court would not take instructions from anybody, and I don't think he would'.

A week-long strike began on 27 August involving 18,000 employees.[63] The strike required the intervention of the premier to pass legislation that addressed the strikers' grievances on 16 September.[64] The intervention was seen as a betrayal of the arbitration system by the government and undermined the authority of the Industrial Court.[65] Gillies attempted to defend his actions in parliament during the no-confidence motion and claimed:

> Arbitration has not been destroyed or weakened because the strike was really settled by the President of the Arbitration Court, thus conforming to that plank of the Labour Party.[66]

The matter was settled before the court in a compulsory conference with the papers of the agreement being filed with the court.

As a result of the debacle the *Industrial Arbitration Act* was amended, abolishing the court and establishing the Board of Trade and Arbitration. Webb remained as president of the court with two laymen appointed and broader powers in investigation and administration. The opposition fears were confirmed that the additional positions would be political

---

[62] *QPD*, Vol 145, 9 September 1925, 516.

[63] Smith, "The Railway Strike," 169.

[64] Lack, *Three decades of Queensland political history, 1929-1960*: 729; Smith, "The Railway Strike," 169.

[65] Blackmur, *Strikes*: 23-24.

[66] Smith, "The Railway Strike," 171.

appointees, as Gillies and a former AWU general secretary, W. J. Dunstan, were appointed to the board.[67]

In 1942 Webb was again the subject of public controversy over his position as the president of the court, with unions pressuring the Forgan Smith Government to remove him. On 20 May the Queensland Trades and Labor Council, representing 36 unions, held a special meeting that agreed to a motion demanding the removal of Webb after he delivered a personal attack on the Secretary of the Australian Meat Industry Employees' Union (AMIEU), A. J. Neumann.[68] Webb asked rhetorically whether foodstuffs were being withheld from Allied forces by the workers on strike who were led by Neumann. Webb then launched an attack on Neumann's loyalty to the nation:

> I say it is black-hearted disloyal— treason—if the men know what they are doing.
> It is important to know who is addressing us on behalf of important organisations in Queensland, who is purporting to lead them.
> The point is that you, with a German name hold yourself forward as having an English name.[69]

Neumann replied that he spelt his name the way people prefer. He was actually born in Victoria and his father had been born in Poland. Forgan Smith refused to meet with the deputation from the AMIEU to consider their request.[70] Webb later believed that he was being attacked by the unions, proclaiming that 'lying propaganda is going on in

---

[67] Ibid. *QPD,* Vol 145, 9 September 1925, 458.

[68] 'Unions Want Removal of Court Judge', *Courier-Mail,* 21 May 1942, 1.

[69] 'A.M.I.E.U. Rep Accused of Fifth Columnism. Justice Webb Opens Attack in Industrial Court', *Maryborough Chronicle,* 12 May 1942, 3.

[70] 'Further Request for Removal of Sir W. Webb', *Courier-Mail,* 25 June 1942, 1.

Queensland to undermine the confidence of the workers in me'.[71] He became aware of a circular being passed between the unions stating that he had been associated with, and a member of, the reception committee for the German emissary, Count Graf Felix von Luckner, during his controversial visit to Australia in 1938.[72] This appears to be an attempt to undermine Webb's loyalty, after he had questioned that of Neumann in supporting the meatworkers' strike, when supplies were vital for the Allied forces in the Pacific.[73] The situation continued to escalate during the year with the new Premier, F.A. Cooper, writing to the Prime Minister John Curtin, stating that industrial peace was impossible to achieve due to Webb's attacks on the unions.[74] This incident is discussed further in the next chapter, as it occurred not long after Webb's experience as the chairman on the Industrial Relations Council established by the Commonwealth Government.

Industrial relations during Webb's service for the Queensland Government experienced a period of growth and reform which benefited the workers of the State. Under Labor, the average wages were above national levels and on a par with the other states. Although industrial action such as strikes and lockouts continued, the arbitration system provided a system of resolution for unions to limit the length of time and the number of workers

[71] 'Court President Says Lies Told About Him', *Courier-Mail*, 30 June 1942, 3.

[72] Webb out rightly denied the allegations and stated that he had never met von Luckner. The Commonwealth Investigation Branch was concerned about the purpose of the visit and followed von Luckner during his tour of Australia. The CIB's file his movements in Queensland makes no mention of Webb interacting with the Count and a survey of the press of the time does not provide any reports of a meeting between the two. NAA: BP242/1, Q3129 Part 3. However, this file does contain a cutting of an article regarding the Chief Justice, Sir James Blair, in his capacity as Deputy Governor having breakfast with von Luckner, 'The Story of "A Most Enjoyable Breakfast", *Telegraph* (Brisbane), 23 June 1938.

[73] 'Court President Says Lies Told About Him', *Courier-Mail*, 30 June 1942, 3.

[74] Blackmur, *Strikes*: 48.

involved. During Webb's tenure as president of the Industrial Court working days lost remained stable and the lowest for the period the first half of the 20th Century.

Central Sugar Cane Prices Board

Webb's second obligatory extra-judicial post was on the Central Sugar Cane Prices Board, where he replaced the retiring Thomas O'Sullivan. The importance of the Board in regulation grew with the sugar industry's significance in Queensland's economy.

Sugar had been a staple of the Queensland economy since the late 19th century, and by the middle of the 20th Century it was the principal primary produce of the tropics in the north of the state, where 80% of the nation's sugar cane was grown. Sugar accounted for a half of the total agricultural out-put and supported a sixth of the state's 1.2 million people. The limited size and nature of the industry led to the development of some interesting and unique characteristics, for example, the domination of small farms, the average size of which was 70 acres. In addition, there was a small number of millers who also held the monopoly on the collection and transport of sugar cane.[75] An agreement was struck in 1923 between the Colonial Sugar Refinery Company (CSR) and the government that the company would refine all of the state's sugar which created a monopoly that required close regulation.

Expansion of the sugar industry in the far north of Queensland was also seen as a defence measure, because it increased the white population in the region. Thus the use of the South Sea Islanders, known collectively under the derogatory name of 'Kanakas', who had been

[75] David S Simonett, "Sugar Production in North Queensland," *Economic Geography* 30, no. 3 (1954): 223, 31.

used to establish the industry in the 19th century was discouraged, and most were repatriated under the *Pacific Island Labourers* Act 1901 (Cth).[76] In the 1950s a foreign observer, David S Simonett, described the Queensland economy as a 'monoculture' dependent on sugar and noted that the deeply ingrained social and cultural connections hindered the diversification and development of other agricultural produce of the state.[77]

Sugar production in Queensland has been extensively regulated and protected by governments in Australia. The Queensland Government demanded guarantees for the protection of the industry before the state would enter the Commonwealth Federation. Thus one of the first pieces of legislation passed by the Commonwealth Government in 1901 concerned tariffs on sugar imports, in order to provide protection for the domestic market and to ensure white domination of production.[78] When Labor won government in 1915, it sought the support of sugar growers in the far north to retain power and protecting the industry became one of the primary foci of legislation. During the First World War negotiations between the Queensland and Commonwealth governments led to the Commonwealth purchasing the entire sugar crop, the CSR refining it for a fee and the Commonwealth Government marketing all sugar nationally and internationally. This agreement lasted until 1923, when control was handed back to the Queensland Government on agreement that raw sugar prices would be reduced.[79] After the First World War the

[76] Kanakas refers to South Sea Islanders who were employed throughout the British Empire as labourers R Muir, "The Australian Sugar Industry," *The Australian Quarterly* 24(1934): 78-79.

[77] Simmonett suggested that mechanisation of the industry and alternative crops needed to be considered to prevent soil erosion. This would have required larger landholders to afford the machines and greater cooperation to rotate crops. However, this would meet protests from sugar growers and labourers. Simonett, "Sugar Production in North Queensland," 233-6.

[78] Ibid., 226.

[79] Muir, "The Australian Sugar Industry," 82-83.

British Government encouraged the development of sugar production in its dominions because of the danger of European supplies being limited during further conflicts, so from the mid-1920s export to the United Kingdom dramatically increased.[80] Thus, with precarious world markets, the importance of the sugar industry for the state of Queensland and the Commonwealth required the industry to be promoted and protected by the state and federal governments.

The Central Sugar Cane Prices Board was a statutory tribunal established by the *Regulation of Sugar Prices Act* 1915. The Act was introduced by the Ryan Labor Government to regulate almost all matters concerning the state's sugar industry. This included all aspects of marketing, the setting of prices paid to millers and growers, controlling the amount of land allowed to be used for cultivation and the production rate for each assigned land, the transfer of land and quarantine of the districts to prevent the spread of cane disease. Producers were assigned mills and fines were imposed on mills that received produce from land not assigned for sugar production. The Board was 'essentially arbitral in character'.[81] In 1929, the Peak Scheme was introduced to prevent over- production as a result of the decline in demand in the global market. The scheme established two marketing pools where all sugar produce was collected. The first was based on the expected fulfilment of domestic and export demands and payment was set on the average prices of the two markets. The second pool gathered the excess sugar that had been produced, the rate of

[80] C. J. Robertson, "Cane-Sugar Production in the British Empire," *Economic Geography* 6, no. 2 (1930): 136-37.

[81] McPherson, *Supreme Court of Queensland*: 372.

payment being set on the export price and only after sale.[82] The scheme was regulated by the Board.

The 1915 legislation also required that the position of chairperson would be occupied by a judge. Later amendments were passed to allow the former premier, Forgan Smith, to chair the Board (1942 to 1952), and for a former judge, Kenneth Russell Townley, to preside in 1961. The amended legislation gave Forgan Smith and Townley the same status as a Supreme Court judge.[83] The chairman was assisted by a body of elected representatives of growers, mill owners, chemists and accountants[84].

Webb was appointed as president of the Board on 25 November 1926, succeeding Justice O'Sullivan, who resigned from the post after serving as president since the Board's inception.[85] An editorial appeared in the *Courier-Mail* the following week questioning the role of judges on the Board. The main concern of the commentator was that justice was being delayed, as there were only seven justices on the Supreme Court. Furthermore, the District Court had been abolished in 1921 taking the total number of judges from nine to seven within the state under the *Supreme Court Act* of 1921.[86] With Webb's time mainly committed to the Sugar Board and Arbitration Courts, reducing the effective membership to six judges, his absence added further stress to the court's workload. The editorial also

[82] Simonett, "Sugar Production in North Queensland," 227.

[83] Forgan Smith was later appointed as Chairman of the Sugar Board which dealt with the marketing side of the industry. He earned more in those positions than when he was Premier. Brian Carrol, "William Forgan Smith: Dictator or Democrat?," in *The Premiers of Queensland*, ed. Denis Murphy, R. B. Joyce, and Margaret Cribb (St Lucia, Qld: University of Queensland Press, 1990), 430-31.

[84] McPherson, *Supreme Court of Queensland*: 373.

[85] 'Central Cane Board, Mr Justice Webb Chairman', *Brisbane Courier*, 26 November 1926, 13.

[86] It is not known the precise reason why the Theodore Government abolished the District Court McPherson, *Supreme Court of Queensland*: 312-13.

commented on the lack of adequate compensation for judges' work.[87] Webb eventually conceded to the concerns about the impact the position was having on his judicial functions and requested to be relieved of the position during 1942. However, this was due to the additional demands that the war had placed on the Board which he felt demanded a full time chairman to fill the role.[88]

The Board was critical in Queensland's economy and affected virtually all of the state's population and many throughout the Commonwealth. The *Courier-Mail* commented that Webb's 'regulative work in the sugar industry has touched every meal table in the Commonwealth'.[89] The arbitral nature of the Board made the position of chairman suitable for a judge because critical decisions were to be made on evidence put forward to the Board, and government policy and legislation were to be interpreted. However, not all decisions were guided by the government, and the Board was required to make decisions that would shape the policies of the government.

Traveston Railway Disaster Inquiry (1925)

In the early hours of the morning on Tuesday 9 June 1925, while crossing a bridge, the Rockhampton Mail train, with 13 carriages attached, derailed, one plummeting into a ravine near Gympie.[90] Nine passengers were killed at the scene and another man died a

[87] 'The Judiciary', *Brisbane Courier*, 29 November 1926, 12.

[88] 'Cane Prices Board. Mr Forgan Smith Chairman', *Cairns Post*, 11 December 1942, 4.

[89] 'The Chief Justice's Varied Career', *Courier-Mail*, 3 August 1940, 4.

[90] The train 'consisted of the two locomotives 683 and 388… and 11 vehicles: 1st corridor sleeper EAS434, 1st Pullman sleepers CAS735 and 723, 2nd corridor sleeper GBS592, 1st sitter 1083, 2nd Sitter 1089, 1st sitter 345, composite sitter 951, 2nd sitter 353, luggage car C9756 (a goods wagon) and mail brake van 1058'. Further vehicles were added at a later station: 'C wagon 840 and T.P.O [Traveling Post Office] were attached in the lead'. J Armstrong, "The Traveston Smash," *Australian Railway Historical Society Bulletin* 386(1969): 283.

week later from injuries. Fifty-five passengers were injured. The accident caused a sensation in Queensland with the *Courier-Mail* publishing emotive reports on the tragic deaths of a mother of a young baby, the wife of a newly-wed couple on their honeymoon and a four-year-old boy.[91] Inevitably the horrified public response to the crash led to calls for a thorough investigation. Furthermore, a Queensland Parliamentarian, George Carter, MLA, had been travelling on a train in the opposite direction and was one of the first to be at the scene of the accident. Two days after the crash, the Minister for Railways, Mr Larcombe, stated that there would most likely be two inquiries. Firstly, there would be the normal magisterial inquiry under the *Inquests of Deaths Act* 1866 (Qld) that came under the jurisdiction of the Commissioner of Police. Another inquest was proposed to be established after this inquiry had concluded its report, to prevent overlapping investigations, and would likely be a departmental board.[92] The Locomotive Driver's Association demanded that the provisions in the *Railways Act* 1914-23 (Qld) be followed. The Act prescribed that any investigation 'shall be deemed to be a judicial proceeding and shall be held in open court in such manner and under such condition as he or they, may think most effectual for ascertaining the causes and circumstances of the accident'.[93]

The Court of Inquiry was established and sat within a week of the accident with Justice Webb being appointed as chairperson. Mr B.H. Matthews of the Commissioner for the Railways Office, was appointed secretary to the court. Mr H.D. Macrossan appeared to

[91] 'The Most Distressing Railway Disaster in Queensland's History', *Brisbane Courier*, 10 June 1925, 7.

[92] 'Double Inquiry, Minister's Statement', *Brisbane Courier*, 11 June 1925, 7 and; 'Public Inquiry Conceded, Judge and Two Assessors', *Brisbane Courier*, 12 June 1925, 7 & 10.

[93] 'Open Inquiry, Unionist Claim', *Brisbane Courier*, 11 June 1925, 9.

represent the government.[94] The court began its proceedings on 16 June 1925, hearing evidence from Walter James, a maintenance inspector, Harry Ellis Cook, the driver of the first engine and William George Hullett, a train examiner. It was revealed that 'most of the trains were not submitted to a thorough examination'.[95]

The public concern regarding the safety on Queensland railways continued to grow during the sitting of the inquiry. On 30 July a member of the Legislative Assembly asked the Secretary for Railways if the Traveston Board would extend its inquiries to 'deal with the abnormal number of railway derailments that have occurred recently'.[96] J. Larcombe replied that 'there is not an abnormal number of derailments, but an abnormal amount of publicity given to derailments'.[97] Therefore, the inquiry's investigation was limited to the crash.

The inquiry found that one of the passengers, John Stevens, became aware that some of the wheels of a carriage had derailed, but was persuaded by fellow-passengers, Hill and Reid, who agreed that something was askew but argued it did not warrant the pulling of the emergency break, as this carried a £5 fine if it was found to be unnecessary. Reid and Hill lost their lives in the crash when the derailed carriage that preceded their own left the bridge and plummeted into the ravine, taking with it the following carriage. [98] The guard of the train, Peter Starkie, told the inquiry that he had been alerted to the existence of a

---

[94] 'Railway Smash, Court of Inquiry Sittings to Commence Tomorrow', *Brisbane Courier*, June 15 1925, p 16.

[95] 'Cause of Disaster… Important Evidence Before Railway Tribunal', *Brisbane Courier*, 17 June 1925, 7 & 9.

[96] *QPD*, Vol. 145, 30 July 1925, 31.

[97] *QPD*, Vol. 145, 30 July 1925, 31.

[98] Armstrong, "The Traveston Smash," 283-84.

possible hot box but found no signs of one when the train stopped at Caboolture. (A hot box refers to the over-heating of an axle-bearing that is contained in a box with oil-soaked packaging to reduce friction and requires constant monitoring by train workers to avoid overheating which leads to the alloy components melting and the axle fracturing, which causes derailments.) The drivers of the engines, Cook and Ryan, noticed sparks coming from one of the carriages on the next leg of the journey and concluded that the brakes must have been sticking, which they attempted to remedy.[99] By the time the guard had discovered the problem it was too late to prevent the accident.

The Court of Inquiry sat for eighteen days examining witnesses and conducting tests. The inquiry promptly eliminated the examiners and engineers of the train from a charge of neglect of duty. Excessive speed was also ruled out because 'the first marks of derailment showed that the wheels of C9756 had left the rails on the lower (ie inside) leg of a curve'.[100] The focus of the inquiry shifted to the state of the railway line. Inspections of the line in March and April of 1925 found that the line was in a satisfactory condition, CXLV a little rough in sections and required to be upgraded to cope with heavy traffic.[101] This led the investigation to conclude that an object must have fallen onto the tracks and caused the wheels of the carriage to jump the rails. The Inquiry found that:

> [A]lthough by no means conclusive, [the evidence] indicated that the derailment was caused by an obstruction under one of the trailing wheels of the leading bogie of the luggage wagon. While it is not clear what the obstruction was, the evidence suggests that it was the bottom part of the brakeshoe holding the block over the leading wheel on the right hand side

[99] Ibid., 283.

[100] Ibid., 285.

[101] Ibid., 286.

> proceeding to Gympie. This part of the brakeshoe may have fallen on the line, because of an imperceptible flaw and uneven pressure which could have been exerted on the brakeshoe when the brakes were applied after a brake pin had come between a wheel of the luggage van and the brake block of that wheel, as conjectured.[102]

The Court of Inquiry found that despite his forty years of service with a clean record, the guard, Starkie, was negligent in his duty, declaring that the Court was 'reluctant to believe that on this occasion he exercised the vigilance which is expected of a guard'.[103] The total cost of the inquiry was £1,146 8s 7d. There were fifty-two compensation claims submitted for a total of £18,029 11s 4d.[104] The inquiry also made some recommendations to the Railway Department to avoid such disasters in the future. Only one of the recommendations was put into effect with the construction of a stage at Mayne to allow for inspection of long-distance passenger trains. Another recommendation was put into partial effect, namely that the practice of running composite luggage and passenger vehicles be discontinued. Goods wagons with passenger trains continued to be used, but only with suitable vehicles. One other suggestion that was discarded by the government was that all wooden passenger carriages that were of the vintage of the one that plummeted into the ravine should no longer be used on Mail trains. However, they continued to be used for the purpose for many years following the Traveston disaster.[105] Many complaints in the press and during parliamentary debates were made about the inadequate and antiquated railway

[102] Ibid.

[103] It should be noted that the Court Secretary, Valentine, did not share this view. Ibid.

[104] *QPD*, Vol. 146, 15 October 1925, 1303.

[105] Armstrong, "The Traveston Smash," 286.

lines and vehicles. Despite this, these matters were still raised by Webb during the Royal Commission on Transport in the late 1930s.

Royal Commission into Transport (1936-1937)

On 23 July 1936, Forgan Smith appointed a royal commission to inquire into matters regarding transport within the state. The terms of reference required the commission to examine the adequacy of transport in the state to efficiently serve the economic requirements of the districts, the number of people employed in the industry and the impact of road transport on rail. It was also asked to consider what administrative control was required for coordinating transport, and whether all ports and harbours should be controlled by the state. Webb was appointed Chairman of the Commission with John Robert Kemp and James David Bell as commissioners. The first sittings were held on 29 July, and the commission took evidence in thirty days over six months, with the last sitting on 11 January 1937. One hundred and twenty-five witnesses were examined and ninety-seven exhibits were tendered.[106] The commission interpreted that 'the broad terms of the Commission appear to us to be calculated to empower us to pursue every line of investigation of any transport problem likely to emerge. But we do not regard it as our proper function to report on every issue raised".[107] One of these limits was the Inquiry into publicly-owned transport enterprises.[108] The final report was completed in August 1937.

[106] William Flood Webb, John Robert Kemp, and James David Bell, "Report of the Royal Commission on Transport," (1938), 2.

[107] Ibid., 3.

[108] Ibid., 114.

The commission was effective in influencing the Government on the passing of the *State Transport Act* 1938. This replaced the *Transport Act of* 1932 and the *Heavy Vehicles Acts* to combine both pieces of legislation into one statute. The new Act incorporated many of the recommendations of the royal commission. For example, the regulation of the hours that a driver carrying passengers or goods was permitted to drive continuously was restricted to no more than 5½ hours per day. The legislation also created the State Transport Commission which had wide powers to investigate and coordinate all matters relating to transport within the state.[109]

Kay Saunders cites the *Transport Act* 1938 as making serious encroachments into civil liberties, with the government being empowered to undertake dramatic intervention in Queensland through the legislation. During the second reading of the Bill, Forgan Smith asked for the Transport Board to be provided with powers to deal with natural disasters and defence matters. The premier used the Royal Commission Report to support the legislation, although the commission did not consider such powers, as it was concerned only with the efficiency and protection of state transport enterprises competing against the private sector. Ironically, the provision added to the Bill was the same as the one in the *Railway Strike and Public Safety Preservation Act* 1931 that the Forgan Smith Government vehemently attacked while in opposition and repealed when it took office from the Moore Government. As a result of the powers being conferred in the legislation, the *Transport Act* was used to ban public addresses by Communists during the war and to suppress numerous strikes after

[109] Lack, *Three decades of Queensland political history, 1929-1960*: 160-61.

the war.[110] The *Courier-Mail* wrote in 1940 that Webb's commission 'aroused world-wide interest'.[111] However, commentators were still criticising the inadequate transport situation in far north Queensland for hampering industrial expansion in the state. This remained a constant criticism levelled at governments in Queensland.[112]

Royal Commission into Sugar Peaks and Cognate Matters (1938)

On 15 December 1938, Webb was appointed Chairman of the Royal Commission into Sugar Peaks and Cognate Matters. Other members of the commission were: William Joseph James Short (Chairman of the Sugar Board), Ernest Stanley Smith (Millers' Representative on the Central Sugar Cane Prices Board), William Henry Doherty (retired Secretary of the Queensland Cane Growers' Council) and Frederick Charles Patrick Curlewis (Secretary of the Australian Sugar Producers' Association). The members of the commission were selected for their experience and association with the sugar industry in Queensland, however, the commissioners stressed that 'they do not represent the industry'.[113] The terms of reference of the commission were:

> Whether or not it is advisable having in view the development of the State, employment generally, and the well-being of the Sugar Industry, to modify, or in any way review the operation of the 'Peak Year' Scheme.

[110] Kay Saunders, *War on the homefront: state intervention in Queensland 1938-1948* (St. Lucia, Qld.: University of Queensland Press, 1993). 15-17, 20; Paul Hasluck, *The Government and the People, 1939-1941*, vol. 1 (Canberra: Australian War Memorial, 1952). 178.

[111] 'Chief Justice's Varied Career', *Courier-Mail*, 3 August 1940, 4.

[112] R.H. Greenwood, "The Challenge of Tropical Australia," *Pacific Affairs* 29, no. 2 (1956): 135 & 38.

[113] Royal Commission on Sugar Peaks and Cognate Matters Queensland, "Report of the Royal Commission on Sugar Peaks and Cognate Matters," (Brisbane: Government Press, 1939), 19.

The terms also required the commission to make recommendations towards modifying the scheme and how they should be enforced.

The Peak Year Scheme was established in 1929 through a series of resolutions by the Queensland Cane Growers' Association, the Australian Sugar Producers' Association and the Queensland Government. The scheme set a limit on the future size of the total state crop based on the highest output of cane from each mill since 1915. The sugar cane produced up to this limit by the mills would be placed in the national pool with rates paid at the price set for the crop. Any additional produce would be placed into a separate pool for export, and the amount paid would be dependent on global prices. The limit of production was set at 611,428 tons.[114]

In 1937, Forgan Smith returned from a sugar conference held in London which renegotiated the International Sugar Agreement and increased Australia's export quota to 400,000 tons per annum. With home consumption at 360,000 thousand tons, the Premier declared that it was possible that the peak could be increased by 100,000 tons.[115] There was general agreement in the industry that the peak could be lifted to 737,000 tons, but little consensus on mill quotas, pools and prices to be paid.[116]

This division was not resolved between the members of the commission, and Webb wrote a separate set of findings in the report to his colleagues, Short, Curlewis and Doherty. Smith

[114] Ibid., 11-12; C. T. Wood and Queensland Cane Growers' Council, *Sugar country: a short history of the raw sugar industry of Australia, 1864-1964* (Brisbane: The Council, 1965). 67.

[115] Queensland, "Report of the Royal Commission on Sugar Peaks and Cognate Matters," 15; Wood and Queensland Cane Growers' Council, *Sugar Country*: 67.

[116] Wood and Queensland Cane Growers' Council, *Sugar Country*: 67.

also offered a separate opinion suggesting that there should be two pools for sugar. The main point of contention between the Chairman and the other members was on the best method of setting peaks and prices for sugar. Webb drew on his experience in the Industrial Court in support of excess production, since during the Depression it had relieved the unemployment situation in the state, although he recognised that this would come at a cost to the producers who had adhered to the 1929 Scheme. Webb concluded that the 'conflicting interests cannot be fully reconciled, '[o]ne section must lose' and that 'the public interests as well as the producers' interests are to be considered'.[117] Webb asserted that the Australian people needed to support the industry for defence purposes as it would develop areas in the far north that were both more suitable for the growing of sugar and under-populated.

The majority decision was favoured, and the individual mill quotas were adjusted with examination of the situation of each area in what was called the Farm Peaks Scheme. Webb commented at the time that this would result in a large quantity of appeals to the Central Sugar Prices Board, and members would be required to spend most of their time assessing each appeal for a long period. This proved to be correct and was reportedly achieved largely through Webb's strong work ethic.[118]

Summary: Honours and the Call for National Duty

Webb's rise has been adequately described as being due to the 'mysterious manner of Queensland public life'.[119] Webb's preferment within the public service was largely a

[117] Queensland, "Report of the Royal Commission on Sugar Peaks and Cognate Matters," 20.

[118] Wood and Queensland Cane Growers' Council, *Sugar Country*: 67.

[119] Fricke, *Judges of the High Court*: 154.

result of a succession of events after the Labor Party under T. J. Ryan came to power in 1915 and his relationship with the Crown Solicitor, T.W. McCawley. The Ryan Government gathered young, ambitious public servants to aid in the implementation of the radical reform platform adopted by the Labor Party, providing ample opportunity for promotion. After years of serving under McCawley as crown solicitor and filling the post himself, Webb had made a strong impression on members of the government and had formed a close relationship with Ryan. Webb's appointment to the Supreme Court was incidental to him filling the position on the Industrial Court left by McCawley after his untimely death in 1925. Webb had been a protégé of the crown solicitor and a key member of the legal team that had defended Labor's industrial legislation when it appointed McCawley to the Supreme Court and established the Industrial Court. Therefore, like his predecessor, Webb was seen by the Labor Government as temperamentally fitted for the post on the Industrial Court.

The Industrial Court was the cornerstone of industrial relations in Queensland, and during Webb's tenure as president the state experienced a period of stability and limited strike actions that was unique in Australia at the time. Furthermore, as president of the Central Sugar Prices Board, Webb played a key role in managing a rapidly-growing sugar industry that was ever-dependent on precarious international markets that created difficulties in creating stability for the second biggest industry of the state. Both roles required striking a balance between vying interests of business, workers and the government. However, these roles inadvertently drew Webb into the political wrangling of the day, as decisions on awards and prices impacted on the often controversial and political sphere of public policy. This led to personal attacks against Webb on a number of occasions, such as during the

Meatworkers' Strike in 1942 when, during the proceedings, the president of the Industrial Court had to defend his loyalty to the nation against rumours. Webb remained the longest serving judge on the court which provided stability that the state required during such a turbulent period.

Webb also presented three reports to the government on the findings of inquiries over which he had presided, fulfilling the dual purposes of investigating issues of concern for the public and providing valuable policy advice to the government of the day. The Traveston Railway Accident Inquiry was Webb's first extrajudicial activity for the state government. The inquiry identified the cause of the accident and the responsibility for the tragedy, which diffused the public concern and curiosity about it and relieved the resultant pressure on the government. The inquiry was also able to make a number of recommendations to prevent other accidents, namely the cessation of using mixed carriages and improvement to all railway lines and vehicles. However, not all of the recommendations were implemented by the government. The Royal Commission into Transport examined the efficiency of transport throughout the state in the interests of the continued development of the state's economy. The inquiry was extensive in detail and led to the passing of the *Transport Act of* 1938. Webb's experience on the Industrial Court and Sugar Prices Board undoubtedly aided him to understand the requirements of the transport of the state to support industry and the expanding sugar sector. The recommendations of the commission's report had implications for public policy. Similarly, Webb's experience put him in good stead for the chairmanship of the Royal Commission into the Peak Year Scheme, although his objection to the majority view, which would make unreasonable demands on the Sugar Prices Board, were not heeded. Webb also drew on his Industrial

Court experience to recommend excess production in order to aid employment and the importance of expansion of the industry for the defence of the nation.

It is evident that concerns could be raised for the case of Webb in regard to McKay's three hazards for members of the judiciary when engaging in extra-judicial activities identified in the previous chapter.[120] The time Webb spent on outside activities was extensive, and concerns were raised in the press that his performance in his primary obligation, the Supreme Court, was impaired by his taking the presidency of the Central Sugar Cane Prices Board. Webb was already chairing the Industrial Court prior to the appointment, which made vast demands on his time. With the additional inquiries on which Webb served, commentators such as Fricke state that Webb only 'occasionally… sat in the Supreme Court'.[121]

McKay's second hazard for judges to avoid was that their involvement in extra-judicial activities would lead to perceived bias in the Court. Webb's appointment to the Supreme Court was criticised by the non-Labor sectors in the state due to his long career and promotion under the Labor Government. Accusations of preferment based on religious and political favour were also raised. This cast a shadow over Webb's judicial career in the state. However, there has been no evidence forwarded to suggest a perceived bias in the Supreme Court. Indeed, fears that unions would receive preferential treatment in the courts were unfounded, and Webb often raised the ire of the unions with his decisions and often caused controversy with such acts as his attack on Neumann, the secretary of the AMIEU.

[120] Robert B. McKay, "The Judiciary and Non-Judicial Activities," *Law and Contemporary Problems* 35(1970): 12.

[121] Fricke, *Judges of the High Court*: 154.

Therefore, any perceived bias of Webb would have been due to his career in the public service and his relationship with the Labor Government.

McKay's third hazard that involvement impairs the dignity of the Court is difficult to determine due to the nature of affairs in Queensland. The independence of the Queensland judiciary faced challenges in this period due to the increasing power of the Executive through the legislative reforms that radically changed the Constitution under the Ryan and Theodore Governments. The *McCawley's Case* clearly established that legislative authority to amend the structure of the courts rested with Parliament. With the passing of the *Judiciary Act* of 1921, the Theodore Government thoroughly altered the nature of the membership of the court by enforcing the immediate retirement of three conservative judges. Their replacements were men who had had association with members of the Labor Party, or had represented the party and government in legal matters, thus setting the trend for appointments until after the Second World War. The executive increased dominance further in the state with the abolition of the Legislative Council in 1922. This had previously been dominated by conservatives who had prevented much of the Labor platform from being passed into legislation. Queensland remains the only State in Australia to be without an Upper House of Parliament. Webb played a prominent role in these legislative reforms while in the Crown Solicitor's Office, enjoying a close relationship with Ryan and accompanying him on overseas trips for appeals to the Privy Council. This controversy over Webb's independence may have impaired the dignity of the court on which he sat and over which he eventually presided.

The Industrial Court and Central Sugar Prices Board were statutory bodies that ensured that the president had the same protection and legal standing as a judge of the Supreme Court.

However, both positions functioned as arbitrators and operated quite differently to a court of law. McPherson described such a position as obligatory, although offers could be refused, as McNaughton did when the Industrial Court presidency was offered to him in 1917. However, as it has been established in this chapter, both roles brought Webb into the political wrangling of the day, and criticism was often levelled at him. The optional duties that Webb performed served various functions for the government. The Traveston Inquiry served the purpose of deflecting criticism about the state of the railways in Queensland by finding a cause for the accident. The inquiries into sugar peaks and transport provided policy advice to the government. However, the Transport Commission raised one risk a judge could experience: they had no control over the government's implementation of their reports and recommendations. This can be seen in the passing of the *Transport Act*, which conferred questionable powers on the executive, and in the royal commission's report, which was cited in the *Parliamentary Debates* to support the passing of the *Transport Act* of 1938.

With nearly thirty years of public service in Queensland, Webb had shown himself as a capable and hard-working judge. He could consider the complexities of the matters brought before him and strike an appropriate balance between the competing demands of worker, business and government interests. He could also make unpopular decisions according to the law and withstand intense public scrutiny and criticism.

In the 1942 New Year honours, Webb received a knighthood on the recommendation of the State Labor Government, which according to Callinan was 'contrary to its longstanding

policy', and which McPherson described as 'surprising'.[122] The recommendation was made by the Premier Forgan Smith revealing in 1953 that he went against Labor Party convention:

> There has to be an exception to every rule. I took the view that our chief justice should not rank lower in precedence than the Chief Justice of any other state.[123]

Webb was the only recommendation by the Queensland Labour Government during its hold on power in the first half of the 20th century. Webb's successor as chief justice, Hugh Dennis Macrossan, did not receive a recommendation for a knighthood after his appointment.[124] Likewise, Alan Mansfield only received his knighthood after tenure as chief justice.

Simultaneous to the announcement of Webb's knighthood was his appointment as Chairman of the newly-founded Australian Industrial Relations Council, which was established by the Commonwealth government to further the war effort by creating greater harmony in industrial relations. This was the first of several Commonwealth appointments Webb received from John Curtin's newly-elected Labor Government. As the war crises deepened, the requirements of the state to control production became unprecedented, and expertise was drawn from all quarters of the nation as the Commonwealth government sought the advice of many prominent experts.

---

[122] 'Justice Webb Knighted In New Year Honour List', *Courier-Mail*, 1 January 1942, 3; Callinan, "Sir William Webb," 707; McPherson, *Supreme Court of Queensland*: 227.

[123] '"Officially Labour Does Not Approve" Queensland has only nine Knights', *Courier-Mail*, 10 June 1953, 2.

[124] 'Premier's charge on Knights', *Courier-Mail*, 6 November 1953, 1.

Chapter Three:
The Industrial Relations Council 1942

> The premier leaves to me the decision as to the nature and extent of assistance I should offer the Commonwealth in this crisis.[1]

The Industrial Relations Council, established and abandoned in January 1942, provides an insightful example of an extra-judicial activity conducted by Sir William Webb during the Second World War that caused some conjecture being raised regarding his impartiality. The events leading to the demise of the Council demonstrates the difficulties facing judges in maintaining judicial independence when they become involved in a body whose primary function is to provide policy advice to the government, advice which is potentially political and could cast doubt on a judge's impartiality. It also illustrates the risk of a judge being removed from a position which undermines tenure of office which is the primary pillar of judicial independence.

The appointment came at a critical time in the war for Australia due to the entry of Japan. Although long expected, the attack rocked the nation, which was now directly threatened by the enemy. Political tension was high in Australia as the new Curtin Government sought to prove itself to the electors after two independents crossed the floor, enabling the Labor Party to form a minority government.

[1] NAA: A472, W5284, Telegram from Sir William Webb to H.V. Evatt, Attorney-General and Minister for External Affairs, 30 December 1941.

Due to the brief existence of the Industrial Relations Council, it is relegated to a mere footnote in Australian Second World War history. The official war historian, Paul Hasluck, provides a short summary of the establishment and demise of the council.[2] S. J. Butlin and C.B. Shedvin do not mention the council in their volumes on Australia's war economy.[3] Weld's biographical sketch of Webb in the *Australian Dictionary of Biography* (*ADB*) only mentions Webb's reluctance to accept the position with assurance that it would operate free of political interference.[4] Furthermore, of the nine members of the council who have entries in the *ADB*, none of the biographers mention their subjects' brief roles on the Industrial Relations Council.[5]

---

[2] Paul Hasluck, *The Government and the People, 1942-1945*, vol. 2 (Canberra: Australian War Memorial, 1970). 59-60.

[3] S. J. Butlin, *War economy : 1939-1942*, Australia in the war of 1939-1945. Series 4, Civil ; vol.3 (Canberra: Australian War Memorial, 1955); S. J. Butlin and C. B. Schedvin, *War Economy, 1942-1945*, Australia in the war of 1939-1945. Series 4, Civil ; vol.4 (Canberra: Australian War Memorial, 1977).

[4] H. A. Weld, "Webb, Sir William Flood (1887-1972)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://www.adb.online.anu.edu.au/biogs/A160612b.htm.

[5] Lynette A Bergstrum, "Fallon, Clarence George (Clarrie) (1890?-1950)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/fallon-clarence-george-clarrie-10149; C.J. Lloyd, "Clarey, Percy James (1890-1960)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/clarey-percy-james-9751; Grey Patmore, "Cranwell, Joseph Archibald (1889-1965)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/cranwell-joseph-archibald-9857; D. B. Webster, "Heath, Albert Edward (1871-1955)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/heath-albert-edward-6624; Ray Markey and Stuart Svesen, "Healy, James (1898-1961)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/healy-james-jim-10470; Graham Dunkley, "Crofts, Charles Alfred (1871-1965)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/crofts-charles-alfred-5823; Frank Farrell, "King, Robert Arthur (1886-1960)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://www.adb.online.anu.edu.au/biogs/A150030b.htm; Alison Pilger, "Oberg, David Olof August (1893-1975)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://www.adb.online.anu.edu.au/biogs/A150587b.htm; Susan Marsden, "Perry, Sir Frank Tennyson (1887-1965)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://www.adb.online.anu.edu.au/biogs/A150696b.htm.

Despite Webb's attempts to maintain a distance from the political situation, his involvement in political controversy was inevitable, and the experience would shadow him for the remainder of his judicial career. Brian Galligan cites Webb's involvement in the Council as one of the criticisms raised when Sir William was appointed to the High Court.[6]

This chapter provides an overview of the establishment and intended purpose of the Industrial Relations Council and Webb's prominent role in its rapid demise. The Industrial Relations Council was intended to perform the function of policy advice for the government, drawing upon Webb's experience in industrial relations, and encourage a consensus between employers and employees on a wide range of issues regarding the achievement of full war production. While Webb illustrates a vigilance of protecting his judicial independence in accepting the position to avoid potential political control, he was brought into the political wrangling between not only the interest groups but also the conflict between members within the Labor Party. Webb's chairmanship is directly blamed for the collapse of the IRC. Webb was offered a position on another board, the Women's Employment Board, however, this did not come to fruition. The chapter closes with a brief examination of other boards headed by judges for similar purposes and functions. This chapter illustrates the hazard of a judge participating on such bodies in which the enabling legislation does not empower a judge to exercise their normal judicial function.

The Establishment of the Industrial Relations Council

A critical factor in a successful prosecution of war is the prevention of stoppages in vital war production and services in such industries as coal mining, waterfront, road and rail

[6] Brian Galligan, *Politics of the High Court: a study of the judicial branch of government in Australia* (St. Lucia, Qld.: University of Queensland Press, 1987).

transport and the munitions factories. Another aspect is the conversion of peace to wartime production, by directing industry to produce what is needed for the war and prevent or limit luxury items and other less required commodities from being manufactured. With the outbreak of war in 1939, the workers' unions throughout Australia made various public declarations that they would assist and cooperate with the government, and that strike action would be resorted to 'only after exhaustion of conciliatory methods'.[7] However, the number of industrial disputes continued unabated, particularly amongst coal miners, and stoppages in other vital industries were a frequent concern for the new Curtin Government.[8] The number of industrial disputes, which amounted to 376 in total (most were in coal-mining, accounting for 314 of the disputes) in 1938, had increased to 567 (395 in coal-mining) in 1941, and almost doubled the pre-war figures in 1942 to 602 (which included 447 coal-mining disputes).[9]

The situation became more critical with the Japanese entry into the war and the Imperial Army's rapid southward advance, amplifying the urgency to maintain industrial peace and increase war production. On 8 December 1941 Japanese forces landed on the beaches near the British airstrip at Kota Bharu in the Malayan Peninsula. Two more forces landed concurrently at Singora and Patani in Thailand. Over 5,000 Japanese troops were landed and quickly swept the 9th Indian Division aside to make deep advances into Malaya

[7] Hasluck, *Government and the People*, 2: 59. The following example of a workplace pledge was made by the Victorian branch of the Arms Employees and Ammunition Workers' Federation 'to produce more and better munitions', see 'Workers' Pledge Praised', *Sydney Morning Herald*, 29 December 1941, 6.

[8] Ibid., 58. For Example, vital war related work was held up at the Sydney ship yard in December when 200 workers walked off the job due to insufficient air raid shelters and work on an airfield was stopped in protest to the dismissal of a worker. 'War Work Held Up', *Sydney Morning Herald*, 20 December 1941, 13.

[9] Butlin, *War economy : 1939-1942*: 240.

towards Singapore. The British Royal Navy, in the form of the inadequate 'Force Z' that was to provide as Australia's safeguard, was decimated by Japanese torpedo bombers on 10 December with the sinking of the battleships *Prince of Wales* and *Repulse*. Suddenly, the war was closer to home, and Australia's lack of preparation to meet the threat left the military strategists and politicians feeling exposed due to the dependence it had placed on Britain and the United States for defence. A belated policy of self-reliance was initiated.[10] When Curtin announced the establishment of the Industrial Relations Council, he candidly declared that Australian forces facing the Japanese not only had to overcome the surprise of the attack, but also the lack of preparation and inferior armaments and supplies.[11] The complacency of the Australian population was also a major problem. The fall of Singapore sparked some reaction throughout the population, but individuals resisted and ignored many of the regulations designed to provide the maximum effort throughout the war.[12] Thus, the administration used many ad hoc bodies to provide policy advice on all matters concerning the total mobilisation of the nation and the prevention of the loss of productivity due to industrial unrest.

The government attempted to find a resolution to ensure industrial peace by calling a conference held from 27 to 29 December 1941, with representatives from the Federal and State Arbitration Courts, employers and employees in attendance. The conference was

[10] David Day, *The Politics of War* (Sydney: HarperCollins, 2003). 362-66.

[11] 'Production Drive, New Advisory Council', *Sydney Morning Herald*, 29 December 1941, 6.

[12] An example of this is the edition of the *Sydney Morning Herald*, 19 January 1942, 4, which contains the following headlines: 'Speed the Ships' (addressing the problems in the stevedoring industry), 'Alleged Waste in Munitions', 'The Industrial Front, Sharp Action Necessary', 'Australia First' (Fadden's new policy), 'Conscription in Industry, Action urged by SA Premier' and 'Milk Dispute, Government May Suspend Act'. Moreover, these headlines appear alongside articles regarding the preparation for air raids and evacuations.

called together by the Minister of Labour, Edward Ward, but due to illness he was unable to attend the meeting, which was then chaired by the Attorney-General and Minister for External Affairs, Herbert Vere Evatt.[13] Also representing the Government were Curtin, John Albert Beasley (Minister for Supply), and Norman John Oswald Makin (Minister for Munitions). The conference extended through Saturday to Monday, the newspaper reports making special note that it sat on a Sunday and was conducted in 'an atmosphere of unsurpassed harmony'.[14] The procedures and administration of the arbitration courts were the focus of the conference. It was argued that the presence of the judges of the arbitration courts could cause prejudice to the discussion or future decisions in their respective courts. However, the view prevailed that their contribution would aid in the understanding of the court proceedings on industrial matters, which was a concern and frustration of employee representatives. Thus, Sir William Webb was invited and was present to represent the Industrial Court of Queensland as an observer.[15] Other points that were discussed included, consolidation of awards, employment of women, maximum utilisation of labour, the availability of trade union records of skilled labour and the elimination of fatigue.[16]

The conference unanimously approved the formation of the Industrial Relations Council, which would be established to 'advise the Government on industrial relations and generally on problems affecting war production and to make recommendations on industrial relations

[13] Ward was suffering from dengue fever and was committed to ten days bed rest, 'Mr Ward's Illness', *Sydney Moring Herald,* 27 December 1942.

[14] 'Industry and War, Wide Functions of New Advisory Council', *The Mercury*, 29 December 1941, 7.

[15] 'Conference on Labour', *Sydney Moring Herald,* 24 December 1941, 6; 'Industrial Peace, Big Conference To-day', *Sydney Morning Herald,* 27 December 1941, 11; *The Courier-Mail,* 27 December 1941, 3; *The Mercury*, 27 December 1941, 2; *Argus,* 29 December 1941.

[16] NAA: A472, W5284, Agenda of Conference on Industrial Matters, Parliament House, Canberra, Saturday 27 December 1941'.

which might be dealt with by National Security Regulations'.[17] Evatt, who chaired the conference in Ward's absence, expressed his hope in the Council declaring it 'a momentous advance in industrial policy'.[18] Specific matters included a review of the machinery of arbitration of disputes (but there was to be no interference with cases before the courts), consolidation of awards, women in the workforce and prevention of work related fatigue.[19] It was strictly an advisory body for the Government, having no legal power, and its decisions, like those of a royal commission, were not binding. In fact, Ward made the position of the council clear when he stated to the press from his sick bed, that as it was only an advisory body, all recommendations made by the council would be submitted to the government before they would be announced.[20]

Membership of the Industrial Relations Council

The council was made up of eight representatives for each of the employers and employees. Many employee organizations and unions promptly expressed their interest in having representation on the newly-formed Industrial Relations Council, for example, the Public Service Association of New South Wales, the League of Women Voters of South Australia and the Clothing Trade Union (Melbourne). The last two organisations strongly urged the government to consider the appointment of direct representation of women on the

[17] NAA: A472, W5284, various drafts of the regulations and correspondence with Webb; 'Industry and War, Wide Functions of New Advisory Council', *The Mercury*, 29 December 1941, 7, Hasluck, *Government and the People*, 2: 58-59.

[18] 'New Body to Advise Industry', *Courier-Mail*, 29 December 1941, 1. 'Industrial Council Set Up, Move to Speed War Output, End Disputes', *Daily Telegraph*, 29 December, 1941.

[19] 'Production Drive, New Advisory Council, *Sydney Morning Herald*, 29 December 1941, 6.

[20] 'Leave and Holidays in Wartime Industry', *Courier-Mail*, 13 January 1942, 3.

Council.[21] However, no women or representative of women's interests were appointed. Nevertheless, it was difficult to represent all interest groups directly as the Office of the Minister for Labour and National Service explained in a telegram to the Queensland Building Trades Group, who wanted a Queensland representative, that two States, Tasmania and Western Australia, did not receive representation on the council.[22]

The eight employees' representatives were made up from representatives of trade unions and workers' organisations: Robert Arthur King (MLC New South Wales), Frederick Walsh (South Australia), Charles Alfred Crofts and Percy James Clarey (MLC Victoria) from the Australasian Council of Trade Unions (ACTU), John Henry O'Toole of the Boilermakers' Society, James Healy from the Waterside Workers' Federation, Clarence George Fallon of the Australian Workers Union (AWU) and Joseph Archibald Cranwell of the Amalgamated Engineering Union.[23] Four of the appointees were present at the conference in Canberra. That participation of the ACTU was significant, as the organisation had resisted providing representatives or participating in previous government bodies sought by Menzies in the first two years of the war and prior to hostilities breaking out in 1939. [24]

---

[21] NAA: A461, AH351/1/1, Telegram from Stephens, Secretary to the League of Women Voters to J. Curtin, Prime Minister, 29 December 1941; General Secretary, Public Service Association NSW to J. Curtin, Prime Minister, 29 December 1941.

[22] NAA: A461, AH351/1/1, E.W. Tonkin, Private Secretary to the Minister of Labour and National Service to T.W. McGrath, Honorary Secretary to The Queensland Building Trades Group, 16 January 1942.

The Department eventually designed a template to send to each organization which expressed interest in being represented on the IRC, NAA: A461, AH351/1/1, Roland Wilson, Secretary of the Department of Labour and National Service to the Secretary of the Prime Minister's Department, 2 February 1942.

[23] 'Spokesmen for Workers, Industrial Relations Council', *Sydney Morning Herald*, 5 January 1942, 7.

[24] Paul Hasluck, *The Government and the People, 1939-1941*, vol. 1 (Canberra: Australian War Memorial, 1952). 414.

The members selected were generally moderate in their political outlook and some had worked on bodies established under the Menzies Government. Walsh, King and Clarey had sat on committees regarding the coordination of manpower in the nation, while Cranwell had chaired the controversial Trade Union Advisory Panel, which had been boycotted by the ACTU.[25] All had extensive and long experience in trade unions and affiliations with the Labor Party, holding leadership positions in their respective organisations. Over half of the employee representatives were openly anti-communist, and only Healy had had previous involvement with communism, after he had become disillusioned with Labor's response to the Depression, and had visited the Soviet Union in 1930s. Healy was also involved in the pig iron strike.[26] Percy and King were members of the Legislative Council in Victoria and New South Wales, and Walsh was a member of the House of Assembly in South Australia. Fallon would have known Webb through his involvement with the AWU as General Secretary (1940-1943) in Queensland. Fallon was close friends with William Forgan Smith (Premier of Queensland 1932-42) and was prominent in representing claims before the state's Industrial Court which included the action relating to the South Johnstone sugar strike.[27] King and Crofts, representing the ACTU, had declared in a series of broadcasts in 1940 that trade unions would be loyal to the war effort and would do their utmost to deter industrial strife through conciliation to ensure that there were no interruptions to war

[25] Patmore, "Cranwell, Joseph Archibald (1889-1965)".

[26] Markey and Svesen, "Healy, James (1898-1961)".

[27] Bergstrum, "Fallon, Clarence George".

production.[28] Therefore, it would appear that the government had attempted to appoint members who would work with the employer representatives.

The employers' representatives were drawn from sections of industries outlined by the conference and were as follows. Four were representatives from the manufacturing industry: John Heine, Harold James Hendy, Frank Tennyson Perry and Alured Kelly. James William Allen represented Grazing and Primary Production, Frederick Bridgman shipping and transport interests, Albert Edward Heath, commercial interests, and Olaf David August Oberg represented the Employers' Federation.[29] The representatives of manufacturing were members of the Chamber of Manufacturers (state and federal). Heath was president of the Sydney Chamber of Commerce (1940-42 and 1944-49). Allen was secretary of a number of organisations, including the Graziers' Association of NSW from 1914, the Producers' Association Central Council from 1923, the Australian Wool Council and the Northern Territory Pastoral Lessees' Association.[30] A number of the Members had served on boards under the Menzies Government. For example, Perry was a representative of the Board of Area Management for SA under the Department of Munitions, and Bridgman was a member of the Shipping Control Board.[31] It can be generally concluded that the employer representatives were conservative in their political outlook. Oberg was known to have opposed the ALP's socialist platforms. However, the Chifley Government selected him in an advisory role with the Australian delegation to the United Nations

[28] A.E. Monk the President of the ACTU was also involved in these addresses to the nation. Hasluck, *Government and the People*, 1: 371n.

[29] 'Industrial Council', *Sydney Morning Herald*, 9 January 1942, 9; *Age*, 9 January 1942.

[30] Who's Who in Australia 1944

[31] Marsden, "Perry, Sir Frank Tennyson (1887-1965)". And *Who's Who in Australia* 1941, 1944, 1947.

Conference on International Organisation in San Francisco in 1945.[32] Thus, his knowledge on industrial and employment matters must have been respected by members of the Labor Government. Unlike the employee representatives, there were no employer representatives who held a parliamentary seat. Perry was very active in state politics in South Australia, but he failed to win a seat on either of the two occasions he ran.[33] It must also be noted that the members owned some of Australia's largest companies or held high managerial positions in them. For example, Heine had taken over his father's engineering company, John Heine and Sons Pty Ltd, which was a pioneer in developing machinery to manufacture canned goods. Bridgman was General Manager of the Adelaide Steamship Company Limited.[34] Perry was the manager of a number of big businesses in South Australia and was very active in bringing munitions and defence contracts to his home state.[35] From the outset it was clear that the task ahead for the chairman of this body would be challenging and it would be difficult to reconcile the philosophical differences between the major power brokers in the economy and the leaders charged with protecting the interests of workers.

The Appointment of Webb and the Drafting of Regulations Establishing the Council

Negotiations between Webb and Evatt had begun the day after the industrial conference in December and within three days Webb had discussed his availability with the Queensland Premier, who, the Chief Justice reported: 'leaves to me the decision as to the nature and

[32] Pilger, "Oberg, David Olof August (1893-1975)" 507.

[33] Marsden, "Perry, Sir Frank Tennyson (1887-1965)" 595-97.

[34] Who's Who in Australia

[35] Marsden, "Perry, Sir Frank Tennyson (1887-1965)".

extent of assistance I should offer the Commonwealth in this crisis'.[36] It had been originally proposed that he be offered the position of deputy chairman of the new body. The unanimous resolution of the conference was that the position of the chairman be filled by a rotation of ministers of the relevant department, depending on the matter that the council intended to discuss at each session. The ministers on the proposed rotation included: Beasley (Supply and Development), Ward (Labour and National Service), Norman John Oswald Makin (Munitions) and John Johnston Dedman (War Organisation of Industry). Webb's name was put forward during the conference for the position of deputy chairman and was reported to be highly sought-after by the Curtin Government. Permission had been promptly sought for the release of Webb from William Forgan Smith, Queensland's premier, the day after the conference was held. It was also reported that: 'The Government intends to refer so much to the Council that its sittings will be very frequent and the Vice-Chairman will probably have to devote his whole time to the activities'.[37] Evatt prophetically stated that the 'success of the new Council will depend to a large extent on the Deputy Chairman, who will be the chief executive officer'.[38] However, due to Webb's concerns and pressure, this proposed model was adapted in an attempt to ensure his judicial independence, and this was to have dire consequences in the functioning of the council and the intentions of the resolutions carried by the conference.

[36] NAA: A472, W5284, William Webb, CJ Supreme Court of Queensland to H.V. Evatt, Attorney-General and Minister for External Affairs, 30 December 1941.

[37] 'Production Drive, New Advisory *SMH*, 29 December 1941, 6.

[38] 'Industry's Great Part in War, Important Decisions at Canberra Conference', *Argus*, 29 December 1941 and; *Daily Telegraph*, 29 December 1941.

Webb was not willing to accept the position on the council with any appearance of government influence on its operation. He told the press: 'I telegraphed Dr Evatt that I declined the office of deputy chairman or any other position which involved political control, or any appearance to it'.[39] Webb's telegram to the attorney-general elaborated that 'any judge could not accept a Deputy Chairmanship under a Minister' and it would require statutory authority for a judge to participate on the council.[40] Many news outlets such as the *Mercury* and ABC radio had reported that he had already accepted the post on the 30 December after the appointment had been approved by the war cabinet sitting in Melbourne. This was due to Forgan Smith's statement that he had released Webb for the position, leaving it to him to choose whether or not to accept the position.[41] It was not until the following day, after he had received his knighthood, that Webb announced his acceptance of the chairmanship of the new Industrial Relations Council. He accepted the post after a number of his proposals had been accepted by Evatt, removing the appearance of political influence.[42] His demand for judicial independence would have appealed to Evatt, a former Justice of the High Court. It was also stipulated that his services would not be at a cost to the Commonwealth, and he would hold the chairmanship as an honorary position with only reimbursement for travel costs provided. Furthermore, he retained his

[39] 'New Industrial Council, Judge Invited to be Chairman', *Sydney Morning Herald*, 31 December 1941, 9.

[40] NAA: A472/6 W5284, Telegram from William Webb, CJ Supreme Court of Queensland to H.V. Evatt, Attorney-General and Minister for External Affairs, 30 December 1941.

[41] 'Deputy Chairman Appointed, Industrial Council', *Mercury*, 30 December 1941, 2. The *Courier-Mail* commented on the confusion of Sir William's appointment, 'Confusion over Federal Offer to Mr Justice Webb', *Courier-Mail*, 31 December 1941, 3. See also: 'Judge Appointed to New Industrial Council', *Argus*, 31 December 1941, 2.

[42] NAA: A472, W5284, numerous draft regulations with hand written annotations; 'New Industrial Council, Mr Justice Webb Chairman', *Sydney Morning Herald*, 1 January 1942, 7; 'Appointment Confirmed', *Mercury*, 1 January 1942, 2.

position as Chief Justice of the Queensland Supreme Court, as the chairmanship was not a full-time appointment, and he had the support of the administration staff appointed to the council.

Another of Webb's demands was that he would be held in the same status as a High Court Justice and the position would have similar protection and standing to that of Sir Owen Dixon's role as Chairman of the Commonwealth Shipping Control Board.[43] Before Dixon was offered the position in December 1940, he telegraphed the Department of Commerce that he would only accept on the promise that 'no political control' would be exercised over the Board. This was agreed to by the government, and the Board was established the following January.[44] With similar assurances provided for the Industrial Relations Council, Evatt telegrammed Webb on 2 January, congratulating him on his knighthood, thanking him for accepting the post and assuring him that his judicial independence would be protected under the regulations.[45] Webb wrote to Evatt on the day the regulations were gazetted, declaring that he hoped to 'be of some real assistance to your government on the Council. If I fail it will not be due to neglect'.[46]

On the 2 January the *National Security (Australian Industrial Relations Council) Regulations* (S.R. 1 of 1942) made under the *National Security Act* 1939-40 were passed

[43]NAA: A472, W5284, Telegram from William Webb, CJ Supreme Court of Queensland to H.V. Evatt, Attorney-General, 30 December 1941. 'New Industrial Council, Mr Justice Webb Chairman', *Sydney Morning Herald*, 1 January 1942, 7; 'Sir William Webb Accepts Federal Post', *Courier-Mail*, 1 January 1942, 3.

[44] Philip Ayres, *Owen Dixon* (Carlton, Victoria: Miegunyah Press, 2003). 128.

[45] NAA: A472, W5284, Telegram from William Webb, CJ Supreme Court of Queensland to H.V. Evatt, Attorney-General, 30 December 1941.

[46] NAA: A472, W5284, Letter from Sir William Webb, CJ Supreme Court of Queensland to H.V. Evatt, Attorney-General, 2 January 1942.

and published in the *Gazette*. The administration of the council was placed under the Minister of State for Labour and National Service, Ward. The regulations required that the chairman be a judge of the High Court or a State Supreme Court, and gave the chairman considerable power over the functioning of the council, including convening meetings, with the only requirement being that six members be present. As requested by Webb, the chairman did not receive payment for the position, with only travelling allowances and other appropriate fees being provided for in the regulations. The other members received £1.10s per day attending and travelling to meetings with reimbursement for any travelling costs.

Webb pressed for further amendments to the Regulations through the Attorney-General's Department to ensure protection of his judicial independence. He had been in daily contact with George Shaw Knowles, the solicitor-general, during the drafting of the original regulations, requesting that they be forwarded to him at the earliest possible time, stating that he was 'holding myself in readiness for first meeting'.[47] However, a week later Webb sent two telegrams to the Attorney-General's Department requesting alterations to be made. The first request was that the appropriate minister of the state be excluded from the constitution of the council to remove the appearance of political influence. In the other telegram Webb expressed his desire to have the deliberative and casting votes as well as the rules of procedures enshrined in the regulations.[48] G.B. Castieau, Assistant Secretary and Australian Policy Draughtsman in the Attorney-General's Department, in a brief to

[47] NAA: A472, W5284, Sir William Webb, CJ Supreme Court of Queensland to George S. Knowles, Solicitor-General Cth, Secretary to the Attorney-General's Department, 2 January 1942.

[48] NAA: A472, W5284, Sir William Webb, CJ Supreme Court of Queensland to George S. Knowles, Solicitor-General Cth, Secretary to the Attorney-General's Department, 2 January 1942.

Evatt, advised that the latter two matters did not require to be addressed by the regulations, but relented:

> However, if His Honour feels that the matter can only be covered by a regulation and it is decided that the appropriate Minister or his nominee is to have a vote, it seems that the only course open is to amend the Regulations by adding a provision that at a meeting of the Council the Chairman shall have a deliberative vote, and in the event of there being an equality of votes on any question, a casting vote.[49]

The other option Castieau proposed was that the Minister of the State be excluded as a member of the council and the matter of the vote would therefore not be an issue. On 28 January, the amendments were made in the *National Security (Australian Industrial Relations Council) Regulations* (SR 18 of 1942) abolishing the previous references to 'the appropriate Minister of State' in sections 1-4. The subsection 6A was created to establish the attendance of Ministers at the Council:

> The appropriate Minister of the State or a person appointed by him as his representative for the purposes of these Regulations may attend any meeting of the Council at which a subject-matter under the administration of that Minister is being dealt with and may take part in the proceedings of the Council in relation thereto but shall not be entitled to vote at any such meeting or be deemed to be a member of the Council for the purposes of a quorum.[50]

Thus, Webb's concerns about any appearance of political influence over the council were satisfied, with the participation rights of the minister being severely curtailed to only allow contribution to discussions on matters directly relating to subjects that were the concern of

[49] NAA: A472, W5284 G.B. Castieau, Assistant Secretary to the Attorney-General's Department to H.V. Evatt, Attorney-General, 7 January 1942.

[50] *National Security (Industrial Relations Council) Regulations*, SR 1 of 1942, S6A.

their department.[51] By the time these regulations had reached the government printing press, the council had virtually dissolved.

The regulations state that the rules of procedure were to be determined by the members of the council. The importance of the position of the chairman was enshrined in the Rules of Procedure of the Council. Rule 4 (2) stated that the 'Chairman shall have a deliberative vote and in the event of an equality of votes, a casting vote'.[52] The contention over the rules that were eventually adopted by the council was a major contributing factor to its demise.

First Meetings and Items of Agendum of the Industrial Relations Council

The first meeting of the council was held on 13 January 1942 in Canberra.[53] Ward and Dedman were present at the first meeting which covered the issues of applications for leave or holidays by workers in vital war industry and the conditions of employment of women in wartime.[54] Proceedings continued through the following day where the council voted in favour of holidays during the national emergency in war production industries, to counteract the strain on the workers. There were also some minor recommendations

[51] NAA: A472, W5284, Roland Wilson, Secretary for the Department of Labour and National Service to Secretary of the Attorney-General's Office, 16 January 1942.

[52] NAA: A472, W5284, Australian Industrial Relations Council – Rules of Procedure [draft with annotations stated 12 January 1942].

[53] The *Mercury* reported optimistically that the 'duty of the Council will be to advise the Government on methods of obtaining and maintaining maximum war production through peace in industry'. 'New Industrial Council, Meeting on Monday', *Mercury*, 10 January 1942; 'Leave and Holidays in Wartime Industry', *Courier-Mail* 13 January 1941, 3.

[54] 'Leave and Holidays in Wartime Industry', *Courier-Mail* 13 January 1941, 3; 'Industrial Council, Initial Meeting at Canberra', *Mercury*, 13 January 1942, 2.

regarding the employment of women, but the proceedings were adjourned until 22 January, to be continued in Sydney.[55]

Employment of women was a contentious matter. There were reports on the day of the council's second sitting that 40 female employees for Dunlop Rubber Australia Ltd in Drummoyne, Sydney had stopped work alleging that they were not being paid the same amount as the men in the same positions that they had replaced.[56] Women were enthusiastically joining the workforce. In early December it was reported that more than 5000 applied for 1000 positions in a Victorian aircraft factory, with similar responses for positions in other states and in January thousands of women registered at state labour exchanges for munitions work.[57] However, it had taken members of the two governments some time to tap this labour pool, being reluctant to encourage the employment of women in war-related activities before the entry of Japan. In June 1941 there were 1,399 women in the three branches of military service, and the total number in munitions and aircraft production amounted to 11,563.[58] The reluctance to employ women in war industries was due to a number of issues of the time, including what were considered appropriate work, health and safety concerns, rates of pay and employment after the war. The ACTU stand on pay decided in June 1941 was that women should receive equal pay, both as an

[55] 'Council in Favour? Holidays in War-Time'. *Mercury*, 14 January 1942, 2.

[56] 'Five Strikes in NSW, Hold-up of War Work', *Sydney Morning Herald*, 14 January 1942, 11. The women at the factory were being paid £2/14/. per week when the men who they replaced and others that they worked with were being paid £4/19/6 per week.

[57] 'Rush to Enlist, Many Applicants for Aircraft Work', *Sydney Morning Herald*, 12 December 1941, 6.

[58] The initial womens' auxiliary units for the armed services were voluntary, completely self-funded and organised without Government participation. The RAAF were first to petition the Government to allow women to be recruited in a number of areas, such as radio operations to release men for other necessary work. Hasluck, *Government and the People*, 1: 401-07.

acknowledgment of their work and to avoid the displacement of men in the workforce as a result of employers turning to cheaper labour.[59] Menzies became proactive in the recruitment of women after seeing their vital role during his trip to Britain, and on 1 June 1941 he directed his ministers to examine the issue within their departments.[60] In a paper delivered and approved by the War Cabinet on 12 December the Chiefs of Staff recommended 'that the maximum use should be made of women power in the services to release men for active duty'.[61] On 15 December it was approved by the war cabinet, after being referred to the full cabinet, for the extensive use of women in industry to replace men who have enlisted for the duration of the war. It was envisioned that Evatt, Ward and Dedman would form a sub-committee to consult with unions and employers to establish a management plan.[62] This was handed over to the Industrial Relations Council and became one of the first items on the agenda of discussion. The first meeting resolved that where women were employed in men's jobs, the men would be reinstated on their return. This was to be guaranteed by an Act of Parliament. The occupations in which women could be employed, hours, measures to remove them after the war, and methods to regulate their employment, were placed on the agenda for the next meeting of the council. A paper by Miss J.M. Robertson, 'Employment of Women and Elimination of Fatigue' was received by the Executive Officer of the Council for the purpose of the members' discussion.[63]

---

[59] Ibid., 407.

[60] Ibid., 406.

[61] NAA: A2673, Volume 9 'War Cabinet minutes - Minute numbers 1456 to 1643', War Cabinet minute 1579, 15 December.

[62] Ibid

[63] NAA: B3533, 127013/3, "Central Office Employment of Women Conditions as submitted by Australian Industrial Council".

However, the matter remained unresolved as the council soon became engulfed by turmoil and dissolved.

Another interesting matter that was to be raised in the council regarded workers at Port Moresby. On 9 January Webb was directed to investigate the departure of employees working on vital defence works in Port Moresby due to the increased risk of attack following Japan's entry into the war. Their departure had been in breach of contracts that they had signed and were to the detriment of preparations in the area, as other workers to replace them were near impossible to obtain.[64] This was another matter that the council was not able consider due to the internal conflict that led to its collapse.

The Demise of the Council

The format of the council with the alterations demanded by Webb for his position inevitably led to its demise within a short period; it did not even last a month. Naturally, the two groups of representatives sided with their own on all issues, resulting in Webb having the decisive vote in each matter. On 20 January articles appeared reporting clashes, and Curtin declared that he had received a telegram from Mr Perry expressing the complaints of the employers' representatives, who desired the council be suspended, pending discussions with cabinet regarding Webb's casting vote. However, Curtin refused to intervene, in order to maintain its independence from politics. In a statement that he sent to the Chambers of Manufacturers and released to the press, he stated:

> In view of fact that Council was established in pursuance of a resolution passed by a conference of all parties concerned, and set up under the

[64] *NAA*, Canberra, A5954, 456/22, John Curtin, Prime Minister to Sir William Webb, Chairman of the IRC and CJ of Supreme Court Qld, 9 January 1941.

> Chairmanship of a Judge of the Supreme Court of Queensland, consider that, until both sides have had longer experience of the working of Council, it is desirable there be no interference on my part with its functions, and I hope and expect that both sides will continue their association with it.
>
> If eight representatives chosen by the trade unions of Australia and eight chosen by the employers of Australia under the chairmanship of the Chief Justice of a state, cannot do some good for Australian industry at this time, it is a reflection on those responsible.[65]

It is questionable whether Curtin was sincere with his argument that he was respecting Webb's demand for independence and any intervention by the prime minister would be seen as a breach of the agreement made upon the Chief Justice's acceptance of the post. It is more likely that Curtin was not interested in supporting the IRC due to the shift in the demands of the war. The worsening military situation would have caused a greater concern for the government at the time. British and Australian forces had suffered successive defeats during the Malayan campaign, most recently at the battles of Gemas on 15 January and the Muar on the 16th. Heavy Japanese bombing of Rabaul had begun from the 20th of that month in preparation for the invasion which occurred on the 23rd. Curtin's daily contact with Churchill had failed to get reinforcements for the Far East because the British Prime Minister and the President of the United States, F. D. Roosevelt, had agreed to concentrate on the European theatre and wage a holding war in the Pacific, in a strategy to 'beat Hitler first'.[66] Thus, the Australian Government was anxious to increase productivity for home defence, and Curtin was frustrated by the inability of the council to provide

[65] NAA: A5954, 456/22, Press Statement by Prime Minister Curtin. 'Industrial Relations Council', 19 January 1942. Also see: 'Employers in Clash, Industrial Relations Council', *Sydney Morning Herald*, 20 January 1942, 4, 'Delegates' Move on Council', *Age* 20 January 1942, 'Hitch on Industrial Council', *Argus*, 20 January 1942.

[66] Day, *The Politics of War*: 220-29, 34-37.

assistance in obtaining this objective. Moreover, the manner in which the IRC dissolved illustrates the concern regarding the degree of protection provided to judges in these roles.

The clash occurred over the issue of compulsory unionism which was a divisive policy within the Labor Government. Many members of the ALP were in favour of its introduction, and the matter was considered by the full cabinet on the 17 February 1942, referred to the war cabinet on 9 March and sent back to full cabinet on 5 May with no resolution found. The government position was that it would support workers to become members of unions and give preference to unionised labour. This evoked an attack from Menzies in September, accusing the Labor government of virtually establishing compulsory unionism under the cloak of supporting preference to unionised workers. This was staunchly rejected by Evatt and Curtin, who declared that they had resisted union pressure to introduce such measures.[67] This underlines the major problem of the format of the IRC and confirms the fear of the employers' representatives. The motion of compulsory unionism was passed by the council with the support of the employee representatives and Webb using his casting vote. However, it was such a contentious issue that the government was reluctant to introduce the measure for the lack of support it would receive from the public and industry.

On the 22 January, Ward and Dedman attended a meeting of the council to resolve the differences between the representatives and Webb. They were unsuccessful and left without comment to the press.[68] The following day Perry telegrammed Curtin declaring:

[67] Hasluck, *Government and the People*, 2: 264-65.

[68] New Council in Deadlock, Industrial Relations', *Sydney Morning Herald*, 23 January 1942, 5.

'present position unworkable' and '[e]arnestly ask your intervention enable Industrial Relations Council work usefully in national interest'.[69] On 24 January 1942 a joint statement was released by the employers' representatives to the press that expressed both their disenchantment with the council and their criticism of the chairman. It was reported that 'Webb had reduced the council to a farce'.[70] The joint statement revealed that there had been problems from the first meeting in Canberra when the motion for nation-wide compulsory unionism was introduced, in support of the employee representatives, and Webb reputedly declared 'that discussion was futile as he was in favour of the proposal'.[71] The employers' representatives also argued that all motions, not just that of the majority side, should have been reported to the government. The statement declared: 'If the Government merely wants the advice of the trade unions or of the Chairman it can obtain that without any council at all'. The statement cited another example of Webb joining the employees in opposing a proposition forwarded by the Minister for War Organisation, Dedman, regarding employment of women in industry, which was backed by the employers' representatives. The latter concluded in their statement: 'with goodwill and sincerity the council can be made a powerful instrument for the good in a time of great crisis'. They also said that the future of the council depended on Curtin fulfilling his promise made in the opening address of the Industrial Peace Conference in December, that the proceedings of the Council would be established on the basis of a joint committee. Furthermore, they felt that the council undermined the Arbitration Court, which was

[69] NAA: A461, AH351/1/1, Telegram from F.T. Perry, Employer Representative on the Industrial Relations Council to Secretary to the Prime Minister's Department, 23 January 1942.

[70] 'New Council Fails, Chairman's Vote Contested', *Sydney Morning Herald*, 24 January 1942, 15.

[71] 'New Council Fails, Chairman's Vote Contested', *Sydney Morning Herald*, 24 January 1942, 15.

intolerable. It was reported that failure to resolve these problems with the chair had resulted in the council having 'virtually collapsed' and it had adjourned indefinitely. [72] Curtin replied that he was 'greatly concerned' at the view taken of the council's ability to function, but thought that it was 'inconceivable' that the representatives could not resolve their issues in order to serve the national interests.[73]

On 27 January, Edward Ward, as Minister for Labour, summarily dismissed the allegations made by the employers' representatives, declaring that the 'employers could not complain of political interference'. However, he regretted that as far as he was concerned the Industrial Relations Council had collapsed: 'the matter is closed, and I refuse to be bothered any more in connection with it, as I am occupied fully getting on with the job which has been entrusted with me'.[74] Ward declared that the reasons for the collapse were that the employers' representatives would cooperate only on their 'own terms and conditions, which made the continuance of the council impossible'.[75] Refusing to be dictated to by one interest group, he added in jest: 'Perhaps as I extend the manpower regulations I will be able to fit the employers' representatives…into some vital war work'.[76]

---

[72] 'New Council Fails, Chairman's Vote Contested', *Sydney Morning Herald*, 24 January 1942, 15.

[73] NAA: A461, AH351/1/1, Telegram from the Prime Minister to F.T. Perry, Employers' Representative Industrial Relations Council, 23 January 1942.

[74] 'Mr Ward and the Employers, Industrial Relations Council "Collapse"', *Sydney Morning Herald*, 27 January 1942, 9; 'Labour Minister to Work Alone', *Courier-Mail*, 27 January 1942, 5.

[75] 'Mr Ward and the Employers, Industrial Relations Council "Collapse"', *Sydney Morning Herald*, 27 January 1942, 9.

[76]'Industrial Council, Employers Allege Partisanship', *Mercury*, 27 January 1942, 5.

Curtin was also very critical of the attitude of the employers in his 'Inside the Fighting Line' speech, known for his reference to the stark choice 'Australians must fight or work' delivered on Anniversary (or Australia) Day, 26 January. Curtin stated: 'Employers' representatives walking out of a conference are in the same category as workmen walking off a job'.[77] However, the following day Curtin did express hope that the council could be saved and would discuss the matter with Ward. He stated: 'I see no reason why employers should not discharge their obligations to Australia, and use the machinery which the Government has devised to establish order in industrial relations'. Speaking on behalf of the employers' representatives, L. Withall, Secretary of the Associated Chambers of Manufacturers, replied: 'It was abandoned by Mr Ward, because he failed to make it a mere instrument of left-wing industrial policy under the cloak of war emergency'.[78] He added that industry and production efficiency would not be adversely affected by the demise of the council. In response, the Australian Workers Union carried a resolution 'deploring and viewing with alarm the application of direct action methods of employers' representatives…and their refusal to cooperate with the Federal Government and representatives of Australian unions in attempts to ensure the continuity of industrial production, the elimination of industrial disputes, and a maximum war and defence effort'.[79]

[77] 'Australian's Must Fight or Work, Mr Curtin's Message', *Sydney Morning Herald*, 27 January 1942, 7.

[78] 'Industrial Relations Council, Mr Curtin's Appeal to Employers', *Sydney Morning Herald*, 28 January 1942, 8.

[79] 'Industrial Relations Council, Mr Curtin's Appeal to Employers', *Sydney Morning Herald*, 28 January 1942, 8; 'Industrial Relations Council, Prime Minister's Request', *Mercury*, 28 January 1942, 1.

Sir William, in the meantime, returned to Queensland to resume as Chief Justice of the Supreme Court. Webb stated to the press: 'I supported compulsory unionism subject to an alteration giving Federal and State Industrial Courts power to grant exemption in proper cases... On female rates, I favoured neither the employers' nor the unions' proposals, as they made no certain provision for compensation for females who would be dismissed in large numbers at the end of the war and would find it impossible to get other employment'.[80] In light of Webb's comments, Curtin supported the beleaguered Chief Justice: 'The views expressed by the employers' representative on the Industrial Relations Council (Mr F.T. Perry) in his original telegram to me regarding the chairman of the council…are not justified in view of Sir William Webb's contradictions published today'.[81]

The employers' representatives appear to have had the last word, with another joint statement published in the press on the 31 January, reiterating the flaws of the council and denying that they had walked out or had been uncooperative.[82]

> Nothing was discussed or agreed upon at the initial conference that could justify the appointment of Mr Justice Webb, or any other judge… Records showed that the judges attending the conference expressed their determination to remain aloof from the council by indicating to the presiding Minister (Dr Evatt) that they would not vote.[83]

[80] 'Curtin Supports Chief Justice', *Courier-Mail*, 28 January 1942, 5.

[81] 'Curtin Supports Chief Justice', *Courier-Mail*, 28 January 1942, 5.

[82] 'Employers Deny "Walk Off"', *Courier-Mail*, 31 January 1942, 5; 'Industrial Council, Employers' View on Breakdown', *Mercury*, 31 January 1942, 2.

[83] 'Industrial Council, Employers' View on Breakdown', *Mercury*, 31 January 1942, 2.

The employers' representatives were shocked when it was declared that the chairman would have the casting vote, and that only those recommendations would be passed to the Government, under the guise of joint resolutions. The statement added:

> Subsequent proceedings revealed that the council was in effect being conducted as an industrial arbitration tribunal the chairman leaving no doubt in the minds of delegates that he intended to follow the methods prevailing in the Queensland Arbitration Court.[84]

The statement was also critical of Ward and his attack on the employers' representatives, declaring that it was 'unjustified', 'irresponsible' and designed to 'stir up industrial trouble'.[85]

Evatt made a final public appeal to the employers' representatives the following day and recommended new members be appointed as the casting vote issue was 'immaterial'.[86] On 2 February 1942, a memorandum was sent from Ward's secretary, R. Wilson, to the Prime Minister's Department regarding requests for representation on the Industrial Relations Council by various organizations. The memorandum advised that the Department of Labour was sending out replies that stated, 'as the Council is no longer functioning, the Minister does not consider it necessary to re-examine the question of the representation… on the council'.[87] This appears to be the final chapter of the Industrial Relations Council, and neither Curtin nor Ward made further comment on the matter.[88] Ward seemed rash in

---

[84] 'Industrial Council, Employers' View on Breakdown', *Mercury*, 31 January 1942, 2; 'Employers Deny "Walk Off"', *Courier-Mail*, 31 January 1942, 5.

[85] 'Employers Deny "Walk Off"', *Courier-Mail*, 31 January 1942, 5.

[86] 'Evatt Appeals to Employers', *Sunday Mail* (Brisbane), 1 February 1942, 5.

[87] NAA: A461, AH351/1/1, Secretary of the Department of Labour and National Service to the Secretary of the Prime Minister's Department, 2 February 1942.

[88] Elwyn Spratt, *Eddie Ward, firebrand of East Sydney*, Seal books (Adelaide: Rigby, 1978). 72.

his dismissal of the council, however, he had received a warning from his friend, Maurice Blackburn, who stated prophetically in a letter to the minister:

> It looks as if the Industrial Council is a plan to run you in the blinkers. If it is, I know it will fail. As far as the rank-and-file are concerned those who think are looking to you. You must keep fit and not let the word-merchants get away with it.[89]

It would appear then that the Industrial Relations Council was being used as a tool in the political bickering among the internal factions of the Australian Labor Party. The potentially tumultuous body was thrust upon the troublesome minister and party member. Ward and Curtin had a chequered history. Ward had supported Lang during the upheavals of the 1930s, but was back in the ALP fold after 1936, where he frequently 'openly opposed and often unsettled' Curtin.[90] Thus, on advice from Blackburn, Ward did not hesitate to wipe his hands of the Industrial Relations Council and place responsibility for its demise squarely on the employers' representatives' shoulders. In this way Webb's judicial independence was threatened by his participation on such a politically fraught council.

Webb was probably saved from further political criticism by the fact that the parliament was not in session, breaking on 17 December 1941 and not returning until 20 February 1942. By that time there were more serious matters of concern: Rabaul had fallen on 23 January, followed by Ambon on the 31st, resulting in the loss of two Battalions (2/22 and 2/21) of the ill-fated 8th Division. Most shocking of all for the British Empire and its Dominions was the defeat of the forces at Singapore, which had surrendered on 15

---

[89] Cited in ibid., 70.

[90] Ross McMullin, "Ward, Edward John (Eddie), 1899-1963," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://www.adb.online.anu.edu.au/biogs/A160579b.htm.

February, where the remaining elements of the 8th Division had been taken into captivity. With the nation already feeling dangerously exposed, on the day before parliament resumed, Darwin was heavily attacked, resulting in large numbers of casualties and massive damage to defence infrastructure. There were consequently plenty of other questions the opposition had to pose to the government other than the failure of the Industrial Relations Council and its chairman. The Council was officially dissolved in 1943.[91]

Women's Employment Board

The government did not attempt to establish another body to replace the IRC after its collapse. There was a plethora of bodies established during the war to examine and make recommendations on a number of matters to ensure maximum output for war production. The ALP was unable to form another council with diverse union representation. In 1943 the government made attempts to form another trade union advisory panel but failed to achieve cooperation due to the unions' diverse and conflicting political points of view.[92] Numerous smaller bodies established to examine more specific areas of war production that allowed for more specialisation than the IRC were more effective in advising the government in formulating policies. In general, it was difficult to form committees that brought together equal numbers of employer and employee representatives. Both parties were 'assiduous in protecting their own special interests'.[93] The Department of War

[91] *National Security (Regulations Revision) Regulations*, SR 1943, No. 88.

[92] Hasluck, *Government and the People*, 2: 251.

[93] Butlin and Schedvin, *War Economy, 1942-1945*: 156-57.

Organisation of Industry found that agreements were easier to achieve through informal conferences, a procedure followed throughout the war.[94]

The issue of the intake of women into the workforce that was raised at the Industrial Relations Council was handled by a special body to examine matters that arose as a result of government policies in this area. The Women's Employment Board (WEB) was established by National Security Regulations in March 1942 to examine conditions, suitability of employment and rates of pay for women.[95]

The Commonwealth Labor government remained interested in securing the services of Webb despite the debacle of his previous appointment. In March 1942, it was agreed that Webb would be the chairman of the WEB, having secured the consent of the Queensland premier, the draft regulations were drawn up and forwarded to the chief justice's chambers.[96] Webb once again requested modifications to the regulations which included that his appointment be made by the governor-general and be for the duration of the war, provision of travel allowance, payment arranged for an associate and that the board was empowered to award deferred pay.[97] The request for tenure and the issue regarding deferred pay proved to be insurmountable for the government to proceed with the appointment. The Government saw no advantage in a permanent appointment as the

---

[94] Ibid.

[95] There were three regulations enacted to establish WEB, the *National Security (Employment of Women) Regulations* SR 42 and 92 1942 were enacted in the first half of March and repealed SR 146/1942 by the end of the month.

[96] NAA: MP574/1, 148/1/8, F.A. Cooper, Acting- Premier of Queensland to E. J. Ward, Minister for Labour and National Service, 3 March 1942.

[97] NAA: MP574/1, 148/1/8, Sir William Webb, CJ Supreme Court of Queensland to R. Wilson, Secretary for Labour and National Service, 24 March 1942. There were reports in the paper at this time regarding the appointment of the board, but no chairman was named, 'In Men's Jobs Regulations for Women', *Mercury*, 26 March 1942, 7.

regulations maybe subject to change. It was also explained to the Chief Justice that a deferred payment model had been explored by the Government in consultation with the ACTU and it was decided that it would not be implemented as a policy.[98] Webb appears to not have been satisfied with this response and replied that 'I have today written to the Minister putting the position as I see it'.[99] A copy of the Minister's reply is not contained in the file, however, it would appear that the difference could not be resolved as Judge Foster was appointed to the role the following week.[100] There may have been other factors behind the reluctance of the Government to appoint the Queensland Chief Justice. Webb may have been removed to appease the various industrial organisations, such as the Associated Chambers of Manufacturers, who opposed the establishment of the board and sent letters to Curtin between 11-14 April, which coincides with the switch in chairmen.[101] Carol Fort adds that Webb's support of providing preference for unionist and equal pay may have also contributed as the government had shifted away from these policies.[102]

---

[98] NAA: MP574/1, 148/1/8, telegram from R. Wilson, Secretary for Department of Labour and National Service to Sir William Webb, CJ Supreme Court of Queensland, 25 March 1942. Webb's suggestions were forwarded to the Minister who then discussed it with the Prime Minister. Four days later a fuller explanation was provided by the Secretary, see R. Wilson, Secretary for Department of Labour and National Service to Sir William Webb, CJ Supreme Court of Queensland, 28 March 1942.

[99] NAA: MP574/1, 148/1/8, Sir William Webb, CJ Supreme Court of Queensland to R. Wilson, Secretary for Labour and National Service, 3 April 1942.

[100] NAA: MP574/1, 148/1/8, E.J. Ward, Minister for Labour and National Service to H.S. Bailey, Attorney-General of Victoria, 15 April 1942 and; A. Dunstan, Premier of Victoria to E.J. Ward, Minister for Labour and National Service, 20 April 1942.

[101] The Associated Chambers of Manufacturers of Australia, the Associated Chambers of Commerce of Australia, the Central Council of Employers of Australia and the Graziers' Federal Council of Australia sent letters to the Prime Minister expressing the opposition to the creation of the Board arguing that the existing arbitration courts were adequate to deal with the issues regarding employment of women, NAA: MP574/1, 148/1/8, various correspondence from representative bodies.

[102] Carol Fort, "Developing a National Employment Policy, Australia 1939-45" (Unpublished Thesis, University of Adelaide, 2000).

Justice A.W. Foster of the Victorian County Court was appointed chairman. There were two representatives from each of employers and employees organisations. Employers wishing to employ women would apply to the Board to obtain approval and rates of pay. All the decisions were filed with the Commonwealth Arbitration Court.[103] Foster used the position to publicly highlight the vital role women were playing in the war effort. The Board suffered many of the obstacles that led to the disintegration of the IRC, having limited powers to compel implementation of its decisions, as well as criticisms concerning the composition of the Board and the perception that it undermined Commonwealth and State arbitration bodies.[104] However, the Board appears to have had the support of the Curtin Government, which attempted to pass legislation to broaden its powers. Foster and the Board were also placed under pressure by equal pay lobby groups and unions complaining of inconsistencies. A significant proportion of criticism was directed at Foster, who from April 1943 indicated his desire to step down to return to court work. Foster denied that criticism directed at him was the cause of this desire. In a letter to the Minister for Labour and National Service, E.J. Ward he wrote:

> Perhaps you will agree that I have weathered quite a few storms as Chairman of this Board as well as quite a number of unpleasant attacks in parliament, in the press and elsewhere. One more would, I think, not have greatly troubled me.[105]

However, the work of WEB was commendable for the emergency: 'From 1942 to 1944 the Board set the wages, hours and conditions for more than 70,000 women in Australian

---

[103] Hasluck, *Government and the People*, 2: 266.

[104] Constance Larmour, *Labor Judge: the life and times of Judge Alfred William Foster* (Sydney: Hale & Iremonger, 1985). 163-70.

[105] Ibid., 171.

industries. Thousands were drafted into industries considered essential to the war effort'.[106] It would have been an advantage to the chairman if membership of the Board was limited to four representatives which would have allowed for easier management of discussions. Furthermore, the Board had a clearly defined focus and guidelines to apply to situations, in that it operated more as an industrial court. Foster continued to chair the Board until his appointment on 12 October 1944 to the Commonwealth Court of Conciliation and Arbitration Court. The Board was also dissolved at this time with the Arbitration Court empowered to deal with all matters relating to female employment.[107]

Removal of Jurisdiction for Statutory Bodies Chaired by a Judge: A Comparison

Webb's experience on the IRC is comparable to that of Edmund Alfred Drake-Brockman of the Commonwealth Arbitration Court while he served as chairman on the Central Coal Reference Board. During his tenure on this position there were allegations of him being biased toward different parties which led to his eventual removal by the Curtin government. Coal mining in New South Wales was the most problematic industry for the wartime government due to continuous strikes and unrest throughout the war.[108] On 23 December 1940 it was announced by the Minister for Labour and National Service, Harold Edward Holt, that Judge Drake-Brockman would be appointed to chair the Central Reference Board for the coal mining industry. The body was supported by a number of local reference boards and was established under the emergency powers. Its establishment had the support of the Advisory War Council. The body would hear disputes within the

[106] Ibid., 170.

[107] Hasluck, *Government and the People*, 2: 268-69.

[108] Ibid., 248.

industry and be made up of representatives of owners of coal mines and the miners.[109] The board was provided with 'extensive powers and allowed great flexibility in procedure' to allow it to consider any matter that is affecting the industry and was in the public interest.[110] The board had a chequered success and survived numerous cases which challenged its authority and jurisdiction.[111] However, it is the interference of the government that holds particular interest for the thesis. In April 1942, the new Minister for Labour and National Service, Ward toured the mining regions due to the increasing number of strikes which he concluded, amongst other causes, were a result of decisions and awards given by the Central Reference Board and the local reference boards.[112] The chairman took exception to Ward's intervention in the strike actions through a series of meetings with miners that should have been raised before the board. An owner representative asked the board: 'I merely wish to know who is the authority on coal mining matters?' Justice Drake-Brockman responded: 'I do not know, I think there will probably be some sort of showdown very shortly, and the position may be clarified'. The chairman also added that if there were further interference, especially if an appeal court was established over the board, he would resign from the position.[113] However, agreement was made between the interested parties to continuing functioning of the Central Reference Boards and its local

---

[109] 'Coalmining Industry. Board Members Appointed', *Mercury*, 23 December 1940, 2; 'Coal Mining Board', *Sydney Morning Herald*, 23 December 1940, 9.

[110] Ian G. Sharp, "Drake-Brockman, Edmund Alfred (1884-1949)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/drake-brockman-edmund-alfred-6014; Hasluck, *Government and the People*, 1: 290. See also, SR 1941, no 25, amended by SR 1941, no. 38.

[111] R v Drake-Brockman; Ex parte National Oil Pty Ltd (1943) 68 CLR 51; R v Hickman; Ex parte Fox (1945) 70 CLR 598 and; The King v Central Reference Board; Ex parte Thiess (Repairs) Pty Ltd (1948) 77 CLR 123.

[112] Hasluck, *Government and the People*, 2: 253.

[113] 'Threat by Coal Board Chairman. Will not tolerate minister's interference', *Argus*, 24 April 1942, 3.

branches.[114] Despite some of the 'greatest' reforms for workers achieved under the chairmanship of Drake-Brockman, in 1943 the Curtin government acquiesced in the Miners' Federation demands for his removal.[115] In October the board was reconstituted as the Central Coal Authority with Albert Charles Willis appointed as chairman to deal with cases involving the Miners' Federation.[116] Ironically, it was the mine owners representatives who protested at Drake-Brockman heading a commission of inquiry into coal stoppages at the beginning of the year, in a letter to the attorney-general with the spokesperson of the mine owners, Telford Simpson stating: 'We would go further and state that the judge on a recent occasion has shown definite bias against the members of the company'.[117] Furthermore, just as in the case of Webb, a similar demand for the removal of the judge was made in the court that Drake-Brockman sat in the months that followed the decision to alter the jurisdiction of the Reference Board.[118] The practice of judges holding chairmanship on statutory bodies can make individual judges vulnerable to having their impartiality questioned and subsequently undermine the perceptions of their independence from the executive. Moreover, through the altering or removal of jurisdiction from statutory boards, the basic principle of security of tenure for members of the judiciary is disregarded.

---

[114] Hasluck, *Government and the People*, 2: 254-55.

[115] Hasluck, *Government and the People*, 1: 389-93; Sharp, "Drake-Brockman, Edmund Alfred (1884-1949)".

[116] 'Central Coal Board Chairman', *Argus*, 30 October 1943, 3; ' Central Coal Board', *Sydney Morning Herald*, 24 November 1943, 9; 'Coal Union's Demands Met by Government to Win More Coal', *Canberra Times*, 27 October 1943, 2; Hasluck, *Government and the People*, 2: 390-92.

[117] For the Commission's establishment see, 'Commission to Investigate Coal Stoppages', *Advocate*, 19 November 1942, 5. For the criticism of Drake-Brockman's perceived bias see, 'Coal Inquiry Boycotted by Owners', *Argus*, 13 January 1943, 3.

[118] 'Tramway Men Want Judge Drake-Brockman Removed', *Northern Star*, 11 February 1944, 5.

Summary

The short life of the council provides crucial insight into Webb and the difficulties of acting on ad hoc committees and boards on behalf of the executive. Despite Webb's best efforts to keep himself politically aloof while overseeing the drafting of the regulations, he was invariably pulled into political controversy.

The Industrial Relations Council was established as a reaction to the entry of Japan into the war. Australia suddenly came under direct threat and for the initial period stood alone in defending itself from Japanese aggression. It quickly became evident that the promised reinforcements from Britain would not be forthcoming, because the total focus of the United Kingdom's forces was to fight Germany in Africa or to reinforce troops in India. Although the United States had entered the war, its naval strength was severely limited after Pearl Harbor, and any assistance would initially be diminutive. The shifting requirements of the war were a challenge to the government, and specific responses were difficult to define in the first three months after Pearl Harbor. The government understood well that the nation was hopelessly under-prepared to defend itself and that the economy had to be placed on a footing for total war. The IRC appears to be a grand gesture to the alarmed public that something was being done to meet the threat from the north and that industrial peace and cooperation could be achieved to obtain the highest levels of output required to defend the nation in its darkest hour.

However, the structure of the IRC was fatally flawed due to the radical changes to its structure from what had been unanimously agreed upon at the initial conference. These changes were a direct result of Webb's insistence on preserving his judicial independence. Had the original intention of the council not been modified, with the chair occupied by a

minister rather than a judge, the rules of procedure would have been different and a casting vote may not have been required as the proceedings would have occurred more informally. It would appear that Webb ran the council as an industrial court by listening to two sides of the argument to bring down a final decision. As discussed in the previous chapter, there was recognition in the 1930s of the shortcomings of judges in the arbitration system of the states: the legalistic approaches that judges inherently took in industrial disputes drew the process out needlessly, so there was a reversion to more informal dispute settling mechanisms such as boards and committees. Thus, by placing Webb on the chair of the IRC it was highly likely that the council would be bogged down in procedure and formalities as Webb protected his position.

As an advisory board, it was not unusual for a body such as the IRC to fail, as it had no executive authority to implement its decisions. Hasluck notes that it was quite common for advisory bodies to be established in the first two years of the war, only to disappear after a short period, and those that remained by the end of the war tended to be organisations that were provided with executive powers to implement regulations. This was certainly a weakness of the IRC, but it was made clear at its formation that it was only to provide advice to the government and enable discussions between the representative organisations of employees and employers. The decisions of the council were required to be sent back to the relevant ministers and their departments or to cabinet for approval and implementation by the government. Thus, although the matter of compulsory unionism was approved by the council, when it was taken to cabinet it did not proceed.

Despite Webb's attempts to remain politically neutral, his judicial reputation was tarnished by his involvement on the IRC. It was certainly a dangerous situation for a judge, as a

number of issues that came before the council required the expression of opinions as opposed to the finding of fact or interpretation of legislation, which is usual courtroom activity. When opinion concerned matters of political sensitivity, especially in the polarised environment of the IRC, it was necessary for Webb to be a diplomat rather than the arbitrator portrayed by the representatives of the employers. In the role of arbitrator, if he favoured the motions of one side too frequently, it would appear to the unfavoured side that there were political motives behind the chairman's decisions. Thus, the headlines of the *Mercury* on 27 January declared the 'Industrial Council – Employers Allege Partisanship', which was extremely damaging to Webb and his identity as a judge.

It would appear that Webb's participation on the council would raise concerns identified in MacKay's three hazards for members of the judiciary when engaging in extra-judicial activities. Namely, that judges should avoid 'participation in out-of-court activities that may lead to an appearance of prejudgement of issues likely to come before the Court' and 'actions that impair the dignity and esteem in which the Court should be held'.[119] Certainly, the employer representatives portrayed Webb as favouring the unions, which would have reflected on his position on the Industrial Court in Queensland. It may also have disturbed employer representatives appearing before him and made them consider their chances of obtaining a fair hearing. However, as discussed in the previous chapter, just three months after the IRC debacle, the Queensland Trades and Labour Council was calling for Webb's removal from the Queensland Industrial Court after his attack on J.A. Neumann of the AMIEU. Webb in response stated to the press:

[119] Robert B. McKay, "The Judiciary and Non-Judicial Activities," *Law and Contemporary Problems* 35(1970): 12.

> Of course the people who are responsible for the motion know very well that less than three months ago the Australian Council of Industrial Relations of which I am Chairman, was brought to a standstill because the employers' representatives withdrew from the council.
>
> Their reason for withdrawing from the council was that I had cast my vote in favour of compulsory unionism throughout Australia. I have not changed my views on unionism in the meantime; nor have I ever said or done anything that would indicate I had changed my views.
>
> The people who drafted that motion know very well that they are not stating the truth when they say I am hostile to unionism.[120]

Although this was designed to reassure parties that he was not against unions, it falls short of reassuring that he would not be prejudging matters that came before him at the Industrial Court. The IRC required Webb to reveal his preferences in divisive policy matters which is inherently not ideal for a member of the judiciary.

Webb's use of tense in the above statement is noteworthy, as he still held the chairman role with the IRC as his appointment was for twelve months. The wartime government was sidestepping the difficulty of removing a judge from a position and therefore, avoiding a direct assault on the principle of tenure that underpins independence of the judiciary, while effectively removing or altering the jurisdiction of the statutory body. Removal of jurisdictiona was experienced by other judges during the war, for example, Drake-Brockman. As discussed in chapter one, government employing this tactic is one of the issues that commentators raise in the concerns with extra-judicial activities.

[120] 'Not Hostile to Unions Says Judge', *Courier-Mail*, 23 May 1942, 1. Also refer to, 'Unions Want Removal of Court Judge', *Courier-Mail*, 21 May 1942, 1.

It is also interesting to note that the two ministers, Dedman and Ward, who were present at the meetings of the IRC when the deadlock arose, were two of the most vehemently vocal against Webb's appointment to the High Court.[121]

The experience of the IRC was not ideal for Webb as he tried to make his mark at the Commonwealth level. It also fell dramatically short of his expectations to be of a 'real assistance to the Government' and its war effort. Further opportunity to be of service to the Commonwealth Government may have passed him by if it had not been for his acceptance of an inquiry into war crimes, which had been relinquished by one his brethren on the Queensland Supreme Court.

[121] Arthur A. Calwell, *Be just and fear not* (Hawthorn, Vic.: Lloyd O'Neil in association with Rigby, 1972). 197.

Chapter Four:
First and Second War Crimes Commissions 1942-1944

> The contents of this report are such as to shock and dismay the feelings of every decent human being. If those responsible are allowed to escape punishment it will be the grossest defeat of justice and travesty of the principles for which the war was fought.[1]

One of the most important progressive steps to be made by the world community after the Second World War was the development of international law in relation to war crimes. The trials that occurred after the war established the precedent that individuals would be held accountable to the international community for their own acts and the behaviour of the troops under their leadership. This was partly the product of the work of investigators, like Sir William Webb, during the war that advised the Allied governments.

Webb's desire 'to be of some real service' to the Commonwealth Government during the war was realised with the commissions of inquiry into the atrocities committed by Japanese forces. What began as a narrow and defined examination of the breaches of the rules of warfare against Australian soldiers was broadened by the government in two successive commissions that allowed Webb to examine issues such as the treatment of local populations in New Guinea, the sinking of the hospital ship the *Centaur* and treatment of allied POWs and internees. The first report prepared by Webb was titled *A Report on Japanese Atrocities and Breaches of Rules of Warfare* and was completed in

[1] Statement of H.V. Evatt, Attorney-General and Minister of External Affairs, on the release of the second war crimes report by Sir William Webb. 'Japan's Atrocities Listed, Webb Report "Will shock the World", *Sydney Morning Herald*, 11 September 1945.

March 1944.[2] This commission and report were followed by two more. In October 1944, *A Report on War Crimes by Individual Members of the Armed Forces of the Enemy Against Australians* was completed and covered the crimes that had not already been reported.[3] In 1946 the third report was completed, *Australian War Crimes Board of Inquiry Report on War Crimes Committed by Enemy Subjects Against Australians and Others*.[4] Two other jurists were appointed on the last commission in 1945 to assist Webb, Justice Alan James Mansfield of the Queensland Supreme Court and Judge Kirby of New South Wales District Court. The last commission went under the title of the Australian War Crimes Board of Inquiry and was established in response to the capitulation of Japan, with its priority to obtain information from released POWs before they were discharged from the armed services.[5]

This chapter examines the first two war crimes commissions conducted by Webb. The main concern regarding his participation in these two commissions was the time dedicated to the task which removed Webb from his court and judicial duties. The third commission is treated separately as the function of this extra-judicial activity significantly changed along with Webb's behaviour. While the first two commissions followed the traditional approach for commissions of inquiry, for a period the third evolved into something of an executive statutory body whose functions extended beyond a mere inquiry on behalf of the

[2] NAA: A10943, 1 and; A10943, 2, 'A report on Japanese atrocities and breaches of the rules of warfare by Sir William Webb'. Referred to infra as 'First Webb Report'.

[3] NAA: A10950, 1, 'A report on war crimes by individual members of the armed forces of the enemy against Australians by Sir William Webb [Report to the Attorney-General and Minister for External Affairs, Dr Evatt]'. Referred to infra as 'Second Webb Report'.

[4] AWM226, 8, '[Records of war crimes enquiries and trials, 1939-45 War] Australian War Crimes Board of Inquiry Report, Volume 1 "Report on War Crimes committed by Enemy Subjects against Australians and others" - [Sir William Webb (Jan 1946) - [Known as the Third Webb Report]' and; NAA: A11049, Roll 1 & 2, 'Report on War Crimes committed by Enemy Subjects against Australians and others [by Sir William Webb…]'. Referred to infra as 'Third Webb Report'.

[5] *CPD*, HR, Vol. 185, 26 September 1945, 5929. *CPD*, HR, Vol. 186, 10 April, 1946, 1294-1295. Justice Mansfield accompanied Webb to Tokyo in 1946 to serve as Australia's chief prosecutor on the IMTFE.

government and took an active role in policy development and implementation. Therefore, this chapter summarises how a need for a commission of inquiry arose through the development of international law and how the allied governments reacted to the atrocities that were being committed by their enemies. The first and second commissions are then dealt with separately, as each had a different function. The first was established as an Australian initiative as there was a growing concern within the army and the government regarding reports of atrocities being committed against its troops fighting the Japanese military in the South West Pacific Area. The second commission was linked to the momentum that had grown internationally for perpetrators to be punished after the war and the establishment of the United Nations War Crimes Commission. The archival evidence examined in this chapter provides examples of vigilance by Webb to potential encroachments on his judicial independence and refraining from directing policy decisions through the advice he gave the government. While the war crimes commissions lacked the political controversy of the Industrial Relations Council, it posed a different set of problems for Webb that is inherent in extra-judicial activities. By the end of the second commission, comments were raised regarding his absence in the press and from the Supreme Court bench regarding the impact his work on war crimes was having on cases being processed in the state. Webb's involvement in war crimes investigations also led to objections and criticism of his appointment to the International Tribunal for the Far East after the war, which directly raised questions regarding his independence and integrity as a judge.

Historical Background to War Crimes

The origins of international law on the conduct of belligerents during war extend at least as far back as the 19th century, although Alexander Gillespie has traced customs and

agreements on warfare that were made between civilisations for the last 5,000 years.[6] The modern concept only emerged once diplomatic communication between the world's contemporary nation states grew which enabled the formulation of agreements, conventions and the development of international law. In 18th century Europe agreements were made to bind belligerents to take care of the wounded from both sides. This principle was furthered the following century through the advocacy of individuals in Europe, such as Doctor Ferdinando Palasciano, Swiss businessman Henry Dunant and jurist Gustave Moynier who received wide support for their calls for the protection of medical personnel and the sick and wounded during conflicts.[7] On 26 October 1863 the Swiss government sponsored a conference involving 26 nations, including Japan, at Geneva, where the first Red Cross Convention was agreed upon. It consisted of ten articles and was signed by twelve European states on 22 August 1864.[8] This convention basically agreed to provide protection for services that assisted the wounded, preventing them from being further targets of violence during land warfare conflicts, and was quickly observed in international law.[9] Further articles were made in 1868, with an additional three states signing the conventions.[10]

In 1899 the first Hague Conference was conducted and agreements were made on the humane treatment of Prisoners of War (POW), the lawful means of injuring the enemy and

---

[6] Alexander Gillespie, *A History of the Laws of War: The Customs and Laws of War with Regards to Combatants and Captives*, vol. 1 (Oxford, United Kingdom: Hart Publishing, 2011).

[7] R. Parsons and Giorgio Del Vecchio, "On the History of the Red Cross," *Journal of the History of Ideas* 24, no. 4 (1963): 578-81.

[8] Geoffrey Best, "Peace Conferences and the Century of Total War: The 1899 Hague Conference and What Came After," *International Affairs* 75, no. 3 (1999): 623.

[9] Parsons and Del Vecchio, "On the History of the Red Cross," 582; "The Geneva Convention for the Amelioration of the Condition of the Sick and the Wounded of Armies in the Field Concluded, August 22, 1864," *The American Journal of International Law* 1, no. 2 (1907): 90-92.

[10] "The Geneva Convention for the Amelioration of the Condition of the Sick and the Wounded of Armies in the Field Concluded, August 22, 1864."

the military power over civilians in occupied territory. These agreements were not efficient in practice, with breaches occurring in the South African war in 1899 and the Russo-Japanese war in 1904. In 1907, further codification was sought in the Second Hague Conference where the Hague Conventions IV were established. These were 'animated by the desire to serve the interest of humanity and the need of civilisation by diminishing the evils of war'.[11] During World War One there were breaches and maltreatment of POWs and civilians in occupied territories. The subsequent trials at Leipzig conducted by German courts prosecuting German soldiers resulted in acquittals and lenient sentences. In 1921, the International Law Association began to revise the Hague Conventions, and in 1929 the Geneva Conventions were adopted. They had greatly expanded on their predecessor, for example, the Convention Relative to the Treatment of Prisoners of War contained 97 articles regarding the treatment of POWs. It is important to note that the 1929 conventions did not abrogate the Hague conventions of 1907.[12] Japan had sent delegates to all of the above mentioned conferences and actively participated in the drafting of the conventions.[13]

Allied Responses to War Crimes during World War II

As early as 1941 the Allied states became aware of the atrocities that were being committed in the territories occupied by the Axis powers, as accounts began to be reported from those who had managed to escape or witnessed atrocities and from other sources. This prompted the Allies to meet at St James's Palace in London on 13 January 1942, which led to the Joint Declaration on the Punishment on War Crimes.[14] During the

[11] SCAP, Trials of 'B' and 'C' War Crimes, 3-4.

[12] James Wilford Garner, "Recent Conventions for the Regulation of War," *The American Journal of International Law* 26, no. 4 (1932): 808-09.

[13] Ibid.

[14] Department of External Affairs Australia, "German Atrocities," *Current Notes on International Affairs* 12, no. 5 (1942): 323; M.E. Bathurst, "The United Nations War Crimes Commission," *American Journal of International Law* 39, no. 1 (1945); Arieh J. Kochavi, "Britain and the Establishment of the United Nations War Crimes Commission," *English Historical Review* 107, no. 423 (1992).

conference, only the Chinese representative, Mr Wunsz King, raised the matter of Japanese atrocities, although it must be noted that the Allies had been at war with Japan for only just over a month.[15] The St James's Declaration was followed by other declarations made by the Allies to the Axis powers. In June 1942, Churchill suggested during a visit to the United States that a commission should be established to investigate the war crimes committed by the Axis powers. This led to the establishment of the United Nations War Crimes Commission.

The Japanese had signed but did not ratify the Geneva Conventions of 1929. The Japanese High Command consistently opposed the ratification on a number of grounds. The Allied governments demanded that Japan subscribe to the conventions when hostilities began in the Pacific in 1941. The Foreign Minister, Tōgō Heihachirō, stated that Japan would apply the conventions, *mutatis mutandis*, thus binding Japan to the provisions. Webb was advised of Tōgō's declaration by the Department of External Affairs in writing his first report: 'In any event, she [Japan] she is bound by the usages which preceded it'.[16] Australia had not signed any of the conventions directly, but was a party to them through Britain, as only the British Crown exercised treaty-making power on behalf of the whole empire.[17]

On 7 October 1942 it was announced internationally that the United Nations War Crimes Commission (UNWCC) would be established, but it was not actually established until 20 October 1943 and did not hold its first meeting until 18 January 1944.[18] Britain initiated

[15] Australia, "German Atrocities," 136; Philip R. Piccigallo, *The Japanese on Trial. Allied war crime operations in the east, 1945-1951*. (Austin: University of Texas Press, 1979). 3.

[16] First Webb Report, 11.

[17] First Webb Report, 11.

[18] The Moscow Declaration was made on November 2, 1943 which reiterated the warning to the Axis Powers that the Allies would seek justice at the conclusion of the war. John V. Barry, "The Moscow Declaration on War Crimes," *The Australian Law Journal* 17(1943). On the UNWCC refer to Egon Schwelb, "The United

the establishment of the Commission, but it was not a high priority of the Foreign Office, as British soldiers and civilians had not been victims of Nazi atrocities. Fear of retribution on British POWs also discouraged a strong line being promulgated for the punishment of war criminals. The State Department of the United States also postponed responding to the initiatives for similar reasons as the British Foreign Office.[19] The Soviet Union did not participate on the commission for a number of reasons and this can be viewed as one of the shortcomings of the body. Moscow objected to being omitted from the initial discussions about the establishment of the UNWCC, protested the inclusion of Britain's Dominions as members, and was frustrated by the Western Allies' war strategy.[20] The UNWCC eventually consisted of seventeen members with national representatives from Australia, Belgium, Canada, China, Czechoslovakia, Denmark, Greece, India, Luxemburg, Netherlands, New Zealand, Norway, Poland, United Kingdom, United States, Yugoslavia and the French Committee of National Liberation. The Union of South Africa had a representative but did not become a member.[21]

The commission was a 'fact-finding body' and served in an advisory role to the national governments who were members of the United Nations. The commission was not invested with any executive powers for investigation, with evidence to be submitted or presented to the commission to record and collate for future trials. Although naming perpetrators was the ultimate aim of the commission, the arrest of suspects was carried out by the military organisations of the Allied forces. Initially the UNWCC resisted creating a list of acts that

---

Nations War Crimes Commission," *British Year Book of International Law* 23(1946); Bathurst, "The United Nations War Crimes Commission."; John V. Barry, "The Trial and Punishment of Axis War Criminals," *The Australian Law Journal* 17(1943); Kochavi, "Britain and the Establishment of the United Nations War Crimes Commission," 323.

[19] Kochavi, "Britain and the Establishment of the United Nations War Crimes Commission," 346-7.

[20] The Soviet Union had established a board, the Extraordinary State Commission for the Investigation of War Crimes ibid., 339, 48-49.

[21] Schwelb, "The United Nations War Crimes Commission," 363.

were considered war crimes, as it did not want such a list to be enshrined in the legislation of various countries, fearing the perpetrating nations would use 'ingenuity' to find 'new ways of violating the laws and customs of war', and it would be 'inconvenient' to amend the legislation as the variations of breaches were uncovered.[22]

The UNWCC tended to focus on the European theatre of the conflict, much to the distaste of the Australian representatives, who were absorbed by uncovering and recording the atrocities occurring in the Pacific and Asia. The Japanese were the main enemy encountered by Australian land forces during the war and inflicted double the amount of casualties that the AIF experienced against their European enemies. During the Second World War, 17,501 of Australia's 27,073 casualties occurred in the South West Pacific Area and 8,031 died as POWs of Japan. The Japanese held three times the number of Australian POWs than did the European powers, and from February 1943, with the return of the 9th Division, all of Australia's land forces were engaged solely against the Japanese.[23] Furthermore, the war in the Pacific was quite different to that the AIF experienced in Africa and Europe and a different set of attitudes toward the enemy was held by Australians.[24] Thus, the focus of Australian policy in regards to war crimes was on those committed by Japanese forces. It was beneficial to the Australian cause when Lord Robert Alderson Wright, the Australian representative, became chairman of the commission, thereby replacing Sir Cecil Hurst, who stepped down due to illness.[25] Lord Wright was an English judge that served on the Lords of Appeal in Ordinary on during two

[22] Ibid., 365-66.

[23] Mark Johnston, *Fighting the Enemy: Australian soldiers and their adversaries in World War II* (Cambridge: Cambridge University Press, 2000). 73-75.

[24] Ibid. Johnston argues that the Japanese were the most encountered and most hated by Australian Soldiers in the Second World War.

[25] Lord Atkin was Australia's first representative, but died in June 1944. *CPD*, HR, Vol. 181, 22 February 1945, 66-67. Bathurst, "The United Nations War Crimes Commission," 568; Schwelb, "The United Nations War Crimes Commission," 364.

periods. He is described as an ‘innovative traditionalist’ in his acknowledgement that judges make law but only within strict constraints of precedent and statutory authority.[26] The position held by Lord Wright gave Australia some leverage to have Japanese war crimes pushed into the international arena. As Watt notes:

> …the U.N. War Crimes Commission in London and its Australian chairman, Lord Wright, were getting restive. Australian opinion had been largely absorbed in the Far Eastern and Pacific war, to the exclusion of those events in Europe, which had originally brought Australia into the war. And the proceedings of the London conference and the obsessions of the Commission were leading, in their view, to the neglect of the Far Eastern and Pacific affairs.[27]

This led to a sub-commission being established at Chungking in May 1944, specifically to examine Japanese atrocities, although the London Commission heard evidence regarding Japanese war crimes as well.[28] The United Nations War Crimes Commission created 8,178 files regarding 36,810 individuals and groups with 36,529 suspected war criminals being named, 34,270 of whom were German. However, only a small percentage of the suspects were ever brought to trial. The commission continued to operate until 31 March 1948.[29] The commission played a significant role in the formulation of the London Agreement, which ultimately formed the basis of the Nuremberg tribunal and its Tokyo counterpart.[30]

The First Australian War Crimes Inquiry

The story of Australia’s war crimes investigation began quite independent to that developing in Europe. The Prime Minister’s Department in Australia received notice of the

---

[26] Neil Duxbury, "Lord Wright and Innovative Traditionalism," *University of Toronto Law Journal* 59, no. 3 (2009): 265-66.

[27] Donald Cameron Watt, "Historical Introduction," in *Tokyo War Crimes Trial*, ed. R. John Pritchard and Sonia M. Zaide (New York: Garland Publishers, 1981).

[28] Bathurst, "The United Nations War Crimes Commission," 570.

[29] NAA: MP7421/1, 336/1/1329, ‘Target Date for winding up United Nations War Crimes Commission’; .Kochavi, "Britain and the Establishment of the United Nations War Crimes Commission," 323.

[30] Ibid., 324.

establishment of the UNWCC and its functions on 27 November 1942. The focus of the commission's work was to 'name perpetrators where possible and direct particular attention in the first instance to atrocities organised in pursuance of deliberative policy'.[31] At this junction it was stated that membership would extend only to members of the United Nations, however, there was no mention of representation of the Dominion governments. Notwithstanding this, the Australian Government replied to the Secretary of State for Dominion Affairs on the 8 October that the Commonwealth desired to be represented.[32]

The Australian government did not wait for the UNWCC to be formally established before launching its own inquiries as it became aware of atrocities committed against its troops by the Japanese after the invasion of New Britain (Rabaul) in January 1942, when survivors managed to escape and to recount what they had witnessed to authorities. This was followed by other accounts of survivors who made it back from Ambon and Timor, where similar atrocities occurred. Rabaul was garrisoned by the 2/22nd Battalion, named Lark Force and led by Colonel Scanlan, which was quickly overrun on 23 January. With no plan of escape the defenders dispersed and attempted to follow their own routes to safety. Several groups congregated at the Tol Plantation before surrendering to the Japanese. There was no resistance to the Japanese, yet four massacres of Australian troops occurred on the 4 February, with at least 140 being killed. Six Australians survived the massacre and made it back to Australia to give evidence.[33] Australian soldiers who had escaped before they could be captured at Ambon gave further information regarding the actions and

[31] NAA: MP742/1, 336/1/1145, Cablegram from Secretary of State for Dominion Affairs London to Prime Minister's Department, 26 November 1942 and Cablegram from Prime Minister's Department to the Secretary of State for Dominion Affairs 8 December 1942.

[32] NAA: MP742/1, 336/1/1145, Cablegram from the Secretary for the Department of the Army to the Secretary of State for Dominion Affairs, London, 8 December 1942.

[33] Lionel Wigmore, *The Japanese thrust*, Australia in the war of 1939-1945. Series 1, Army ; v. 4 (Canberra: Australian War Memorial, 1957). 669; Timothy Hall, *New Guinea 1942-44* (Sydney: Methuen Australia, 1981). 22-32.

behaviour of the invading Japanese.[34] The defence of Ambon was a diplomatic rather than a defensive manoeuvre. On 17 December, Gull Force 2/21st Battalion was dispatched to defend the island with Dutch forces. Hopelessly outnumbered and under-equipped when three battalions of the 228th Regiment under Major-General Takeo Ito invaded, the combined forces were quickly overwhelmed and surrendered to Japanese forces from 1 February. Gull Force was divided between the sides of the bay and a small detachment of about 300 defending the Laha airfield were massacred by the Japanese after their surrender on 2 February. Details of the murders have not been established, although it is evident that 150 Australians and several Dutch and Indonesians were killed in a series of executions that occurred on 6 February and between 15-20 February.[35] As Sparrow Force, 2/40th Battalion, retreated in Timor they discovered on 20 February several of their members who had been captured, bound and executed by shooting or having their throats cut by Japanese para-troopers in the Babau area. Four of the soldiers of the 2/40th who made their way back to Australia were able to inform authorities about the massacres.[36] Other atrocities carried out by the Japanese in the initial stages of the war would not be discovered until after the war with the release of Australian POWs who witnessed the events. An example is the Parit Sulong massacre, which occurred during the Malaya campaign after the Maur River action. One hundred and ten Australian and 45 Indian wounded were left behind as the combined Allied forces withdrew. All were killed and burnt by Japanese forces; only one Australian survivor of the ill-fated F Force, Ben Hackney, who also managed to survive

[34] Lord E.F. Russell, *The Knights of Bushido. A Short History of Japanese War Crimes* (London: Cassell & Company, 1958). 307.

[35] Wigmore, *The Japanese thrust*: 436-37; Joan Beaumont, *Gull Force: Survival and Leadership in Captivity 1941-1945* (North Sydney: Allen & Unwin, 1988). 54-55.

[36] Peter Henning, *Doomed battalion: mateship and leadership in war and captivity : the Australian 2/40 Battalion 1940-45* (St Leonards, N.S.W.: Allen & Unwin, 1995). 99 & 115.

the Thailand-Burma Railway, was able to tell authorities of his ordeal.[37] Most of the atrocities that occurred in the early period of the war with Japan would only be revealed with the release of POWs in 1945. However, gradually, as 1942 progressed the Australian military and government were made aware of further breaches of the rules of warfare being committed by Japanese forces and the general brutal nature of the warfare throughout the Asia-Pacific area.

The Allen Court of Inquiry

The Australian Government in consultation with the Commander-in-Chief, Sir Thomas Blamey, responded to the reports as they filtered through. The Tol Massacre was widely reported in the press on 7 April based on the accounts of three survivors, including Driver Wilkie Desmond Collins from the 2/10 Field Ambulance. In response to the reports the Minister of the Army, Forde, declared that a report would be prepared and during the War Advisory Committee meeting on the following day the Chief Publicity Censor was called into question in allowing unauthenticated statements to be published.[38] On the 28 April the War Advisory Council was advised that a military court of inquiry would be established and that there was to be no further publicity on the matter.[39] Consequently, further reports on the events that had occurred only begin to reappear in 1944. Brigadier Arthur R. Allen was appointed chair of the military court of inquiry that was established on 13 May 1942, with Lieutenant-Colonel A. Dean and Lieutenant-Colonel F.L. Heward as members, to

[37] Lynette Ramsay Silver, *The Bridge at Parit Sulong. An Investigation of Mass Murder. Malaya 1942* (Sydney: Watermark Press, 2004); Ian Ward, *Snaring the other tiger* (Singapore: Media Masters, 1996); Wigmore, *The Japanese thrust*: 246-48.

[38] NAA: A5954, 814/1, Advisory War Council Minutes, 8 April 1942, minute 892. Also refer to: 'Shocking Atrocities by Japs. Party of Australians Murdered', *Argus*, 7 April 1942, 3; 'Atrocities in New Guinea. Japanese Savagery', *Sydney Morning Herald*, 7 April 1942, 6; 'AIF Massacre, Minister Calls for Report', *West Australian*, 8 April 1942, 5; '125 Soldiers Massacred by Japanese', *Argus*, 10 April 1942, 3.

[39] NAA: A5954, 814/1 Advisory War Council Minutes, 28 April 1942, minute 924.

investigate the landing of the Japanese Forces in New Britain, Timor and Ambon with reference to:

a) the surrender or capture of Australian troops;
b) the treatment of Australian prisoners of war by Japanese troops;
c) the death, after capture or surrender, of Australian troops;
d) any acts of terrorism or brutality practised by the Japanese against Australian troops;
e) any breaches of International Law or rules of warfare committed by Japanese forces;
f) any assistance given to the enemy by local inhabitants;
g) the escape of Australian Troops from the above territories;
h) any acts of a specially meritorious nature done by Australian troops;
i) any other matters relating to the above which, in the opinion of the Court, are necessary or desirable to be investigated.[40]

Sixty-eight witnesses were examined in regards to New Britain, 27 for Ambon and 6 for Timor. The information they provided over the two months the inquiry investigated provided insufficient evidence on the breadth or scale of the atrocities that occurred during the Japanese southward push. However, one of the major findings of the court handed down on 8 July was that there had been at least four massacres of Australian troops in New Britain.[41]

[40] AWM226, 1, Terms of Reference for a Court of Inquiry assembled at Melbourne by or of Major General V.H.P Stanke, LGHQ, 13 May 1942.

[41] AWM226, 1-3, [Records of war crimes enquiries and trials, 1939-45 War] Court of Inquiry with reference to landing of Japanese forces in New Britain, Timor and Ambon; D.C.S. Sissons, "The Australian War Crimes Trials and Investigations (1942-51)," University of California at Berkeley - War Crimes Studies Centre, http://socrates.berkeley.edu/~warcrime/index.htm.

Further reports of Japanese atrocities against Australian troops and civilians were received with the landing of Japanese forces in Papua on the 21 July 1942 and their push over the Owen Stanley Ranges during a fierce campaign where brutality against the enemy was exercised by both sides. The battle for Kokoda Trail has taken on similar significance in Australia as that of Gallipoli with a far darker edge. Due to the defeat on the Coral Sea at the beginning of May, the Japanese attempted a land based attack on Port Moresby, which was supported by an unsuccessful attack on Milne Bay on August 25-26. The Japanese were defeated at Milne Bay by 7 September and Kokoda was recaptured on 2 November.

Appointment of Sir William Webb

On 31 March 1943, the Minister for the Army, F.M. Forde suggested to the Prime Minister, Curtin that a judicial authority be appointed to investigate Japanese atrocities to expand on the report of the court of inquiry which made no findings, due to an 'oversight'.[42] This was seen also to enable coordination between the Commander-in-Chief, the Department of External Affairs, the High Commissioner's Office in London and the War Office, which had requested that they be kept informed on the matters.[43] On 4 June a Department of the Army Minute Paper advised that the solicitor-general, Sir George Knowles, in consultation with the attorney-general, Dr Herbert Vere Evatt, had agreed to appoint a commissioner to investigate the atrocities of the Japanese, terms of reference were being drafted and a request was made of the Queensland Supreme Court via the attorney-general of Queensland for a judge to be made available. It was proposed that Justice Roslyn Foster Bowie Philp would be appointed as commissioner, and counsel

[42] NAA: MP742/1, 336/1/1145, Department of the Army Minute Paper for Chief of General Staff, HQ AMF, 7 April 1943.

[43] NAA: MP742/1, 336/1/1145, F.M Forde, Minister to the Army to J. Curtin Prime Minister, 31 March 1942; Australia House, London memorandum for the Department of the Army, 10 December 1942.

would be appointed on notification of where most of the evidence would be collected.[44] Justice Philp initially accepted the position and was prepared to commence work on 25 June with National Security (Inquiries) Regulations drafted for his appointment.[45] However, on 22 June the Advanced Headquarters for the Allied Land Forces (SWPA) was informed that Webb had replaced Philp as commissioner.[46] Philp was a distinguish lawyer and member of the judiciary in Queensland. His career followed a similar path to Webb's in that it began in the public service in the Department of Justice. After passing the Bar examination in 1923 Philp was the legal assistant and assistant crown solicitor under Webb. Philp was elevated to the Supreme Court in 1939, replacing the late Justice Hereward Humphrey Henchman. Philp was another Queensland jurist to benefit from the *Mungana Case*, in which he successfully represented E. G. Theodore. He also served in the First World War and suffered a gas attack at Ypres in 1917.[47] His military experience would have been viewed as a benefit for the inquiry. B. H. McPherson describes him as 'a man of forceful character and strong principles, who brought to the Bench a fearless and independent outlook'.[48] Philp was already serving on an executive body before being offered the War Crimes Commission chairmanship. He had been acting as chairperson of the Queensland Advisory Committee on Aliens from 1945. On 23 June the Attorney-General's Department informed the Department of the Army that Philp requested 'to be

[44] NAA: MP742/1, 336/1/1145, Attorney-General's Department Minute Paper to the Department of the Army, 4 June 1943; NAA: A10953, 1, Gledson, Attorney-General of Queensland to Sir William Webb, Chief Justice of the Supreme Court of Queensland, 1 June 1943, 'Atrocities Commission. Sir William Webb.

[45] NAA: MP742/1, 336/1/1145, Solicitor-General, Sir George Knowles to F. Sinclair, Secretary to the Department of the Army.

[46] MP742/1, 336/1/1145, Col. Adm. Staff 'A', Advanced Headquarters, Allied Land Forces, Southwest Pacific Area to LHQ (for DPS).

[47] James B Thomas, "Philp, Sir Roslyn Foster Bowie (1895-1965)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/philp-sir-roslyn-foster-ross-11389.

[48] Bruce Harvey McPherson, *The Supreme Court of Queensland, 1859-1960: history, jurisdiction, procedure* (Sydney: Butterworths, 1989). 381.

relieved of the obligation to undertake' the inquiry into war crimes, and the Chief Justice, Webb, would undertake the commission.[49] Philp explained to the Deputy Crown Solicitor, Arthur G. Bennett, that he would not be prepared take evidence in New Guinea.[50] Webb's decision to head the inquiry may have had personal consideration as his son John Webb was serving in New Guinea at the time as a Private with the 2/5 Battalion and his other son, William Clifford, had also enlisted in the AIF.[51] Moreover, his desire to aid the war effort that remained unfulfilled since the demise of the Industrial Relations Council would have also been satisfied with the appointment.

Sir William Webb became the first commissioner appointed by a democratic government to inquire into war crimes and to report to the UNWCC. However, his appointment was an Australian initiative and was unrelated to the establishment of the UN body.[52] Webb was appointed as commissioner under the *National Security (Inquiries) Regulations*, the terms of reference requested an inquiry into:

> Whether there have been any atrocities or breaches of the rules of warfare on the part of members of the Japanese Armed Forces in or in the neighbourhood of the Territory of New Guinea or the Territory of Papua and, if so, what evidence is available of any such atrocities or breaches.[53]

---

[49] NAA: MP742/1, 336/1/1145, Secretary for the Attorney-General Department to the Secretary for the Department of the Army, 23 June 1943.

[50] NAA: J1889, BL43895/1, A. G. Bennett, Deputy Crown Solicitor to George Knowles, Crown Solicitor, 19 June 1943.

[51] A war correspondent, Allen Jones interviewed John in New Guinea during the Mount Tombu action, he said 'I often get letters from Dad [Sir William]… He tells me to not to forget to keep my head down', 'Our N.G. Guns Sweep Mountain Like Storm', *Courie- Mail*, 19 August 1943, 3 and; NAA: B883, QX25995, 'WEBB JOHN VINCENT STANISLAUS : Service Number - QX25995 : Date of birth - 15 Jun 1922 : Place of birth - BRISBANE QLD : Place of enlistment - BRISBANE QLD : Next of Kin - WEBB WILLIAM'.

[52] *CPD*, HR Vol. 185, 26 September 1945, 5929; Department of External Affairs Australia, "War Crimes," *Current Notes on International Affairs* 15, no. 10 (1944): 305; United Nations War Crimes Commission, *History of the United Nations war crimes commission and the development of the laws of war* (London: H.M.S.O. for the United Nations War Crimes Commission, 1948). 386-91.

[53] First Webb Report, 428.

Due to Evatt's absence on the second leg of his mission to Washington and London to secure aircraft for the defence of Australia, the appointment was signed by John A Beasley. The Attorney-General's Department advised the Department of the Army that Webb was 'anxious to complete the inquiry as soon as possible'.[54] On the 22 June General Douglas MacArthur gave his consent to the commission to interview U.S. Army personnel.[55] The subject of the inquiry that Webb would conduct was not made public with the *Courier-Mail* reporting Webb would be absent from the court on an inquiry that was secret.[56]

Functioning of the Commission

The Commission began sittings on 6 July 1943 in Brisbane. Assisting the commissioner was Edwin J.D. Stanley, a prominent criminal defence lawyer in Queensland, who acted as counsel for the commission.[57] Keith G. Brennan was appointed as secretary and was an associate to Evatt on the High Court before enlisting in the army in 1940.[58] Noel Sexton, a lawyer from Queensland, instructed counsel.

During the discussions on the establishment of the commission, the army was of the opinion that there was no requirement for the re-examination of the witnesses interviewed by the court of inquiry, as one of the members was a prominent Melbourne barrister,

[54] NAA: MP742/1, 336/1/1145, Secretary for the Attorney-General Department to the Secretary for the Department of the Army, 23 June 1943.

[55] NAA: MP742/1, 336/1/1145, General Douglas MacArthur, Commander of SWPA (USA) to General Thomas Blamey, Commander Allied Land Forces, SWPA, 22 June 1943.

[56] NAA: J1889, BL43895/4, K.G. Brennan, Secretary of WCC to Major Cummins, HQ, QLD L of C Area, 30 June 1943. Also refer to: 'Sir W. Webb for Federal Inquiry', *Courier- Mail*, 2 July 143, 3 and; *Courier-Mail*, 5 July 1943, 2.

[57] McPherson, *Supreme Court of Queensland*: 382-83.

[58] P.G.F. Henderson, "Brennan, Keith Gabriel (1915-1985)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/brennan-keith-gabriel-12252.

Lieutenant-Colonel A. Dean.[59] The inquiry had been exhaustive on the matters, and the findings and proceedings would be available to the commissioner.[60] However, Webb re-examined all of the witnesses available on the grounds that the regulations provided him with scope to retrace the ground of the Allen Court. The Webb inquiry did not uncover any new material, with witnesses providing very similar accounts as they had before.[61] This is another illustration of Webb's ideas regarding judicial independence by ignoring such executive direction and attempts to influence the direction of his inquiry, although in the initial correspondence establishing the commission there were concerns expressed about omissions by the military court of inquiry. Furthermore, Webb was of the opinion that his status as a member of the judiciary would ensure that the evidence collected by the commission would be accepted at the highest international level.[62]

The task of gathering evidence was far more extensive than Webb had anticipated and resulted in a prolonged absence from the bench. Webb was absent from the Supreme Court and the Industrial Court from the start of July through to the end of October while the Commission gathered the bulk of the evidence. Justice Macrossan was appointed as the acting chief justice. The Queensland Government saw no need to appoint an additional acting judge to the court at the time.[63] The commission sat for most days of the week for

[59] Arthur Dean was a veteran of the First World War and was wounded while fighting on the Western Front. After returning to Australia he established a successful legal career while continuing to serve the military in the Reserve of Officers achieving the rank of lieutenant colonel and served as the 3rd Division's legal officer. He was appointed as KC in 1944 and to the Victorian Supreme Court in 1949. R.L. Sharwood, "Dean, Sir Arthur (1893-1970)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/dean-sir-arthur-9933.

[60] NAA: MP742/1, 336/1/1145, F.R. Sinclair, Secretary for the Department for the Army to Sir George Knowles, Commonwealth Solicitor-General, 29 July 1943.

[61] First Webb Report, 18.

[62] NAA: MP742/1, 336/1/1145, F.R. Sinclair, Secretary for the Department for the Army to Sir George Knowles, Commonwealth Solicitor-General, 29 July 1943.

[63] 'Sir William Webb for Federal Inquiry', *Courier-Mail*, 2 July 1943, 3

the duration, interviewing AIF and US troops stationed in Queensland and Port Moresby, eventually examining 471 witnesses and tending 100 exhibits for the report.

On the 3 January 1944 Webb provided Evatt a brief summary of the report as he had heard the Prime Minister was leaving Australia. His general observation was:

> Of course, the Japanese cannot be found guilty of any charge without being heard or being given the opportunity to be heard and to cross-examine the witnesses against them. My function in reporting could not be higher than to say whether in my opinion there is a case for prosecution if one can be and is to be launched.[64]

These lofty standards and expectations of how prosecutions would proceed would be abandoned by the Chief Justice and the prosecuting nations in the coming months as more practical considerations and necessity were prioritised.

The difficulty Webb had balancing of the work of the Commission and his judicial duties impacted on the completion date of the report. In March, Webb explained to Evatt that his court duties to which he returned on the 27 October, were delaying the writing of the report. He had advised the attorney-general that it would be completed in two weeks on 24 February. Webb had also lost time due to staff shortages, for example, his typist's father died resulting in his absence for two days and he was waiting on the arrival of important documents for the report. He emphasised the magnitude of the investigation in which Stanley had collected notes extending over 1200 foolscap pages and that his report would extend to 350 pages. Moreover, he was required to spend time in his judicial role: 'Still again I am now to do the Chamber work tomorrow in this Court, and sit in the Arbitration

[64] NAA: J1889, BL43895/6, Sir William Webb, War Crimes Commissioner and CJ of Supreme Court of Qld to H.V. Evatt, Attorney-General and Minister for External Affairs, 3 January 1944.

Court on Friday. In this way I lose about four days from the Commission', and that he 'was giving all my time' to completing the report.[65]

Findings of the First Report

The report was completed on the 15 March and extended to 465 pages. The report recorded atrocities on a case by case basis and the structure was organised by location of the crime with each subsection dealing with a different area of the South West Pacific, as well as a section on the bombing of the Darwin hospital. However, the first section of the report outlined the rules of warfare as established by international conventions and the law and customs of the belligerent nations. The extent and breadth of the atrocities committed by the Japanese Army was a shock to the commission, which recorded Japanese atrocities from every theatre of the war. Webb concluded that the crimes tended to rise and fall in areas corresponding with the success and defeat of the Japanese Army.[66] Later this was seen not always to be the case, for example, the policy of deprivation and active massacre of POWs in Sandakan during the closing stages of the war, when mistreatment by the Japanese escalated with Allied success.[67] Evidence was gathered for atrocities committed against Australian and US servicemen, Australian subjects living in occupied areas and the local population. The crimes included the ill-treatment and killing of prisoners, mutilation and vivisection conducted on live prisoners, the bayoneting of restrained prisoners, the rape and mutilation of missionary and local women, maltreatment and failure to bury the dead, attacks on medical personnel and hospitals, and what has become one of the most notorious findings of the commission, the practice of cannibalism.

[65] NAA: A10953, 1, Sir William Webb, War Crimes Commissioner and CJ of Supreme Court of Qld to H.V. Evatt, Attorney-General and Minister for External Affairs, 7 March 1944.

[66] First Webb Report, 426.

[67] Paul Ham, *Sandakan: the untold story of the Sandakan death marches*, [2013 edition] ed. (2012).

Yuki Tananka dedicates a chapter of his *Hidden Horrors* to Webb's investigations into cannibalism and the complications resulting from Webb's desire not to have the matter raised at the International Military Tribunal for the Far East (IMTFE).[68] This judgement of Webb is harsh, as Webb was under considerable pressure not to allow his experience on the War Crimes Commission to intrude on the proceedings of the IMTFE, which will be discussed in Chapter Six. Interestingly, Gillespie writes that Australian troops engaged in cannibalism of the Japanese dead which he argues was probably due to bets or dares which he contrasts to the Japanese resorting to the practice due to starvation.[69]

The Webb report attempted to strike a balance in its findings, which is commendable in considering the crimes committed and the anti-Japanese sentiment of the nation at war. This lends support to the argument that the special skills of discernment when examining evidence and the impartiality that judges can bring to inquiries supports their employment in extra-judicial activities. Remaining above the flames of public fury would become more essential when sections of the report were released in 1944, however the commission would remain unaffected by such pressure until then due to the secrecy orders in place. The balance in the first report's findings can be found in the evidence regarding the practice of cannibalism by the Japanese army:

> From this evidence it is clear beyond any possible doubt that Australian, American and Japanese dead were cut up and in many cases eaten by members of the Japanese armed forces. The possibility that natives were responsible in some cases is so slight as to be negligible. Not only were Japanese soldiers seen cutting up their own dead and putting the flesh into dixies, but they actually admitted they were eating one another. It is significant that most of the cutting up of dead bodies and the removal of flesh therefrom, took place in areas where there is clear evidence that the

[68] Yuki Tanaka, *Hidden Horrors. Japanese War Crimes in World War II* (Boulder, Colorado: Westview Press, 1996). 111-34.

[69] It is not clear where Gillespie draws his information on this matter and it is the only reference to Australians engaging in cannibalism to emerge while conducting the research for this thesis. Gillespie, *A History of the Laws of War*, 1: 208.

> Japanese were short of food, and indeed, on the point of starvation…However, it appears that the majority of Japanese soldiers who were left without food preferred to starve to death rather than resort to cannibalism …There is a comparatively recent case of Europeans resorting to cannibalism in an extremity. The case, of course is well known to you, as it appears in the Law Reports.[70]

The balance in the commission was also evident in finding fault with the practices of the Australian army:

> Of all the witnesses, only one or two claimed to have worn the red cross brassard fixed in the way stipulated in the Red Cross Convention.
>
> In the light of this evidence as to the attitude towards the wearing of brassards or armbands, it may not be surprising to learn that I have found only a few breaches of the rules of warfare, including that in respect of the dreadful episode at the American Aid Post at Buna, known as "the Butcher's Picnic". However, I have set out the facts in a large number of cases and given brief reasons for my finding in most cases.[71]

The Commission also made findings against the Japanese Army for mistreating their own troops by abandoning the sick and wounded without food or medical supplies.[72]

The principal focus of the Commissions was the treatment of Australians, but incidents involving the ill treatment of indigenous populations were also reported. For example, after the successful defence of Milne Bay in September 1942 the commission listed 59 cases involving the murder, torture and mutilation of the local population by the Japanese. Webb found that the Japanese were in breach of Article 44 of the Hague rules and that the natives were killed for refusing to act as guides to the Japanese. Similar incidents were reported to have occurred on Guadalcanal at the southern end of the Solomons group. The

[70] First Webb Report, 239-240. The case refers to from the Law Reports is most probably that of Tom Dudley and Edwin Stephens who were tried in 1884 and sentenced to death for killing and consuming their shipmate to prevent their starvation. A. W. B. Simpson, *Cannibalism and the Common Law: the story of the tragic last voyage of the Mignonette and the strange legal proceedings to which it gave rise* (Chicago: University Of Chicago Press, 1984).

[71] First Webb Report, 300.

[72] First Webb Report, 243-244.

commissioner concludes that further investigation into atrocities committed against the indigenous population would be more efficiently conducted by local authorities.[73]

The hope of the Commission was to ascertain individual responsibility in all cases, a hope shared by the United Nations War Crimes Commission that was gaining motion in Europe. Webb also anticipated that the first report would also be eventually used to establish compensation claims and in the interim to make representations to the Japanese Government.[74] However, at this stage of the inquiry Webb was unable to conclude that the atrocities were being carried out as a policy of the Japanese Government.[75]

The discussions to extend Webb's appointment as commissioner began in December 1943 when Webb was finding difficulty in balancing his responsibilities to the Supreme Court with his extra-judicial duties. Therefore, he included his desire to have assistance with the further appointment:

> If an additional Commissioner were appointed he could take evidence, and travel for that purpose, when I am not available. After all, the offices of Chief Justice and President of the Industrial Court leave me little time for extra duties.[76]

The Second War Crimes Commission

Discussions to extend Webb's commission were in progress before the report had been completed due to a number of witnesses not being available during the first commission and further evidence being discovered. The Commonwealth government was made aware

[73] First Webb Report, 277. Also refer to: Peter Londey, "Remembering 1942. Milne Bay, 5 September 1942," Australian War Memorial, https://www.awm.gov.au/education/talks/1942-milne-bay/; Russell, *The Knights of Bushido. A Short History of Japanese War Crimes*: 267-69.

[74] First Webb Report, 426.

[75] NAA: J1889, BL43895/4, Sir William Webb, War Crimes Commissioner and CJ of Supreme Court Qld to H.V. Evatt, Attorney-General and Minister for External Affairs, 3 January 1944.

[76] First Webb Report, 426.

of the difficulty for Webb to provide sufficient time to the commission due to carrying on with his judicial duties. As quoted previously, in his report Webb suggested the need for an additional judge to be appointed to assist in interviewing the witnesses who would only be available for short periods during the respite from operational areas and this was made as a direct appeal to the Department of the Army and the Department of External Affairs.[77] However, no additional commissioner was appointed to provide assistance to Webb or any relief to cover his absence from the Queensland Supreme and Industrial courts during this commission.

The second commission was established for an international purpose with the development of the UNWCC in Europe, although by the time of the drafting of the first report, the primary intended use of the report was to make representations to this body. There were two notable shifts made in the second commission: firstly the Commission was to report to Evatt as Minister of External Affairs as opposed to the Attorney-General. Secondly, the terms of reference were designed to reflect the war crimes that had been identified and listed by the UNWCC (refer to appendix 5). The secrecy of Webb's war crimes investigation was also lifted at the beginning of the second commission with Evatt releasing a statement regarding his appointment and his findings that the Japanese had committed 'serious defaults' in their obligations to uphold international conventions. The statement was widely reported in the press.[78]

Webb was conscious of the importance of his work and the role his commission had in contributing to the development of international law. In the discussions on accepting a

[77] NAA: MP742/1, 336/1/1145 and NAA: 10953, 1, Letter from K. G. Brennan, Secretary of the War Crimes Commission to Secretary of the Department of Army, 18 March 1944.

[78] 'Japanese War Crimes. Official Australian Inquiry', *Sydney Morning Herald*, 1 February 1944, 7; 'Inquiry Into Jap Atrocities. Details for War Crimes Commission', *Argus,* 1 February 1944, 1.

further commission he provides another example of his awareness of avoiding any speculations of political influence on his work similar to those raised with the Industrial Relations Council. Webb requested that John M. Brennan, who had served in New Guinea with the 2/25Australian Infantry Battalion, be appointed as secretary to the second commission. In a letter to the attorney-general on 24 March 1944, the Chief Justice requested that Brennan be released from the army stating that 'I feel that, to obviate any possibility of criticism from other countries that the Commission is the instrument of the Army, the Secretary should be a civilian'.[79] Brennan's release from the army was forwarded to the Minister for the Army on the 11 May where the matter was urged to protect the 'judicial character of the Commission' and he was discharged on 5 July.[80]

The commission was of a shorter duration than the first, sitting only for 21 days in Melbourne, Sydney, Brisbane and Yungaburra (Atherton Tablelands) with 110 witnesses being examined. The focus of the investigations was on atrocities committed against Australians, with the focus on identifying individuals for prosecution using the guidelines expressed in the UNWCC progress report of September 1944. The report that was produced was also shorter than the previous one, namely, 101 pages.[81] Further evidence was gathered regarding incidences of cannibalism, killing of wounded, attacks on medical personnel and facilities. The bulk of the report concerned the treatment of the captured 8th Division as POWs and the sinking of the Hospital ship, the *Centaur*.

[79] NAA: A989, 1944/735/580/2, Sir William Webb, War Crimes Commissioner and CJ of Supreme Court Qld. to H.V. Evatt, Attorney-General and Minister for External Affairs, 24 March 1944.

[80] NAA: A989, 1944/735/580/2, Secretary to the Attorney-General to F.M. Forde, Acting Prime Minister and Minister for the Department of the Army, 11 May 1944; World War Two Nominal Roll, John Michael Brennan, NX91098, http://www.ww2roll.gov.au/Veteran.aspx?serviceId=A&veteranId=199590

[81] Second Webb Report.

Treatment of Prisoners of War

With the fall of Singapore and other outposts of the British Empire in the Pacific, thousands of Australians became prisoners of war or internees held by the Japanese. Almost the entire 8th Division of the AIF was captured with nearly 15,000 men becoming POWs. Throughout the war the Australian Government and families of the captured received little to no information about their fate or treatment by the Japanese. While the first Webb inquiry did not investigate any matters regarding POWs held in Malaya, the second commission was able to examine a number of survivors who had returned to Australia that gave detailed information about the treatment of those held in Malaya. Prior to this the government was left to speculate and relatives to fear the worst.

Late in 1942 the Minister for the Army became concerned about rumours circulating about the treatment of POWs in the hands of the Japanese and contacted Justice Norman O'Bryan of the Supreme Court of Victoria on the 5 November who was a legal advisor to the minister for the army, Francis Michael Forde: 'I would be grateful if you could undertake a survey of the whole position in order to ascertain whether any practical steps might be taken for the amelioration of the condition of these prisoners of war and civilian internees'.[82]

O'Bryan's report furnished three days later did not offer much hope to the minister. Australia was dependent on Washington and London for obtaining information about POWs. The report discussed the use of radio transmission from Australian POWs and concluded that selective distribution to the public would be advisable, but it would not be advisable to allow Japanese POWs in Australia to transmit messages due to the lack of

[82] NAA: MP742/1, 255/1/101, 'Australian Prisoners of War in Japanese hands - Mr Justice O'Bryan's report'.

linguistic experts. Australian responses would be limited to ensuring that supplies were provided for the Australian captives and there was no way of enforcing its distribution by the Japanese.[83]

On the 14 April the Secretary of the Australian Red Cross Society advised the Minister that the official reports received from Japan could not be trusted. The Minister sent a request to O'Bryan two days later for the Justice to chair a meeting with the Red Cross and Army to discuss the matter and to establish lines of investigation. On the 11 May O'Bryan informed the Department that he had chaired a meeting with O'Dell, Crowther (Red Cross) and Colonel McCahon (Director of POW and Internment at LFHQ) that had concluded that the reports from Japan and the occupied territory could not be relied upon. The Department also received a notification that day stating: 'am afraid our pows in Japanese hands are working as coolies on coolies' rations… there does not seem to be anything we can do'.[84]

In March 1944, three Australians who had escaped from the notorious Sandakan POW camp in North Borneo arrived in Darwin. They were the first escapees to land in Australia who had been incarcerated at Changi. They gave a detailed report about the treatment of POWs to the Army. They were not interviewed by the first two Webb Commissions and a censorship prohibition was enforced protecting their story from being reported.[85] However, the second commission interviewed twelve survivors of the eighty-six that were recovered by a US Submarine which had inadvertently torpedoed the *Rakuyo Maru* on 12 September

[83] NAA: MP742/1, 255/1/101, 'Australian Prisoners of War in Japanese hands - Mr Justice O'Bryan's report'.

[84] NAA: MP742/1, 255/1/101, 'Australian Prisoners of War in Japanese hands - Mr Justice O'Bryan's report'.

[85] The three men were Ray Steele, Jim Kennedy and Walter Wallace. Hank Nelson, *Prisoner of War. Australians Under Nippon* (Sydney: Australian Broadcasting Corporation, 1985). 117-18. Their absence from the war crimes commission may be due to the army considering plans to rescue the prisoners in Borneo and their ability to provide information on the camp and the local guerrilla activity, see Ham, *Sandakan: the untold story of the Sandakan death marches*: 253.

1944 which was transporting POWs from Singapore to Japan. The survivors returned to Australia in late October and were interviewed shortly after their arrival.[86] Webb was advised of the recovery of survivors on 19 October 1944 by Secretary DEA: 'War Cabinet has decided that interrogation of recovered Prisoners of War by Service officers is to be carried out in conjunction with yourself' and that there was a 'Blanket Censorship already imposed' until the Prime Minister had made a statement with the UK Prime Minister.[87] Webb surmised in his report:

> …the 12 men examined by me give, I think, a fair idea of the general treatment meted out by the Japanese. It is clear that the Japanese almost entirely disregarded the rules of warfare concerning prisoners of war.[88]

The Second Webb Report outlined to the Australian government how widespread atrocities being committed against POWs being held by Japan. The recovered POWs were able to confirm that POWs were worked like slaves on military related projects such as the Burma-Siam Railway Line, the airfield at Ambon and in work camps in Japan in breach of the Geneva Conventions. Extraordinary rates of death occurred at these and other sites where the POWs were deployed as labourers. Food rations were severely limited and access to medicines and adequate treatment was denied; the spread of illness was exacerbated by the tropical environment. Malnutrition and the inability to treat illnesses contributed to a majority of deaths. Many deaths were also the result of being beaten, tortured or executed for disciplinary reasons, especially for stealing food and attempting to

[86] '86 Australians Saved from Torpedoed Jap Ship', *Argus*, 17 October 1944, 1; Second Webb Report.

[87] NAA: A10952, 1, Secretary of Department of External Affairs to Sir William Webb, War Crimes Commissioner and CJ Supreme Court Qld, 19 October 1944.

[88] Second Webb Report, 7.

escape.[89] Captured airmen were often executed in retaliation for bombings.[90] Furthermore, the prisoners were transported around the empire in what came to be known as hellships with severe overcrowding, poor sanitation and ventilation below decks where they were held with limited access to latrines on deck.[91] The full realisation of the plight of prisoners held by the Japanese would not be known until the end of the war. Twenty-seven percent of Allied POWs perished under the Japanese, compared to four percent under German and Italian confinement. The Australian POW fatality rate was the highest of the Allied nations at thirty-four percent (7,412) perishing of the 22,726 captured.[92] Sir William proposed in his report that the evidence he collected from the 12 survivors he interviewed be placed before the UNWCC under the crimes of (ii) murder and massacres – systematic terror and; (xxxi) employment of prisoners of war on unauthorised works.[93]

On the 17 November 1944 the public was made aware of the appalling treatment of POWs in Malaya when the Acting Prime Minister made a statement which summarised the evidence taken by Webb and provided in his report.[94]

---

[89] Second Webb Report, 6-51. There are a number of accounts of the experiences of Australian prisoners of war under the Japanese that have been published from the 1980s until present, some of the major works are: Patsy Adam-Smith, *Prisoners of War. From Gallipoli to Korea* (Collingwood: Ken Fin Books, 1992); Beaumont, *Gull Force: Survival and Leadership in Captivity 1941-1945*; Cameron Forbes, *Hellfire : the story of Australia, Japan and the prisoners of war* (Sydney: Pan MacMillan Australia, 2005); Brian MacArthur, *Surviving the Sword. Prisoners of the Japanese 1942-1945* (Great Britain: Time Warner Books, 2005); Gavan McCormack and Hank Nelson, *The Burma-Thailand railway: memory and history* (St Leonards, N.S.W.: Allen & Unwin, 1993); Nelson, *Prisoner of War. Australians Under Nippon*; Peter Brune, *Descent into Hell. The Fall of Singapore-Pudu and Changi-the Thai-Burma Railway* (Crowsnest, NSW: Allen & Unwin, 2014).

[90] See First Webb report, 272-274; 'Barbaric Act by Japanese. Diary's story of Execution', *Sydney Morning Herald*, 6 October 1943, 9; Michael J. Goodwin, *Shobun. A Forgotten War Crime in the Pacific* (Mechanicsburg, PA: Stackpole Books, 1995); George Odgers, *Air war against Japan, 1943-1945*, Australia in the war of 1939-1945 Series 3, Air (Canberra,: Australian War Memorial, 1957). 386.

[91] Second Webb Report, 6-51; Raymond Lamont-Brown, *Ships from Hell. Japanese War Crimes on the High Seas* (Phoenix Mill, UK: Sutton Publishing, 2002).

[92] Tanaka, *Hidden Horrors*: 3.

[93] Second Webb Report, 13.

[94] *CPD*, HR, Vol. 180, 17 November 1944, 1921-1930; NAA: A2937, 222, Statement by the Acting Prime Minister, F. M. Forde, 17 November 1944.

The Sinking of the Centaur

The *Centaur* was sunk without warning on 14 May 1943 by a Japanese submarine 50 miles east north east of Brisbane. The ship had only recently been converted to a hospital vessel in February, and as a freighter the ship had a reputation for luck after escaping Singapore before it fell to the Japanese; it had been in Darwin harbour during the first bombings and had 70 near misses through the war.[95] The *Centaur* was on only its second voyage in its new role conveying the wounded from New Guinea to the Australian mainland. The ship departed Sydney Harbour on 13 April with 257 military personnel aboard, 62 medical staff and 192 members of the 2/12 Field Ambulance. The ship was clearly marked with prominent Red Cross markings on the hull, and it was illuminated so as to meet the specifications of the Geneva Conventions, with notification and specifications sent to Tokyo through Switzerland.[96]

Only 64 of the 332 aboard survived the pre-dawn attack; it was estimated that 150 made it to the water but many drowned or were attacked by sharks.[97] Responsibility could not be established during or immediately after the war.[98] The sinking caused outrage in Australia when reported in the press on 19 May, and the government lodged a protest to the Japanese government.[99] Thus, Webb's second commission to investigate war crimes included in its terms of reference an examination of the sinking of the *Centaur*. It was suggested by Sir

---

[95] Patsy Adam-Smith, *Australian women at war* (Melbourne: Nelson, 1984). 172.

[96] G. Hermon Gill, *Royal Australian Navy, 1942-1945*, Australia in the war of 1939-1945. Series 2, Navy ; v. 2 (Canberra: Australian War Memorial, 1968). 258.

[97] Adam-Smith, *Australian women at war*: 174.

[98] Australian War Memorial, "Centaur (Hospital Ship)," Australian War Memorial, www.awm.gov.au/encyclopaedia/centaur.htm.

[99] The release of the sinking to the public was delayed to allow relatives to be informed, however, one article by a Murdoch paper was completely suppressed by censorship which attempted to outline why the Japanese would not have intended to sink the *Centaur*, the article infuriated Curtin. F. T. Smith, C. J. Lloyd, and Richard Hall, *Backroom briefings : John Curtin's war* (Canberra: National Library of Australia, 1997). 148, 50-1.

George Knowles that it be included in the first commission, but was omitted.[100] While Webb was in Melbourne in early August 1944 on matters regarding the censorship inquiry (discussed in the next chapter) he interviewed 32 of the 64 survivors who were available before the submission of the second report.[101] He found that the hospital ship was protected under international law under the Hague Convention of 1907 and that the *Centaur* was a fully accredited hospital ship under Article 1 of that convention and marked as required by Article 5. The witnesses testified that the ship had sunk within two minutes of the attack and that they saw a Japanese submarine surface twice in the twenty-four hour period after the attack. Furthermore, two days prior to the event there were reports of unsuccessful submarine attacks on the *Orminston* and *Carradale* off the coast of Coffs Harbour. The *Centaur* was the seventh ship sunk off the Eastern coast in the Japanese submarine offensive on Australian shipping.[102] A witness examined by Webb, Lieutenant Colonel Leslie Outridge, stated that he had 'heard rumours that there might be reprisals for alleged attacks on Japanese hospital ships', a line of inquiry that Webb followed up and concluded it did not justify the attack.[103] The Japanese government at the time of the sinking had protested to the United States regarding attacks on six Japanese hospital ships. The United States denied four of the incidents and declared the other two incidents were accidents caused by insufficient markings and visibility.[104] Webb found that the sinking of the *Centaur* was a breach of the rules of warfare and declared his intention in the report to

[100] Secretary Department of the Army to Assistant Secretary of the Department of the Army, 30 June 1943, NAA Melbourne: MP742/1, 336/1/1145 "Establishment of the UNWCC and AWCC".

[101] NAA Melbourne: MP742, 299/3/114, 'Sinking of "Centaur" Preliminary Investigation by Sir William Webb, War Crimes Commission.

[102] Second Webb Report, 52; Smith, Lloyd, and Hall, *Backroom briefings : John Curtin's war*: 148.

[103] Second Webb Report,

[104] David Jenkins and Peter Sullivan, *Battle surface: Japan's submarine war against Australia 1942-44* (Milsons Point, N.S.W.: Random House Australia, 1992). 283.

place the matter before the United Nations War Crimes Commission when he presented his report in the United Kingdom later that year.

For many years it was believed that either Commander Hidejiro Unagi or Lieutenant Commander Toshio Kusaka had sunk the *Centaur*. However, it has since been established by the Japanese National Defence Agency that Commander Hajime Nakagawa's vessel I-177 was responsible.[105] Strong cases have been put forward for both arguments that the sinking was accidental and that Nakagawa intentionally targeted the vessel disregarding international law to increase his sinking tally. Nakagawa had a record of incompetence, being suspended from duties for 21 months after bearing responsibility for a training exercise accident where a submarine in his command rammed another, sinking and killing all on board the unfortunate stationary submarine.[106] Furthermore, the Japanese had had a distinguished record of honouring the Red Cross, withholding attacks against vessels marked as hospital ships. Also, identification of the *Centaur* was attempted through a periscope which provided poor visibility. However, Nakagawa later blatantly disregarded international law when following Vice-Admiral Shiro Takasu's order to kill all survivors of enemy torpedoed ships. In 1944, crews of two sunken British ships, *British Chivalry* and *Sutlej*, in the Indian Ocean were machine-gunned in their life rafts by Japanese sailors on the submarine under the command of Nakagawa. Nakagawa was tried as a B-Class war criminal and sentenced to a four-year imprisonment for these offences after the war.[107] Nakagawa refused to answer questions about the incidents when interviews were sought from him in the early 1980s.[108] The sinking of the *Centaur* was the pinnacle of the losses

[105] Ibid., 279. The Official History of the Royal Navy dismissed the likelihood of Nakagawa's involvement, Gill, *Royal Australian Navy, 1942-1945*: 260.

[106] Jenkins and Sullivan, *Battle surface: Japan's submarine war against Australia 1942-44*: 277.

[107] Ibid., 280-84.

[108] Ibid., 284-5.

experienced in Australian shipping lanes and raised grave concerns throughout the nation of its vulnerability to be cut off from the outside world with the effectiveness of Japan's submarine warfare.[109] Thus, the government wanted the matter to be a subject of the commission and placed before the UNWCC. Unfortunately, it was impossible for the commission to identify individual responsibility.

Webb Reports to the United Nation War Crimes Commission

Webb departed Australia for London in December 1944 to report to the UNWCC on his findings and he also served on a committee that drafted instructions for war crime trials. Webb was aware at an early stage that his report may be used at an international level as he stressed to Brigadier J. D. Rogers in his request for thoroughness in evidence collected from witnesses: 'The evidence and my report may yet come before an International Committee of high standing, so they must be as complete and as free from error as possible'.[110] In November 1943 the Dominions Office became interested in the work of the Webb inquiry and its scope as it was creating interest in Washington with various US departments making enquiries through the office. The Australian Government declined to elaborate on the activities being conducted by the commission and decided that it would be wise to wait for the 'judicial report' to be released.[111] Evatt told the Australian public on Webb's departure that: 'The Australian Government is determined that nothing that can be done to punish those responsible for brutality and cruelty will be left undone'.[112]

---

[109] G. C. Bolton, *The Oxford history of Australia. Volume 5, 1942-1988 : the middle way* (Melbourne: Oxford University Press, 1990). 16.

[110] NAA: A10953, 1, Sir William Webb, War Crimes Commissioner and CJ of Supreme Court Qld. to Brigadier J. D. Rogers, Advanced LHQ, Brisbane, 12 July 1943.

[111] NAA: MP742/1, 336/1/1145, Stanley Bruce, High Commissioner for Australia in Great Britain cablegram to Department of External Affairs, 12 November 1943 and; Secretary for the Department of the Army to Australia House in London, 13 December 1943.

[112] 'Report on Japanese Atrocities, Commissioner to Visit London', *Argus*, 1 December 1944, 3.

Webb presented his evidence to the UNWCC on 24 and 31 January and 7 to 8 February. His presentation was received well by the members, and Webb received special commendation from the chairman for the preparation and completeness of the submission. Australia's High Commissioner, Stanley Bruce, added in his report to the Australian Government that the compliments 'were not just empty platitudes' as the French presentation received criticism from the Chairman of the UNWCC. All the names that were added to list A at that time had been forwarded by Webb.[113] Further compliments were forwarded to the Australian government from the United States and China, with their members advising their nations to use Webb's method as a model for their own investigations and presentation of cases.[114]

Later in London, Webb attended meeting at the United Kingdom Law Office to discuss possible procedures for trial of war criminals by specialised tribunals.[115] During the meeting Webb urged a diminution in the rules of evidence at the trials to allow such evidence as affidavits to be admitted in the trials. He further argued that in cases involving breaches by military units the onus of proof should be shifted to the individual to show non-participation in the crime, however, he notes that the Lord Chancellor had already drawn this conclusion.[116] These were propositions that he had put forward in a letter to the attorney-general before his departure, due to the difficulty he had in gathering evidence for the first two reports that would be acceptable to a domestic court or sufficient to identify

[113]NAA: A2937, 222, Telegram External Affairs Office London to the Prime Minister, 25 January 1945.

[114] NAA: A2937, 222, Telegram from London that the Chairman of the Committee to the Acting Secretary of the the Department of External Affairs, 13 February 1945 and; NAA: A1066, H45/580/2, Secretary of the Department of Exteranl Affairs to the Secretary of the Army, 24 February 1945.

[115] Sissons, "The Australian War Crimes Trials and Investigations (1942-51)" 6.

[116] Ibid. and; NAA: A2937, 222, Sir William Webb, War Crimes Commissioner and CJ of Supreme Court Qld. (in London) to H.V. Evatt, Attorney-General and Minister for External Affairs, 30 January 1945.

and convict individual perpetrators.[117] The legal form of the proposed tribunals was discussed with two options being proposed – either the Australian Government issues directives to commanders or the Minister request a Royal Warrant to be issued. Interestingly, Webb withholds advice on this matter: 'The question is a political one upon which I venture to express no opinion'.[118] This illustrates the fine line that was present in Webb's position, being an independent judicial body while assisting in formulating government policy. Before leaving London Webb was forwarded a copy of the draft regulation to establish military tribunals and reflected his contribution: 'I think you will agree that it meets the points you raised at the conference'.[119]

The trip established important international contacts for Sir William with UN representatives and other dignitaries sending glowing appraisals of his work to the Australian government that raised his reputation as a legal authority on war crimes. This provided Webb with great leverage for gaining additional support and expertise for the third commission and enhanced his prospects to be promoted to the High Court bench.

Summary

The first two war crimes commissions had been straightforward inquiries that were reasonably immune to political controversy and carried out under the umbrella of secrecy until September 1944. Webb had provided valuable information for the Government which in turn provided a symbol of activity when it could no longer maintain secrecy of public

[117] NAA: A989, 1944/735/580/2, Sir William Webb, War Crimes Commissioner and CJ of Supreme Court Qld.to H.V. Evatt, Attorney-General and Minister for External Affairs, 1 October 1944; NAA: A2937, 222, Department of External Affairs to High Commissioner in London, 30 November 1944; First Webb Report, 3 and; Second Webb Report, 2-3.

[118] NAA: A2937, 222, Sir William Webb, War Crimes Commissioner and CJ of Supreme Court Qld. (in London) to H.V. Evatt, Attorney-General and Minister for External Affairs, 30 January 1945

[119] NAA: A1066, H45/580/2, Harry MacGeagh, Judge Advocate General of the Forces (Great Britain) to Sir William Webb, War Crimes Commissioner and CJ of Supreme Court Qld, 30 January 1945.

discourse on the atrocities as the growing concern within Australian society demanded an official response. Throughout he had sought to retain judicial integrity over the inquiries and restraint by referring decisions to government. However, Webb had been occupied for nine months on the first inquiry and five for the second, which included a trip to the United Kingdom and undertaking a second inquiry on censorship concurrently with the one on war crimes, which is the subject of the next chapter. As discussed in Chapter Six, his absence from the Supreme Court led to criticism being raised in the press and from the bench which led to a the Queensland Government being reluctant to allow Webb to continue as Australia's war crimes investigator. Robert McKay's first hazard applies to Webb's growing preoccupation as war crimes commissioner in that '[p]articipation in outside activities is so extensive that the time and energy available for the primary obligation are measurably impaired'.[120] This particularly became an issue for the third war crimes commission which led to a delay in his reappointment and criticism from a fellow Queensland judge which is discussed in chapter six. The following chapter examines the censorship commission which was conducted concurrently with the second war crimes commission. This inquiry was brief, but embroiled in political controversy and the criticism of his report disparaged Webb's judicial reputation.

[120] Robert B. McKay, "The Judiciary and Non-Judicial Activities," *Law and Contemporary Problems* 35(1970): 12.

Chapter Five:
The Censorship Inquiry of 1944

> Nowhere is the ambivalence of our legalistic adherence to a doctrine of separateness more apparent than in the eagerness of politicians to exploit the apolitical image of judges (an image which the judges themselves are anxious to maintain) by using them as members and chairmen of official inquiries into matters of current political concern.[1]

In July 1944, Sir William Webb was appointed to chair a commission of inquiry into the use of censorship and became embroiled in the political maelstrom in the heightened tension during the referendum campaign on post-war powers. Censorship had been subjected to two parliamentary inquiries and a judicial investigation prior to the controversial appointment of Webb to replace one of the parliamentary committees. After what was criticised as a limited investigation, the commission produced a report that satisfied neither the parties objecting to the uses of censorship nor the government seeking to ease the mind of the public. The report was criticised for its appearance of political expediency and reflected on Webb's standing as a member of the judiciary.

During the war in Australia, it was often claimed that the government was using the national security powers beyond the intended purpose and that wider policy objectives were motivating the restrictive measures being employed. It was frequently argued that fundamental rights and privileges of citizens were being unnecessarily infringed. Discontent regarding use of wartime powers heightened from 1943, when the favourable outcome of the war became evident, and the Labor Government began to plan post-war reforms under measures that were equivalent to the national security

[1] Gavin Drewry, "Judges and Political Inquiries: Harnessing a Myth," *Political Studies* 23, no. 1 (1976): 50.

powers. The reforms raised concerns about the growth of the Commonwealth at the expense of the states, the centralisation and growth of the bureaucracy in Canberra, and that the Labor Government was pushing a socialist agenda. Members of the opposition and the print media seized upon any perceived misuse of the national security powers to create apprehension and mistrust of the government in the electorate to undermine support. Consequently ministers often called on members of the judiciary to investigate allegations of the misuse of national security powers in an attempt to absolve the government of wrong doing and reassure the electorate.[2] Likewise critics would not hesitate to call for an inquiry in an endeavour to expose the perceived inadequacies of the government to the voters. Both sides sought the independence and impartiality of members of the judiciary to uncover the truth and make the required recommendations for reform through their inquiries. Ideally this process reassures the public that the government is being open and accountable.[3] However, it creates a potential danger for members of the judiciary when called to investigate allegations of impropriety, as they may be seen as entering into the realm of politics. When the judge finds no abuse in the use of power or appears to favour the government, it can lead to allegations, or the inference, of partisanship. This is a direct threat to the perceptions of the judges' independence as members of the judiciary.[4] Webb's censorship inquiry provides an example of the hazards for judges performing extra-judicial activities.

---

[2] There were at least six inquiries held under the *National Security (Inquiries) Regulations* in 1944 leading up to the referendum that concerned the impact of national security regulations on individuals; five of these were chaired by a member of the judiciary. Matters investigated included whether the pamphlets distributed by Angus Dean were a breach of national security; the use of 'quota sold' signs by retailers; the internment of Australian First members; the internment of persons from overseas and two inquires relating to censorship. Refer to Appendix 2 for details.

[3] Drewry, "Judges and Political Inquiries: Harnessing a Myth."

[4] Alexander Wiley and United States Senate Committee on the Judiciary, "Nominations of Hon. Marvin Jones and Hon. John Caskie Collett: Report on the Use of Judges in Nonjudicial Offices in the Federal Government," in *Executive Report of the United States Senate No. 7* (1947), 3; A. R. B. Amerasinghe, "Judicial Independence - Some Core Issues," *Journal of Judicial Administration* 7(1997): 76.

This chapter examines the factors that led to the censorship controversy, the failed attempts to address the matter through parliamentary bodies, and why the matter finally was handed over to the judicial inquiries. It will be argued that this extra-judicial activity had a significant impact on the perception of Webb's independence and provides an example of the dangers posed to judges by such an inquiry, especially when a government has 'sought shelter behind the borrowed shield of judicial authority'.[5]

The chapter begins outlining the use of censorship during the World Wars and the organisation and general policy on censorship will also be discussed. The chapter will then analyse the growth of the censorship controversy that led to the establishment of the parliamentary committees and the role that the political manoeuvres of the referendum campaign had in shaping the events, leading ultimately to the appointment of the judicial inquiries. Although the focus is on Webb's inquiry, the inquiry by Clyne will also be examined, as it provides an interesting comparison in the response to the reports submitted by the judges. The chapter will conclude that this inquiry was damaging to the perceptions of Webb as an independent judge.

Second World War Policy and Regulations

During the World Wars government censorship expanded under the requirements of national security.[6] The most significant diversion from peacetime functions was the

[5] Gavin Drewry, "Judicial inquiries and public reassurance," *Public Law* (1998): 372.

[6] During peace times, censorship has been exercised through three different legal channels. The Commonwealth Department of Trade and Customs has exercised wide powers of censorship through sections 51 (i) and 86 of the Constitution that enabled the Department to confiscate and prohibit material from entering into Australia. The Postmaster General has also exercised powers to confiscate offensive and obscene material and prosecute persons distributing such material. Each state has had legislation in place to prosecute persons for the production or distribution of material. There have been numerous informal mechanisms used by governments to censor, for example, the use of public health and safety regulations to prevent buildings being used for public meetings. Australian governments have also applied pressure on distributors, publishers and broadcasters through licencing and other regulations to encourage self-censorship. Anthony Blackshield, "Censorship and the Law," in *Australia's Censorship Crisis*, ed. Geoffrey Dutton and Max Harris (Melbourne: Sun Books, 1970), 9-26; David Day and Australian Customs Service, *Contraband & Controversy: the customs history of Australia from 1901*

imposition of censorship on newspapers and private communications. A broad definition of censorship was adopted in the regulations:

> Censorship is the exercise of a government's right in the interests of national defence or public safety to examine all communications and publications and to modify or dispose of them in the manner best calculated to promote these interests.[7]

During the Second World War, censorship powers were primarily derived from Regulation 16 of the *National Security (General) Regulations* 1939 in pursuance of the *National Security Act* 1939 (Cth):

1. If it appears to the Minister to be necessary or expedient so to do in the interest of the public safety, the defence of the Commonwealth or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, he may by order provide for the censorship of –
   (a) Communications by telegraph, telephone or submarine cable or by wireless transmitting apparatus or wireless receiving apparatus;
   (b) Postal articles;
   (c) Newspaper or other publications;
   (d) Broadcasting by wireless transmitting apparatus; or
   (e) Cinematograph films.

(Canberra: AGPS Press, 1996). 208-09; Roger Douglas, "Saving Australia from Sedition: Customs, the Attorney-General's Department and the Administration of Peacetime Political Censorship," *Federal Law Review* 30, no. 1 (2002): 135-75.

[7] AWM54, 175/1/1 – [Censorship – General] General Definition of Censorship 1938 – 1939, (U.K. Regs for Censorship, 1938).

2. Any order under this regulation may contain such incidental and supplementary provisions as appear to the Minister to be necessary or expedient for the purposes of the order.

Other measures in the National Security (General) Regulations concerning the control of information in the Commonwealth that supported the censorship included: regulations 14 and 15 concerning the prohibition of conveying of postal articles through unofficial channels; regulations 17 and 19 concerning the restriction of recording or holding records of information by unofficial persons that maybe considered useful to the enemy; while regulations 41 and 42 contain provisions to prevent persons from causing disaffection in the community or to influence public opinion in a manner that would likely be prejudicial to the war effort.[8]

Administration of censorship was divided into two categories: 'publicity' or 'general communications' (media, newspapers and radio) and 'communication' or 'individual' (postal and telegraphic/cable). Responsibility for policy development and implementation of regulations for each category was exercised by two departments. The Department of Information was established on 4 September 1939 with the two primary functions of producing propaganda to promote the war effort and publicity censorship.[9] The Department of Defence and later the Department of the Army were responsible for communication censorship.[10] This was a deviation from the precedent of the First

[8] *National Security (General) Regulations*, SR 1939, No. 87.

[9] *National Security (Information) Regulations*, (amended, SR 1940 No 188). NAA: A2676, 36, War Cabinet Minute No 36, 16 October 1939; Edward Louis Vickery, "Telling Australia's story to the world: The Department of Information 1939-1950" (Austrailan National University, 2003); John Hilvert, *Blue Pencil Warriors. Censorship and Propaganda in World War II* (St Lucia: University of Queensland, 1984).

[10] Hilvert, *Blue Pencil Warriors*.

World War, when both arms of censorship were handled by the military.[11] The Department of Trade and Customs retained its role of intercepting the import of films and books that offended on moral grounds or were seditious, while also performing a supportive role of informing censorship authorities of any doubtful material that could be considered under the national security regulations.[12]

Communications censorship was an important component of controlling information during the war, but little was known about its extent at the time, even though it represented an alarming government activity that breached democratic principles and individual rights. The official historian, Paul Hasluck wrote:

> Wartime communications censorship, being comprehensive, efficient and secret, probably introduced the habits and practices of the police state into Australian democracy to a greater extent than any other use made of national security.[13]

Communications censorship was a responsibility of the army, operating from the Allied Military Forces Headquarters in Melbourne and directed by the Chief of the General Staff. The head of censorship was Phillip W. Ettelson, the Controller of Postal and Telegraph Censorship, who held the position for the duration of the war. Ettelson was a Barrister and Solicitor for the Supreme Court of Victoria, a censor during the First World War and member of the Australian Military Forces.[14] He would be prominent in the inquiries in 1944 and was examined by the four inquires that were established to examine the use of censorship. In each state capital and in the Northern Territory,

---

[11] Ernest Scott, *Australia During the War*, 7th ed., vol. 11, Official history of Australia in the war of 1914-1918 (Sydney: Angus & Robertson, 1941). 58-64.

[12] Day and Australian Customs Service, *Contraband & Controversy: the customs history of Australia from 1901*: 227.

[13] Paul Hasluck, *The Government and the People, 1939-1941*, vol. 1 (Canberra: Australian War Memorial, 1952). 186-7.

[14] *Who's Who in Australia*, Adelaide: F. Johns, 1944, 327

district censors were appointed and were effectively deputies to the controller. By 1940 censorship staff had reached a peak of 1,190, and in January 1944 the staff had been reduced to 962.[15] Communication censorship served similar functions to publicity censorship in preventing vital information reaching the enemy, damaging public morale or affecting the war effort. Communication censorship also served a more sensitive and personal role of intelligence gathering and surveillance. Censorship provided detection of subversive activities and breaches of various national security regulations with reports forwarded on to the proper authorities and government departments. Information was also gathered to enforce a variety of wartime regulations and later for other war related purposes. This became the central issue in the censorship controversy.

Communication censorship regulations were announced on 2 September 1939 and empowered 'the censorship staff to open all postal articles and to withhold from delivery of all such postal articles as are considered:

> To be traitorous or to contain information of a secret or confidential nature likely to be useful to an enemy.
>
> To contain written or printed matter which would in the present emergency be prejudicial to the public safety, the defence of the Commonwealth or the maintenance of supplies and services essential to the life of the community.'[16]

It was the second point which would cause the most difficulty for the government to define, as there was often a fine line between what information could be considered as prejudicial to the public safety and what was suppressed due to political reasons and how the information gathered through communication censorship was being used by the

[15] NAA: A472, W22283, Parliamentary Committee on Censorship, Report of Proceedings, 5 June 1944, 39.

[16] *The Advertiser (Adelaide)*, 2 September 1939, p 27.

administration. The population had been subjected to the scrutiny of their mail during the First Wold War, and it was acknowledged as unpopular but nonetheless a 'tolerable evil' in total war.[17] Byron Price stated on his appointment to head the newly established Office of Censorship in the United States that:

> Any approach to censorship in a democratic country is fraught with serious difficulties and grave risks. . . . The word itself arouses instant resentment, distrust and fear among free men. Everything the censor does is contrary to the fundamentals of liberty. He invades privacy ruthlessly, delays and mutilates the mails and cables, and lays restrictions on public expression in the press. All of this he can continue to do only so long as an always-skeptical public is convinced that such extraordinary measures are essential to national survival. The censor's house is built on sand, no matter what statutes may be enacted, or what the courts may declare.[18]

By 1944, the public in Australia was becoming more sceptical, and questions were being raised regarding the necessity of the measures being taken in censoring information. The situation was complicated further by the Australian government policy of maintaining secrecy in the operation of censorship rather than convincing the people of its necessity in war, which was based on the following rationale:

> One of the favoured devices of enemy 'intelligence' strategy is the creation of a feeling of distrust and alarm among the people, and nothing is better calculated to assist such a device than repeated reference to the working of the Censorship, whose work is more effective when it is done silently.[19]

---

[17] United Kingdom, "Report on Postal Censorship during the Great War (1914-1918)," (HMSO, 1920).

[18] U.S. Office of Censorship, *A Report on the Office of Censorship* (1945), p. 1. Cited in Louis Fiset, "Return to Sender: US Censorship of Enemy Alien Mail in World War II," *Prologue* 33, no. 1 (2001).

[19] Minister of State for Information, *Censorship Rules and Broadcasting Standing Orders for Press, Broadcasting Stations and Distributors of Motion Picture Films*, (Department of Information, Commonwealth Government) 1941, p 2. NAA, Canberra: A5954, 1705/11 COPY 1, 'Regulations for Censorship 1938'.

The secrecy of the operation of censorship caused wide speculation and distrust, which would be exploited politically during the referendum campaigns. Furthermore, the secrecy allowed the growth and functions of censorship beyond what was acceptable, and many viewed the measures as unnecessary for national survival. From the beginning of the war the use of censorship was contested, and agitation from newspaper editors, members of the parliamentary opposition and other commentators around the nation kept the issue in the public mind.[20] Allegations of misuse or excessiveness in the censorship policy was raised frequently in both houses of the Commonwealth Parliament, especially after 1943 with the abatement of the fears of invasion, members of the opposition began demanding the government review the policy on censorship. This coincided with the Curtin Government petitioning the states and then the people to enlarge Commonwealth powers after the war.

The government had been able to avoid appointing a public inquiry into censorship, despite the numerous incidents throughout the war and allegations of abuse of the censorship becoming heated in the parliamentary debates and reported in the press. There were at least thirty questions or complaints regarding censorship in the Hansard record for 1943. Typically they referred to publicity censorship, for example, statements made by parliamentarians being cut from reports prior to publication. Communication

[20] See for example, Brian Fitzpatrick letter to Seantor Richard V. Keane (Cth), 21 November 1941, regarding the ACCL's concern about the military control of censorship. NAA: MP508/1, 52/702/95 [Representations by Australian Council for Civil Liberties on Censorship of imported books] [Box 86]. There were many articles appearing in the newspapers that were critical of the use of censorship powers, for example, 13 November, 'People Must be told the News', *The Mercury*, 1942 and; 16 June, 'A "Dirty" Election', *Sydney Morning Herald*, 1940. Rupert A. G. Henderson, President of the Australian Newspaper Proprietor's Association was very critical of the use of censorship and compared its use with Gestapo methods, 11 November, 'Caustic Criticism of Censorship', *The Morning Bulletin* (Rockhampton), 1942 & 'Government Control. Safeguards of a Free Press', *Sydney Morning Herald*, 11 November 1942, p 6. It was reported that John HF Fairfax resigned from the Press Advisory Committee in 1942 in protest of what he saw as the misuse of censorship, 'Censorship Protest Against Misuse of Powers', *The Canberra Times*, 1942; 'Government Control. Safeguards of a Free Press', *Sydney Morning Herald*, 11 November 1942, p 6.

censorship was raised in Parliament on 26 February 1943 when Albert Oliver Badman (MHR, South Australia) produced a letter to the House of Representatives protesting that it had been censored. The letter had been posted by a constituent in Adelaide and sent to him in Canberra, and he felt that the censor opening his mail was a breach of his parliamentary privilege. On Badman's request Curtin had the matter investigated and reported that the letter had been mis-sorted with overseas mail and consequently censored by mistake; the matter was not pursued further.[21] Whether it was a coincidence or politically planned, Badman's allegation came as it was increasingly becoming apparent that the states would not pass the *War Powers Bill* and force the Commonwealth Government to take the matter to a referendum.[22] Indeed, Curtin's reply to the question was followed by his criticism of the states in failing to provide the Commonwealth with the additional post-war constitutional powers to enable the government to enact legislation relating to their reconstruction policies.[23] The allegations hit a nerve as they tapped into the mounting disquiet towards the growth of the Commonwealth's public service and the centralisation of administration in Canberra under national security measures. The referendum in 1944 enabled the opposition to apply the pressure on the government to make censorship a matter for public inquiry.

The 'no' campaigners began to link the censorship issue to the post-war powers appeal before the legislation was passed for the referendum; in this way they provided an illustration to voters of the risk of vesting too much authority in the Commonwealth

[21] *CPD*, HR, Vol. 173, 26 February 1943, 1055 & 1092. 'Censoring of Civilian's Letter', *The Advertiser* (Adelaide), 27 February 1943, 6. Badman lost his seat in the 1943 election, *Who's Who in Australia 1944*, (Adelaide: F. Johns, 1944).

[22] The House of Assembly in South Australia had passed the 'much amended' War Powers Bill two days prior to Badman raising the allegations in Canberra. 'Transfer of Powers Effect of Delay by States', *The Advertiser* (Adelaide), 23 February 1943, 3.

[23] *CPD*, HR, Vol. 173, 26 February 1943, 1092-1094. 'States Criticised by Mr Curtin', *The Advertiser* (Adelaide), 27 February 1943, 6.

Government. Censorship became a key example of administrative excess and was used to induce anxiety about the growth of centralised bureaucracy. During the campaign, the government became increasingly desperate to disprove the allegations of abuse and reassure the electorate before they went to the polls.

Censorship and the Referendum

Throughout the referendum campaign the Curtin government attempted to manage the controversy and ease the public mind about the uses of censorship and the credibility of the public servants exercising the powers. The events that led to the Webb commission support the criticisms this was an appointment for political expediency. A judicial inquiry was manageable, could be contained and carried the notions of impartiality that the government sought to reassure the voters. With the greatest abuses exposed by the committee, Webb could only report that the government was managing the situation and the necessary reforms were being made. Thus, it can be seen that Curtin was using judicial authority to reassure voters that the government was being accountable, and there was no further cause to be alarmed over the proposals at this critical juncture of the campaign. However, this was not achieved due to the revulsion felt by citizens at having their private correspondence scrutinised and shared amongst public servants, and broad sections of the public remained unconvinced of the trustworthiness of the government. Censorship provided opponents with a clear example that was directly affecting the voters and illustrated the risks of allowing a continuation of the exercise of emergency powers by the government after the war.

The constitutional reforms had their origins in late 1942, when the Japanese advance had been reversed and post-war reconstruction was being considered. Their primary aims were to prepare well in advance smooth demobilization into a peace time

economy, while avoiding the economic and social problems that followed the First World War. The Labor Party saw unemployment as an underlying problem of society and sought to achieve full employment after the war. The success of wartime regulations through centralisation of legislative control with the Commonwealth led the government to consider how the momentum and power could be retained after the war, as the nation dealt with repatriation, immigration, housing and economic growth. It was also seen as a key component of furthering Australia's international standing and activities. Constitutional reform was supported by most commentators irrespective of their political leanings, and previous governments had unsuccessfully sought on several occasions in the previous twenty years to amend the instrument via referendum.[24]

The government was conscious of the lack of success that referendums had in Australian history, particularly in wartime. Therefore, it was resolved to approach the states to transfer the necessary powers to the Commonwealth as provided through Section 51 (xxxvii) of the Constitution.[25] A meeting of state premiers and attorney-generals was organised in November. The convention ended with an agreement on terms of a temporary transfer of powers to the Commonwealth Government for five years after the war, and a deadline of March 1943 was set for the necessary legislation to be passed by the states. New South Wales and Queensland met the deadline, while South Australia and Western Australia passed amended legislation that did not transfer all of the powers agreed to at the convention. Tasmania was unable to pass legislation, and Victoria's legislation had a condition that all states needed to pass corresponding

[24] See, Paul Hasluck, *The Government and the People, 1942-1945*, vol. 2 (Canberra: Australian War Memorial, 1970). 528-30, 35-40 & 626.

[25] '(xxxvii) matters referred to the parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law'.

legislation before it would come into effect. This effectively ended Curtin's desire to avoid a referendum, with the result that after a further year of negotiation with the states, the legislation was introduced into Parliament to enable a referendum to be held to approve a five-year transfer to the Commonwealth of the powers that were contained in the 14 points.[26] There were a few clauses added to guarantee rights of religion, speech and the press. Percy Spender crossed the floor to support the Bill, while the Country Party supported the first reading of the Bill, but then retracted their support on the second. The second reading of the *Constitutional Alteration (Post-War Reconstruction) Bill* 1944 began on 11 February 1944 and continued until being passed in the early hours of 16 March.[27] The bill was passed in another all-night session in the Senate on 23 March.[28]

Discussions within government regarding the referendum began in earnest in November 1943; the parties involved were the Department of Information, the Ministry of Post-War Reconstruction and the Attorney-General's Department. In a conference between these departments on the 14 January 1944, the chairman, E.G. Bonney (Director-General of Information), stated that 'the conditioning of the public mind' was a matter of government concern, that it was essential that the voters were convinced of the necessity of the additional powers for reconstruction, as hostility towards the reforms

[26] The 14 points were the powers that were being sort by the government which included: rehabilitation of returned servicemen, employment and unemployment, organised marketing of comedies, uniform company law, trusts and monopolies, profiteering and prices, production and distribution of goods, overseas exchange, air transport, railway gauges, national works, national health, family allowances and indigenous Australians. 'The Proposed Law, 14 Main Points', *West Australian*, 22 June 1944, 6.

[27] Hasluck, *Government and the People*, 2: 526-36. For the House of Representatives debates on the bill see: *CPD*, HR, Vol. 177, 11 February 1944, 136-153; 23 February 1944, 448-480; 7 March 1944, 1028-1054; 8 March 1944, 1070-1120; 14 March 1944, 1253-1295; 15 March 1944, 1335-1376. *CPD*, HR, Vol. 178, 15 & 16 March 1944, 1377-1432.

[28] For the Senate debates on the bill see: *CPD*, Senate, Vol. 178, 17 March 1944, 1519-1526; 21 March 1944, 1589-1636; 22 March 1944 1698-1752; 23 March, 1834-1904.

were mounting. There were four reasons for the increased hostility forwarded in a report attached to the meeting minutes:

(1) The tactics of the opposition;

(2) A genuine fear of the dangers of over-centralisation to policy and administration;

(3) The fear that wartime controls on personal freedom will be retained unnecessarily;

(4) The absence of a clear and positive statement of post-war policy.[29]

The first three points bear importance in relation to how censorship policy was used in the campaign and why it became a central political issue in 1944. It was argued that effective opposition tactics were being developed to ensure the failure of the referendum:

> The most dangerous opposition is being expressed not in direct criticism of the powers but in the creation of doubts and uncertainties. Questions are raised as to the precise meaning of the powers, and of the possibility of their abuse by the present and future governments.[30]

The example provided in the report was the concern about industrial conscription. During the month and a half to have the Bill passed, the criticism of the uses of censorship became a pressing issue for the government, as it was tied to the additional powers. After the second day of debate on the Bill, two members of the opposition raised matters concerning the exercise of censorship regulations; this became a

[29] NAA: A9816, 1944/29, Notes from the Referendum Campaign Conference between representatives of the Department of Information, the Ministry of Post-War Reconstruction and the Attorney-General's Department, held at the offices of the Ministry of Post War Reconstruction, 14 January 1944.

[30] Ibid.

prominent issue during the referendum campaign and ended with Webb's commission appointment. Spender asked a series of questions, upon notice, relating to information from commercial correspondence being extracted and furnished to government departments. He also raised concerns about information from private correspondence being used for prosecutions of breaches of the national security regulations.[31] Later in the session Archie G. Cameron raised a protest regarding his mail being scrutinised by the censors.[32] Response to Spender's concern was delayed under the pretext that investigations in the matter were being undertaken. However, the opposition was able to use Cameron's allegations to pressure the government to take action, resulting in the establishment of the Committee on Privileges.

It is not evident at this time that the government foresaw the censorship issue as a threat to the referendum campaign. Members of the opposition on the other hand were quick to use the issue to undermine the proposal. The key role that censorship would play in the referendum was evident in the debate when Joseph Palmer Abbott of the Country Party argued on 8 March:

> The referendum proposals will be lost, not carried, because of that phantom army in our midst – that army of snoopers, telephone tappers, peeping Toms, and others who are operating the censorship.[33]

Holt also drew upon the allegations of the abuse of the censorship powers as a reason to vote against the Bill, referring to a *Sydney Morning Herald* article claiming the suppression of reports on political grounds, and Senator Leckie's earlier allegations of

[31] *CPD*, HR, Vol. 177, 24 February 1944, 494.

[32] *CPD*, HR, Vol. 177, 24 February 1944, 569.

[33] *CPD*, HR, Vol. 177, 8 March 1944, 1096. This was also widely reported in the press: 'Says Bill Too Wide', *The Courier-Mail*, 9 March 1944, 3; '"Hybrid Measure". Referendum Bill', *Cairns Post*, 9 March 1944, 5; 'Powers Bill's Fate', *The Advertiser*, 9 March 1944, 5. The *Daily Telegraph* led with Abbott's statement: 'Warning on Snooper. Censorship Issue May Swing Referendum Vote', 9 March 1944.

company mail being scrutinised and information being extracted.[34] Through the debate on the bill, censorship became a pressing issue for the government, however, the initial response was to resist the calls for a judicial inquiry and refer the matters to parliamentary committees.

The Committee on Privileges

Cameron initially raised his claim about his mail being scrutinised by the censor as an aside during a speech on the army administration and the government's treatment of officers on a Grievance Day session of parliament. John Johnstone Dedman, ALP, asked where he received his information, to which Cameron replied: 'Notwithstanding that my mail is continuously opened by the censor, my letters still get through'.[35] Cameron raised the matter more directly later in his address, stating that he was not satisfied with the response that the Minister for the Army, Forde, had provided to his private inquiry of the previous month. He added that the matter required further investigation, as the Prime Minister had guaranteed the discontinuation of censorship of members' internal mail in response to the concerns raised by Badman in 1943. He assured the House that the letters being scrutinised included ones to people not on active service. William Joseph Hutchinson then pursued the issue after Curtin failed to address the allegations raised by Cameron in his response to the other criticism raised regarding army administration. Hutchinson asked Forde to explain the tampering with members' mail and rhetorically asked the House if it was not a breach of parliamentary privilege.[36] The following day Cameron argued that the opening of his mail by the censor breached parliamentary privilege and moved a motion to stop the opening of

[34] *CPD*, HR, Vol. 177, 14 March 1944, 1278-1279.

[35] *CPD*, HR, Vol. 177, 24 February 1944, 569.

[36] Forde replied that he had replied to Cameron by a letter stating that there was no government direction to censor his mail. *CPD*, HR, 24 February 1944, 579-580.

members' mail. In his motion he claimed that he had come under the 'special scrutiny' of the censor. Other members of the opposition argued that letters to the members of parliament should receive immunity from censorship as foreign representatives enjoyed, with the exception of letters received from service personnel in military areas. It also raised concerns from within the Labor Party, with Brennan and Makin questioning the government's policy. Evatt proposed that a standing committee be appointed to investigate the matter and that Cameron withdraw the motion.[37]

The standing committee was established on 7 March and sat for the first time two days later. Examination started on 14 March and continued on four separate days, with the final report completed on 31 March 1944. The Committee consisted of four members from Labor: Joseph James Clark, Herbert Vere Evatt, Francis M. Forde and Reginald T. Pollard. There were also three members from the opposition: William Joseph Hutchinson and Eric John Harrison from the United Australia Party (UAP) and John McEwen of the Country Party. The UAP representatives could be seen as expedient choices for the government, since Harrison was responsible for banning James Joyce's *Ulysses* when he was Minister for Customs, and Hutchinson was a known rebel in the party and played an active role in the fall of Menzies as prime minister in 1941.[38] Thus Cameron later criticised the committee in parliamentary debates, stating: 'There is such a thing as going to law with the devil and holding the court in hell'.[39]

The committee sent a letter to all members of parliament requesting evidence be brought forward, but no affirmative responses supported with evidence were received.

---

[37] *CPD*, HR, 25 February 1944, Vol. 177, 628-644. See also *Sydney Morning Herald*, 26 Feb 1944, 1, 9-10.

[38] Don Whitington, *Ring the Bells. A Dictionary of Australian Federal Politics* (Melbourne: Georgian House, 1956). 65 & 74.

[39] *CPD*, HR, Vol. 180, 24 November 1944, 2142.

The committee examined Cameron, Phillip W. Ettelson and Lieutenant-Colonel Eric Harvey Wilson (Chief Field Censor). Cameron was unable to produce evidence to prove that his civilian mail had been subjected to censorship, with all letters presented originating from service personnel in areas under military control. Both Ettelson and Harvey stated that Cameron was not under 'special scrutiny', and this was the conclusion reached by the committee. Furthermore, the committee found that parliamentary privilege was not breached. Section 49 of the Constitution of Australia states that privileges 'shall be such as are declared by parliament' or as established in the House of Commons of the United Kingdom. Parliament had not enacted legislation establishing privileges, and in debates in the House of Commons it had been established that members of parliament enjoy no immunity from wartime censorship and that privilege was not breached.[40] The committee also mentioned that there were other grievances relating to communications censorship that were not addressed due to a lack of jurisdiction.[41] On 31 March the Committee finished its report. When it was later tabled in parliament, Cameron received a letter from the District Censor in Adelaide stating that his letter had been mis-sorted and accidentally been opened by a censoring officer who had been disciplined.[42] Cameron used this development to further the issue in the debates, alluding to the unusual procedure of receiving a written apology and the severity of the punishment given to the officer responsible for opening the letter that had been mis-sorted. Forde, with the support of Evatt, was evasive in providing the

[40] During the First World War there was a partial exemption initially granted to members of parliament in the UK, however, this was later revoked with later justification when a member was prosecuted for sending security information to a neutral country in 1916. United Kingdom, "Report on Postal Censorship during the Great War (1914-1918)," (HMSO, 1920): 152-153.

[41] 'Report from the Standing Committee of Privileges Relating to Censorship of Members' Correspondence, Parliamentary Papers, Commonwealth of Australia, 1944.

[42] *CPD*, HR, Vol. 178, 31 March 1944, 2504-2506. 'Privileges of MPs Not Infringed. Mail Censorship Report' *Sydney Morning Herald*, 1 April 1944, 2.

Government's response, shifting the focus on the misfortunate suspended officer and declaring that the members and public should be satisfied with the finding of the 'impartial report' that assures 'that the Government stands for strict impartiality in connexion with censorship'.[43] Cameron criticised the limited scope of the inquiry and argued that a fuller inquiry would have to be conducted. Sir Earle Page and Holt complained that the rush of tabling the report without printing and distribution to members inhibited any debate on the matter; to make things worse, the close of the parliamentary session coincided with the tabling of the report.[44] The press was equally critical of the report, labelling it as a 'whitewash' and an 'anti-climax' in light of the further allegations made by Cameron.[45]

The inadequacy of the Committee on Privileges to appease the critics of censorship was clear before the proceedings had begun, as censorship was firmly placed on the political agenda in the parliamentary debates and the press throughout March, forcing the government to make further action to reassure the public as the Constitution Alteration Bill was being passed and the referendum campaign was beginning in earnest.

Parliamentary Standing Committee on Censorship

The Parliamentary Committee was appointed to manage a political crisis that was damaging public confidence at a time when the government sought approval to expand executive powers. This is seen with the timing of the establishment of this committee and the previous one, both of which were announced before a continuation in the second reading of the *Constitutional Alteration Bill*. The political function of the two

[43] *CPD*, HR, Vol. 178, 31 March 1944, 2505.

[44] *CPD*, HR, Vol. 178, 31 March 1944, 2505-2506. The Government used this tactic with the next report on censorship by the Parliamentary Committee on Censorship.

[45] 'Spoiling the Effect of the Whitewash', *Sydney Morning Herald*, 3 April 1944, 4; 'Censor Suspended for Opening Mail Addressed to MP', *Canberra Times*, 2.

inquiries is also evident in the Parliamentary Committee lapsing for two months after the passing of the bill and the close of the parliamentary session. This delay was also exacerbated by the action of the *Daily Telegraph* in defying censorship orders that resulted in legal action before the High Court. Although serving as a pretext for further delays in the sitting of the committee, this event fuelled the censorship controversy. With the referendum date being set and the opponents exploiting the public concern regarding censorship, the function of the committee to reassure the electorate was reinvigorated. The committee was also shaped by the shifting of the political stakes during the ensuing months. Initially it was thought that leaders of the opposition were concerned about the fallout due to their involvement in the establishment and development of censorship policy. Nevertheless, as the controversy evolved, the opposition saw censorship as a key issue to undermine the government's quest for increasing post-war powers and was seemingly unconcerned about the possible fallout reflecting on their time in government. The committee served to expose some of the unsavoury developments of the operation of censorship and provided a platform for the government to act. However, as Curtin returned from overseas with the referendum looming and the censorship issue being drawn out by the opposition members of the committee, the prime minister transferred the investigation to a judicial inquiry, after having resisted this for the duration of the controversy. The decision to appoint Clyne and Webb exudes political expediency. Moreover, the controversy surrounding the use of censorship and the political manoeuvres being undertaken by the parties in a referendum campaign established a situation where it was undesirable for a judge to become involved.

The Parliamentary Standing Committee was established after the allegations made by Cameron were followed by further accusations and demanded a wider inquiry beyond

only investigating censorship affecting members of parliament. Spender's questions of 24 February regarding information being extracted by the censor and provided to other government departments remained unanswered until the end of March.[46] E. Thornton, secretary of the Iron Workers' Union, was widely reported in the press when he alleged that the organisation's mail had been scrutinised by the censors and telephone conversations had been monitored since the beginning of the war.[47] Pressure for wider investigation came from within the ranks of Labor as well. John Patrick Breen urged a review of the exercise of the regulations that were circumventing press reports.[48] A week after Spender's initial questions and Cameron's motion of privilege, Abbott proposed that the government appoint a royal commissioner to investigate all aspects of censorship to ease 'the grave public apprehension'.[49] Senator Leckie in a discussion on the 'Review of the War Situation' criticised the report for not including censorship; he raised the issue of members' mail being interfered with and the interception of business mail, including an incident where a formula was extracted from correspondence.[50] This

[46] *CPD*, HR, 177, 24 February 1944, 494.Spender asked the Government again on the 28 March whether there had been any conclusion to the investigations on his questions, *CPD*, HR, Vol. 177, 28 March 1944, 2078. Forde responded two days later in the early hours of 30 March during a late sitting that the matter was being referred to the Parliamentary Committee established by the Prime Minister on the 15 March 1944, *CPD*, HR, Vol. 177, 30 March 1944, 2277-2278.

[47] 'Censorship of Union's Mail', *Argus*, 1 March 1944, 4; 'Censoring Mail of Politicians', *The Advertiser*, 1 March 1944, 5; 'Union Phones Tapped', *The Sydney Morning Herald,* 1 March 1944, 6.

This was not the first time a union had complained to the Government that they were being scrutinised by censorship. In August 1942, C. G. Fallon, Secretary of the Queensland branch of the Australian Workers' Union sent a letter of protest to Evatt asking why they had come under the suspicion of the government. Ettelson, via Forde replied that the scrutiny was due to the area being under strict censorship at the time due to troop movements and that the Union was not under special observation. NAA: MP508/1, 52/703/255.

[48] Breen was concerned that a number of stabbings by African-American soldiers in Sydney was being covered up to avoid political criticism, *CPD*, HR, Vol. 177, 3 March 1944, 917-918. Curtin responded to Breen's questions five days later and disagreed that there was a large number of such incidents and that the matter was not an excessive use of censorship. *CPD*, HR, Vol. 177, 8 March 1944, 1060.

[49] Abbott had three points he wanted investigated which included: what methods were being employed, what material that is not connected with national security was being scrutinised and the qualities of staff. *CPD*, HR, Vol. 177, 1 March 1944, 716.

[50] *CPD*, Senate, Vol. 177, 3 March 1944, 957-958.

latter issue soon became the focus of investigations for the parliamentary committee and the Webb investigation. The *Sydney Morning Herald* argued that the allegations that had been raised required a wide inquiry: 'Nothing less will now satisfy public opinion'.[51]

The call for a royal commission into censorship was resisted by the leaders of the major parties. Forde initially appeared to hope that the Privileges Committee would suffice to dispel the criticism being levelled and ease the public mind.[52] The day after Abbott raised his request with the Prime Minister, Curtin announced to the House that he was in consultation with Menzies and Fadden regarding what course should be taken.[53] The three political parties had involvement in directing censorship policy, which had been in operation from the beginning of the war with its functions expanding under each of the wartime administrations. It was clear that an inquiry was necessary at this stage, as the operation - and the more unsavoury aspects - of the censorship was going to be exposed to the public by members of parliament and the press. Overall, there were national security issues to consider, but courting favourable public opinion was also of considerable concern. It was speculated in the press that a 'battle of tactics' was ensuing, and the government was pressuring the opposition parties in limiting the inquiry, as they had more to lose for having been the administration that established the censorship in the first place.[54] The opposition parties had less at stake due to the federal elections having been contested in August of the previous year, returning the Curtin

[51] 'It is Happening Here', *Sydney Morning Herald*, 3 March 1944, p 4.

[52] Forde initially dismissed the request as being already discussed the previous week on the privileges motion and stated after being coerced: 'No new evidence has been adduced to justify the appointment of a royal commission. The censorship to-day is being carried on in the same was as during the regimes of the Menzies and Fadden Governments, which were supported by the honourable member for New England'. *CPD*, HR, Vol. 177, 1 March 1944, 716.

[53] *CPD*, HR, Vol. 177, 2 March 1944, 951.

[54] 'Committee of Privilege. Mr Curtin's Plan', *Sydney Morning Herald*, 3 March 1944, 4.

Government with a large majority. Meanwhile, the government was about to seek public approval through the referendum which was being debated in parliament while this unfolded. The censorship issue was already being drawn into the debates on the Bill before parliament. The Victorian Premier, Dunstan, in a speech pointed out the irony of the freedom of speech clause in the Bill when there were such tight restrictions on communications.[55] Holt drew upon the allegations of the abuse of the censorship powers as a reason to vote against the Bill, referring to a *Sydney Morning Herald* article claiming the suppression of reports on political grounds and Senator Leckie's earlier allegations of company mail being scrutinised and information being extracted.[56]

By early March, a consensus was reached between the leaders of the political parties for a parliamentary committee to be established. It was widely speculated in the press that the opposition members had been pressured to propose a narrower inquiry than initially sought to protect them politically.[57] On 14 March Curtin stated that he had received a memorandum from the opposition leader, Menzies, outlining the establishment of a parliamentary committee and the prime minister's intention to enact the proposals. Menzies explained that a royal commission into censorship would not be desirable, as it would be too narrow and would be drawn out. He also stated that he was aware of the need for censorship, but he wanted it to be reviewed in relation to the present wartime security needs.[58] The *Sydney Morning Herald* led the attack again in an editorial, highlighting the hypocrisy of Menzies and Fadden, who had previously supported Abbott's demand for the widest inquiry into censorship, and declaring that the

[55] 'Victorian Premier on Censorship', *Barrier Miner* (NSW), 13 March 1944, 2.

[56] *CPD*, HR, Vol. 177, 14 March 1944, 1278-9.

[57] 'Full Inquiry Unlikely', *Sydney Morning Herald*, 14 March 1944, 7; 'Censorship Inquiry. Restrictions Likely in Scope', *Canberra Times*, 13 March 1944, 2.

[58] *CPD*, HR, Vol. 177, 14 March 1944, 1245-7.

'proposed inquiry is, in plain language, a fraud'.[59] The main concerns were that the scope of the inquiry would be decided by members of the committee, the proceedings would be held in camera, the investigatory powers were not equivalent to a royal commission of inquiry, and the report would go to the government to decide what portions would be released to the public. In an article following up the editorial, the *Sydney Morning Herald* supported Spender's criticism of the proposal. However, the opposition members of the committee were reported to be confident that the inquiry would be satisfactory and prompt.[60]

Forde was appointed chairman of the committee, but was replaced by Evatt at the beginning of May before the first meeting. The members appointed to the committee either held or had held ministerial portfolios that directly related to the operation of censorship, as suggested in the Menzies memorandum. The members drawn from the government included Calwell (Department of Information), William P. Ashley (Post-Master General), and Senator Fraser was appointed to replace Forde (he held an assisting role with the Minister for Supply and Development, which would be scrutinised by the committee; he was also Acting Minister for the Army). Representing the opposition parties were three members who were key protagonists in the censorship controversy. Cameron was Post-Master General before the war and deputy to Menzies as prime minister, Abbott who had been Minister for Home Security in the Menzies and Fadden Governments and the former Minister for Information, Senator Hattil Foll, all of

[59] 'Cold Feet Over the Censorship', *Sydney Morning Herald*, 15 March 1944, 6.

[60] 'Censorship Inquiry Plan Attacked', *Sydney Morning Herald*, 16 March 1944, 5.

whom had raised criticism and allegations regarding censorship numerous times in Parliament.[61]

Despite being appointed on 15 March, the committee did not sit until 5 June due to a number of factors. Immediately after the establishment of the committee, the members were occupied with debates on critical legislation, and the Privileges Committee had yet to report. On 31 March the Report of the Privileges Committee was tabled and the parliamentary session came to a close, denying a platform for members of the opposition to agitate the government to continue reviewing censorship. Another complication was with the chairman of the committee, Forde, who was burdened with an increased workload as acting prime minister with the departure of Curtin overseas in early April, a situation that the Menzies Memorandum wanted to avoid with the committee.[62] Sections of the press took an active role in maintaining the pressure on the government, but inevitably through these actions caused further delay in the meeting of the committee due to the subsequent proceedings in the High Court, which served as a pretext for the government to postpone the inquiry.

The High Court action resulted after the Sydney press was effectively shut down by the Federal Police for breaches of the censorship regulations. The incident arose after the Australian Government was criticised by members of the United States Senate for demobilising 20,000 AIF troops earlier in the year, as they were not informed that a

[61] For example for Senator Foll see, *CPD*, Senate, Vol. 164, 1 April 1943, 2566; Vol. 175, 30 June 1943, 528 and; Vol. 177, 25 February 1944, 602.

[62] Point three stated: 'the committee should not be constituted of party leaders, but that it should be composed, having regard to the responsible nature of the inquiry, of Ministers and former Ministers from the Government and Opposition sides of the House'. NAA: A472, W22283, Part 2B, Report of Proceedings, Commonwealth Committee on Censorship.

It does appear that Forde was making a valid attempt to begin the Committee's inquiry in late April with a secretary being sought from the Attorney-General's Department. NAA: A472, W22283, Part 1.

portion of the men were demobilised for normal health reasons or for employment in vital war industry services. The Australian press claimed that ignorance in the United States was due to the oppressive censorship exercised by the Commonwealth Government, which prevented such information from being transmitted overseas for publication. This claim led to rancorous exchanges between Rupert Albert Geary Henderson, as president of the Australian Newspaper Proprietors' Association and the Minister of Information, Arthur Calwell, who had only just taken over the portfolio from Curtin in September 1943.[63] Calwell inflamed tensions with the press by ordering the *Daily Telegraph* to submit articles relating to the war to censorship before publication.[64] Sections of the press became infuriated with Calwell and his department when the censor cut portions of the reporting of Henderson's reply to allegations of him lying made by the Minister of Information. The Sydney *Daily Telegraph* led a protest by defying censorship orders and printing a blank section where the censor had cut. This led to the paper being suppressed by the Federal Police on the 17 April. A number of other Sydney newspapers joined the protest and were also suppressed. The *Telegraph* and others appealed to the High Court for an injunction, which was granted to allow continuation of publication of the newspapers. Chief Justice Latham intervened and urged the two parties to negotiate. On 18 May, a new 'code' was agreed upon between

[63] Colm Kiernan, *Calwell : a personal and political biography* (West Melbourne, Vic.: Thomas Nelson (Australia), 1978); Graham Freudenberg, "Calwell, Arthur Augustus (1896-1973)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/calwell-arthur-augustus-9667; V.J. Carroll, "Henderson, Rupert Albert Geary (1896-1986)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/henderson-rupert-albert-geary-12621.

[64] Hilvert, *Blue Pencil Warriors*: 175-6; Arthur A. Calwell, *Be just and fear not* (Hawthorn, Vic.: Lloyd O'Neil in association with Rigby, 1972). 90.

the Department of Information and the Newspapers which amended the Press and Broadcasting Censorship Order.[65]

The publicity censorship controversy significantly shaped the inquiries. Firstly, it kept the issue alive after Parliament adjourned and ensured that the government deliver its promised inquiry. It also enabled the government to shift the focus of investigation to communication censorship on the basis that the issues relating to publicity had been resolved with the new agreement and regulations. Communication censorship could be potentially contained on the basis of legitimate national security issues. The war between Calwell and the press served to undermine the legitimacy of the committee, as there were calls for his removal before the first meeting on the basis that investigations would be prejudiced.[66]

Initially the committee was established informally with its terms of reference based on the Menzies Memorandum, which stated its terms of reference were: 'To inquire into and make recommendations to the Government with respect to censorship'.[67] The memorandum also declared that the committee would have no formal instrument of appointment, but authority would be granted if required through regulations. This caused some debate among members of the committee regarding the administration of the oath and whether the sittings would be held in public. The *National Security (Supplementary) Regulations* were amended to include section 127 that established the

[65] NAA, Canberra, A2703, 82, 'Minutes of meeting of full Cabinet, 11am, Wednesday, 31st May 1944, Parliament House, Canberra'.

[66] Menzies and Fadden released a joint statement for the removal of Calwell, 'Change sought in Censorship Inquiry', *Argus*, 20 April 1944, 3. However, Calwell refused to retire from the Committee, 'Royal Commission on Censorship Advocated', *Canberra Times*, 22 April 1944, 2. This led the opposition parties to threaten withdrawal from the committee, 'Censorship Committee', *Canberra Times*, 24 April 1944, 2. By the end of the week, Calwell had the support of the Acting Prime-Minister to stay on the Committee, 'Will Not Remove Mr Calwell from Committee', *Canberra Times*, 29 April 1944, 2; 'Mr Calwell Remains on Committee', *Argus*, 29 April 1944, 3.

[67] *CPD*, HR, Vol. 177, 14 March 1944, 1245.

Censorship Committee and provided legal powers to the committee and guaranteed that public access to the proceedings would be decided as required.[68]

In the first meeting, Evatt set the agenda, despite the objection of opposition members that the focus of the committee should be on communication censorship. They argued that publicity censorship had been dealt with in the new regulations, and that the concern that had not been investigated was communication censorship which was the basis of the matter being raised in parliament that led to the formation of the committee, with a particular focus on the use being made of information acquired through censorship:

> I have not discussed this matter with any of my colleagues but a very important thing for this committee to consider is the use made by certain departments of Government of the material gleaned from censorship. I consider that that should be restricted; it has gone too far.[69]

This remained the focus of the committee over the six meetings and later of the Webb Commission.

In evidence heard by the committee and leaked to the press, it was exposed that censorship had been used to extract valuable information from personal and business correspondence at the request of various departments.[70] Furthermore, some of the information was used to prosecute persons infringing national security regulations. The

---

[68] NAA: A472, W22283 Part 2B, Commonwealth Committee on Censorship, Report of Proceedings, Monday 5 June 1944, 2; *National Security (Supplementary) Regulations* SR 1944, no 88 under the *National Security Act* 1939-1943.

[69] Cameron wanted the events surrounding publicity censorship to be examined by the committee as the matter required 'public ventilation'. Commonwealth Committee on Censorship, Report of Proceedings, Monday 5 June 1944, 2-6A. A copy of the transcript is contained in NAA: A472, W22283 Part 2B, 'Censorship Enquiry – Copies of Evidence and Reports etc.' Further reference to the Censorship Committees transcripts will be denoted as Committee Proceedings.

[70] For a list of Departments and the information they were obtaining refer to Appendix 5. NAA: A472, W22283 Part 3.

Sydney Morning Herald editorial declared a 'scandalous misuse of censorship' and claimed that a 'Gestapo system had emerged' in Australia.[71] It had been previously reported that the Rationing Commission had secured a number of prosecutions based on information received from extractions from personal correspondence by the censor.[72] However, evasion was common, and detection and enforcement were difficult. Breaches had the maximum penalties of £100 or six month imprisonment under national security regulations.[73] It was reported in the press that a woman was prosecuted after disclosing in a letter to an airman in Canada that a friend had supplied clothing coupons to her from their book. The report also stated: 'If this is a crime, it is venial; but indignation will be vented chiefly against the means which our new "Gestapo" used to trap its victim'.[74] The controversy was heightened by the fact that the victims of this surveillance were servicemen and their relatives. Ettelson gave evidence before the parliamentary committee and stated that he did not want information from censorship to be used in prosecutions: 'Such a disclosure is liable to prejudice the censorship'.[75] Evatt also thought the method distasteful and called for it to cease, he had already issued orders to deputy crown solicitors that the practice would be put on hold until the committee had made a decision.[76] However, Senator Keane, Minister for Trade and

---

[71] Editorial, 'Scandalous Misuse of Censorship', *Sydney Morning Herald*, 10 June 1944, 2.

[72] Petrol and tobacco rationing was introduced early in the war, in the critical year of 1942 clothing and tea were subject to coupons, as was butter in early 1943. Most of the population accepted rationing for the necessity of the war effort and the direct military threat by the Japanese. Memories of the scarcities caused by the Depression also aided the acceptance of going without luxury items and making full use of items and material. Libby Conners et al., *Australia's Frontline. Remebering the 1939-45 War* (St Lucia: University of Queensland Press, 1992). 70-75.

[73] A total of 168 persons were imprisoned and 2,613 fined for the total amount of £42,868 between the years 1943 to 1948 as rationing continued after the war. S. J. Butlin and C. B. Schedvin, *War Economy, 1942-1945*, Australia in the war of 1939-1945. Series 4, Civil ; vol.4 (Canberra: Australian War Memorial, 1977). 295-309.

[74] Editorial, 'Scandalous Misuse of Censorship', *Sydney Morning Herald*, 10 June 1944, 2.

[75] NAA: A472, W22283 Part 2B, Commonwealth Committee on Censorship, Report of Proceedings, Monday 5 June 1944, 2-6A, 31-36, 58-64. Referred to infra as 'Committee Proceedings'.

[76] Ibid.

Customs and responsible for rationing, was of the opinion that it was correct to use censorship to police rationing offences. When asked in July whether the practice would continue, he replied: 'We shall continue to do that. Individuals who break rationing regulations will be dealt with…I do not favour a "square off" on rationing offences'.[77] After the Censorship Committee's recommendations made in the interim report to stop the practice were accepted by the government, Senator Keane stated: 'I consider that the black-marketer and the racketeer should be shown no mercy, and I am not satisfied with the recommendations of the Censorship Committee'.[78]

It was also revealed at the committee that business information was intercepted and if deemed useful to the war effort would be forwarded to various government departments through liaison officers. A case was brought forward by Senator Leckie (initially raised in parliament), where a manufacturer's formula for the production of plastic, which was sent by a United States parent company, was extracted by the censor and forwarded to the Department of Munitions.[79] The concern of the members of the committee was whether the information would come into possession of temporary public servants who had business interests outside of the government. Two members of a company concerned in Leckie's case, Moulded Products (Australasia) Limited, were examined by the committee, and both stated that they were displeased with the extraction of information from the company's mail.[80] Three liaison officers were subsequently examined to determine how the extracted information was used, and whether there was

[77] *CPD*, Senate, Vol 179, 19 July, 1944. Don Rawson, "Keane, Richard Valentine (1881-1946)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/keane-richard-valentine-10663.

[78] *CPD*, Senate, Vol 180, 27 & 28 September, 1535.

[79] Committee Proceedings, 65-69.

[80] E.V. Nixon, Chairman of Directors and John W. Derham, General Manager of Moulded Products were examined. Ettelson also submitted correspondence relating to the incident. Committee Proceedings, 70-78.

any risk of the information being passed onto rival businesses. All three witnesses testified that the extracts were treated with the utmost secrecy and were seen by a very limited number of people. Furthermore, the authors of the correspondence were consulted, and their consent was sought if there was any information deemed to be useful for the department to adopt.[81] Despite the reassurances in this case, it raised concerns about how other departments were gathering and using information gleaned by the censors.

The committee began to examine the breadth of information other departments were requesting and receiving from censorship, which were used to develop policies or enable the policing of their functions under the national security regulations. The departments examined included the Taxation Department, the Department of Trade and Customs and the Commonwealth Bank.[82] The central question for the committee became whether censorship should continue to be used to improve the administration of departments exercising their wartime functions. In the last meeting of the committee it was resolved that these practices were to discontinue and that the use of information from censorship would only be for matters directly related to national security.[83] However, the allegations of previous practices were largely left unexplored by the committee as the meetings began to lapse. Allegations were made by the crown solicitor of South Australia, and with the referendum vote approaching, the freshly returned

[81] The three public servants were, Edwin J. Drake (Controller of Industrial Chemicals, Ministry of Munitions), Harold C. Green (Assistant Secretary, Munitions Department, Director of Materials Supply of the Department of Munitions) and Jack S. Hosking (Second in Charge of Information Section, Council for Scientific and Industrial Research), Committee Proceedings, 78- 102.

[82] Editorial, 'Mail Censorship Scandal' and 'Mails Censorship Report' *Sydney Morning Herald*, 16 June 1944, 2-3.

[83] Committee Proceedings, 14 June 1944.

prime minister attempted to resolve the matter to end the distraction to the campaigning for the referendum.

The committee made an interim report on 14 June summarising the findings of how censorship was being used and made six recommendations. Abbott refused to sign the report. The committee recommended that censorship for national security should continue, however, there should be a review of censorship policy in the far north due to the military situation. It further recommended that censorship should not be used for policing minor offences and that a number of changes be made to the procedure followed by the censor in the extraction of information that might be of use to the war effort, changes that applied a narrower definition of national security. [84] Moreover, the report hoped to:

> …enable the Government to inform and to relieve the public mind, and to tender assurances that certain practices will cease, consequent upon the adoption of certain reforms in method and procedure.[85]

As the government sought to close the censorship controversy, the crown solicitor of South Australia made comments in the press two weeks after Forde's statement on the interim report which would undermine the reassurances given by the government and would lead to the involvement of two justices in the censorship controversy.

The Hannan Allegations and the Clyne Commission

On Monday 12 June, Forde announced the date of the referendum as 19 August. The committee's interim report was strategically completed on Wednesday. This provided the government sufficient time to respond to the recommendations and reassure the

[84] NAA, Canberra: A472, W22283 Part 2B Censorship - Committee of Senators and Members ,Interim report dated 14th June, 1944. 'Mails Censorship Report', *Sydney Morning Herald*, 16 June 1944, 3.

[85] Interim Report of the Parliamentary Committee on Censorship, 14 June 1944.

public. The findings of the report were covered in the press for the remainder of the week, and by Saturday the opposition made quick use of the revelations in their launch of the 'No' campaign. Menzies, the Victorian Premier Dunstan and the UAP released statements over the following week urging a 'No' vote, citing the abuses in the censorship powers as an example of how the powers could be welded after the war if the referendum was successful.[86] Curtin returned to Australia on 26 June, and it was largely anticipated that he would lead the recovery of the government, under strain from the domestic policy problems that had undermined public confidence. Censorship was at the forefront of problems facing the prime minister on his return.[87] Abbott and Foll kept censorship in the press by releasing statements on the same day as Curtin's return, criticising the delay in the Parliamentary Committee on Censorship meeting since the interim report and arguing that the inquiry needed to be completed, as there were a number of issues yet to be covered.[88] However, the situation regarding censorship was relatively under control until the crown solicitor of South Australia, Albert James Hannan KC, made allegations that his private correspondence had been made available to members of the government through censorship and that his phone conversations had been listened into by government parties interested in the developments of the 'No' campaign in the state.

On 30 June Hannan alleged in a statement to the press that letters he had posted from Parliament House in Canberra to Adelaide were intercepted in the post and information

[86] '"Censorship Misused", Public Inquiry Urged', *Sydney Morning Herald*, 17 June 1944, 4; 'Premier of Danger of "Yes" Vote', *Argus*, 19 June 1944, 3; 'Why UAP Opposes Wider Powers', *Mercury*, 20 June 1944, 7.

[87] Gollan, R., 'Political Interregnum. Some Problems for Mr Curtin. Referendum and Gestapos', *Sydney Morning Herald*, 26 June 1944, 2; 'The Referendum: Mr Curtin as Trump Card', 27 June 1944, 2.

[88] 'Inquiry into Censorship. Committee Members Criticise Delay', *Sydney Morning Herald*, 26 June 1944, 4; 'Resumption of Censorship Inquiry Urged', *Mecury*, 26 June 1944, 4.

forwarded to the Security Service and the Department of Information. He based his opinion on the fact that the delivery of the letters he posted in Canberra while attending the Constitutional Convention in 1942 was delayed by up to two weeks. Comparing the situation to Hitler's Germany, he stated:

> I have reason to believe that eight or ten of my letters posted at Parliament House during the first week of the conference were intercepted in the post, and their contents made available to the Department of Information… I believe that after my return to Adelaide my telephone conversations were listened into, for I usually heard a click from the exchange after beginning the conversation.[89]

Hannan also stated that he began to hear a slight click and fading in the line when he was talking to members of the Constitutional Powers Committee, an organisation that had been established in South Australia by prominent business men and academics to oppose the Commonwealth's increasing constitutional powers.

Hannan raised the allegations to counter an allegation of hypocrisy levelled at him by Arthur Calwell concerning the position the crown solicitor would take in the referendum. He alleged that the Minister for Information was basing his allegation on information obtained through censorship. Calwell promptly denied that his department had received any information from the censorship concerning the crown solicitor and that the allegations were a 'pure fantasy'.[90] The Minister for the Army, Forde, also declared that no requests for surveillance of Hannan had been made and added that he

[89] 'Referendum. Nazi Technique Alleged. Mr Hannan Replies to Mr Calwell', *The Advertiser,* 30 June 1944, 5; 'KC Says Letters Intercepted', *Argus,* 30 June 1944, 3; 'Law Officers Allegation', *Sydney Morning Herald,* 30 June 1944, 4.

[90] 'Mr Calwell Replies to Mr Hannan', *Argus*, 1 July 1944, 5; 'Mr Hannan's Charges Mr Calwell Says "Pure Fantasy"', *Advertiser* (Adelaide), 1 July 1944, 5; 'Fantasy Says Mr Calwell', *Sydney Morning Herald,* 1 July 1944, 4.

would recommend the matter investigated by the Parliamentary Censorship Committee.[91]

Hannan was a key figure in the post-war powers debates and prominent for his obstruction of the Commonwealth's plans. He 'fervently believed in States' rights and was suspicious of any move towards centralism'.[92] Hannan based his suspicions on a number of other incidents, including a conversation between the South Australian Premier, Thomas Playford, and Evatt and the drafting of the War Powers Bill. Playford told Hannan that Evatt had become enraged during a telephone conversation on 11 January 1943, when Playford told Evatt of the growing agitation in the state against the proposed increase in Commonwealth powers. During the telephone conversation Evatt declared that he would find out who was funding the campaign against the federal government and use the information 'politically'.[93] Hannan was also suspicious on the grounds that there were certain omissions in the final bill proposed at the convention that he believed were due to information garnered from his private correspondence.

The allegations were eventually referred to a judicial inquiry over the parliamentary committee. Justice Clyne was appointed under the *National Security (Inquiries) Regulations* on 8 July by the prime minister to investigate the Hannan allegations. Earlier in the week Curtin stated to the press that he was deeply concerned about the allegations and the breach of privacy, but stressed the importance of appointing a commissioner to substantiate the claims and 'established beyond any doubt that it did

[91] 'KC's Charges Denied. Censorship Body to Inquire', *Sydney Morning Herald*, 3 July 1944, 4.

[92] John Playford, "Hannan, Albert James (1887-1965)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/hannan-albert-james-10415.

[93] 'Evidence on Charges by Mr Hannan, Says Letters Were Intercepted', *Argus*, 25 July 1944, 3.

happen'.[94] Clyne's appointment brought a sharp rebuke from the opposition who thought it should be investigated by the parliamentary committee. Senator Foll and J. P. Abbott, members of the opposition and the committee criticised the appointment arguing that the 'Government was now simply ignoring the committee… Why should it be considered necessary for a judge, instead of the committee, to hear Mr Hannan's allegations and not other people's allegations.'[95] Curtin responded that the committee had not been disbanded, reiterating the seriousness of the allegations and that Hannan had told the government that he wanted a judicial inquiry.[96] Evatt stated that a Commission was favoured due to the seriousness of the allegations that required prompt scrutiny.[97] Despite the government reassurances about the future of the parliamentary committee, the appointment of Clyne was the first step toward its abandonment, with the government members becoming increasingly preoccupied with the referendum campaigns.

The Clyne Commission opened in Melbourne on 19 July, but moved to Adelaide on 24 July after Hannan declared that he was unable to go to Melbourne for the hearing.[98]

---

[94] NAA: A1608, S21/1/1 and; NAA: A5954/69, 164/4, Press Statement by the Prime Minister, Clyne initially declined to accept the commission due his commitments to the Australian First Inquiry and his duties on the Bankruptcy Court. The Attorney-General's Department was confident that the inquiry should only take half a day unless it was required to sit in Adelaide. Memorandum from Castieau (Assistant Secretary, Attorney-General's Department) to Evatt (Attorney-General), 6 July 1944, NAA: A472, W22985, A. J. Hannan – Crown Soliticor S. Australia – re opening of letters and listening in to Telephone Conversations - N.S. (Inquiries) Regs.

[95] 'Judges Inquiry Criticised', *Daily Telegraph*, 10 July 1944.

[96] The support for the Parliamentary Committee was also seen with the narrow terms of reference provided to Clyne. 'Wide Censorship Inquiry Refused', *Daily Telegraph*, 11 July 1944.

[97] *CPD*, HR, Vol 179, 19 July 1944, 142.

[98] Hannan wrote to the Attorney-General that he was unable to attend the sitting at Melbourne due to his 12 witnesses residing in Adelaide who were unable to travel at late notice and that further evidence may be produced during the inquiry. Hannan threatened the credibility of the commission if his application was denied: 'If the Commonwealth desires an adequate and proper judicial inquiry I must be given the fullest opportunity of calling witnesses and presenting my case in Adelaide'. NAA: A472, W22986, Telegram from AJ Hannan (Crown-Solicitor, South Australia) to the Attorney-General's Department, 11 July 1944. *Herald*, 11 July, 1944 and 14 July 1944.

Andrew James Watt and Archibald McDonald Fraser assisted the commission, while Hannan was represented by F. J. Smith and J. F. Bazel. Fraser was a barrister, Labor member of the Legislative Council in Victoria and had represented Ward in the Brisbane Line inquiry in 1943; he had additionally acted as counsel in other national security inquiries. He would also act as counsel for Webb in his inquiry. One of the first matters addressed by Smith was to stress that his client had not identified any individuals in his allegations. However, on the second day of giving evidence Hannan stated that 'I think Dr Evatt had a hand in it'. When Watt asked if that was 'an imputation against Dr Evatt', Hannan replied 'yes'.[99] On the second day of evidence, South Australia's Attorney-General, Abbott and Kevin L. Ward, legal practitioner and lecturer on constitutional law at the University of Adelaide, confirmed for the commission the letters posted to them by the crown solicitor had been delayed. Also, members of the Constitutional Powers Committee, Mr O.L. Isaachsen, general manager of the Bank of Adelaide and Sydney Powell, chartered accountant, gave evidence to the commission on 25 July that they had heard similar noises to Hannan during telephone calls.[100] Various members of the postal service and censorship bureaucracy were examined including the district censors for South Australia and New South Wales, the Director and Deputy Director of Security and Ettelson. All of them denied that there was ever a request made or direction given to intercept Hannan's mail or listen into his telephone conversations. However, no-one could provide an adequate explanation as to why all of the letters would have been delayed in their arrival, as mis-sorting of seven individual letters would have been unlikely.

[99] 'Evidence on Charges by Mr Hanna, Says Letters Were Intercepted', *Argus*, 25 July 1944, 3; *Herald*, 25 July 1944.

[100] 'Did Not Complain to Authorities, KCs Evidence on Letter Delays', *Argus*, 26 July 1944, 5; *Age*, 26 July 1944.

The practice of 'tapping' of telephones was unsettling for the public, who conjured a sense of disquiet when crackling, clicking or other noises were heard when using a phone. Therefore, the allegations made by Hannan carried a resonance with voters concerned about a growing bureaucracy coveting powers to intrude in their lives. Hannan's allegations were supported by other influential individuals. Whether sincere or sinister, it was a concern for the Curtin Government. The General-Manager of the Bank of Adelaide stated his support for Hannan's allegations of telephone surveillance in the press and was so convinced that his conversations were being monitored due to his position with the Constitutional Powers Committee that he resorted to using public telephones when he required to convey any private matters.[101] In investigating these claims and serving to reassure the public about phone noises, Edward F. Dowse, a telephone engineer, was called before the commission. He stated that tapping did not create any noise, and the most likely source would have been faulty lines. He provided a plausible explanation regarding the noises during the phone conversations.[102] This would also be re-iterated by Webb in his inquiry.

The gathering of evidence was completed on 28 July, however, the commission did receive a number of telegrams requesting a stay in proceedings to allow for further evidence, but the commissioner did not see the necessity, especially as the nature of the evidence was not outlined. In his closing statement Watt declared:

> I submit Hannan is a jealous man and had reason to believe he had been ousted from his position of influence with the Premier (Mr Playford) by the Canberra Conference, at which Dr Evatt was present.

[101] 'Mail Tampering Inquiry', *Canberra Times*, 26 July 1944, 2.

[102] 'Did Not Complain to Authorities, KCs Evidence on Letter Delays', *Argus*, 26 July 1944, 5; *Age*, 27 July 1944; *Daily Telegraph*, 27 July 1944; 'New Start with the Censorship Probe' and 'Censoring of the Censor, "Demands" Public Should Make, *Sydney Morning Herald*, 27 July 1944, 2 & 4; 'Security Chief as Witness, "No Order to Tap Telephone"', *Sydney Morning Herald*, 28 July 1944, 4.

> Evidence has shown that Hannan is a man who, once he gets his suspicions, will promulgate them, absolutely regardless of injury they might do to the reputation of any man.
>
> I sum up, Hannan is a gentleman crazy with suspicion when he finds something is said about him and he wants to throw back something that will hurt.[103]

Clyne finished his report on 16 August 1944, finding that there had been no interference with Hannan's mail or telephone conversations. The commissioner found that it was regrettable that the complaints were not made at the time of their occurrences as it would have allowed a more thorough investigation as to what delayed the letters. Clyne stated: 'I consider that Mr Hannan was carried away by his suspicions in making the statements subject of this inquiry, and that his telephone conversations had been listened into'. Furthermore, he found that the 'interference could not have occurred without coming to the knowledge of one or more of the witnesses called by Counsel assisting the Commission'. Finally, he added that 'the imputations contained in the statement attributed to him are not true; but in regard to this conclusion I think it just and proper to add that I believe that these statements were not purposely untrue'.[104] Clyne's report was tabled in the Senate and the House of Representatives on the 30 and 31 August respectively. However, the contents of the report were released to the press and appeared in the papers on 18 August. The Adelaide *Mail* described the timing as opportunistic before the referendum polls on the following day.[105]

---

[103] *Daily Telegraph*, 29 July 1944.

[104] NAA: A5954/69, 164/4 and; A1608, S21/1/1, 'Report of Justice Clyne, Commission of Inquiry into the imputations contained in the statements attributed to Albert James Hanna, Crown Solicitor of South Australia'.

[105] 'It Happened in SA This Week', *Mail* (Adelaide), 19 August 1944, 8. For coverage of the report: 'Rejection of Mr Hannan's Charges', *Argus*, 18 August 1944, 3; 'Mr Hannan's Charges not Upheld. Royal Commissioner's Findings', *Sydney Morning Herald*, 18 August 1944, 4; 'Judge Says "Peep" Claim Unfounded', *Courier-Mail*, 18 August 1944, 3.

The Replacement of the Parliamentary Committee for a Judicial Inquiry

The appointment of Webb as a commissioner to inquire into censorship was a political manoeuvre to counter the opposition members exploiting the issue of censorship in the referendum campaign by prolonging the inquiry and raising doubts in the electorate whether the government could be trusted in exercising the powers sought. Although there was a substantial pretext justifying the handing over of the inquiry to Webb, it was controversial and reflected poorly on the judge and the perception of his independence.

Sections of the press predicted the committee's demise in early July after Justice Clyne was appointed to investigate the Hannan allegations.[106] Curtin quickly dismissed the widening of the terms of reference for Justice Clyne while expressing his 'surprise' that the committee had not finished its investigation in the period that he was overseas and he would consider the committee's interim report before making a decision.[107] It was argued in the press that the government members of the committee would not have time to sit on the committee due to the coming referendum, especially with the difficulties it had had meeting in the past. At least it was thought that the committee's membership would have to be reconstituted, with members of the government's caucus taking over the minister's positions on the committee.[108] The *Herald* in Melbourne speculated that the delay in the committee was an intentional strategy: 'there has arisen a strong suspicion that the adjournment is being prolonged until the Parliamentary sittings and the referendum campaign provide further excuses for avoiding more revelations embarrassing to the Government'.[109] Evatt was supportive of reconstituting the

[106] 'Censorship Inquiry. Judge May Take Over', *Sydney Morning Herald*, 10 July 1944, 4.

[107] Daily Telegraph, 11 July 1944.

[108] Ibid.

[109] 'Fade-Out of the Censorship Inquiry', *Herald*, 11 July 1944.

membership of the committee or handing over the inquiry to a member of the judiciary.[110] Cameron raised objections to the latter proposal in parliament, arguing that the issue was essentially an administrative matter and that it was the duty of parliament to oversee, not to administer a judicial inquiry.[111] Curtin remained supportive of the continuation of the committee, and after consultation with Menzies and Fadden directed Evatt to call a meeting for Friday 21 July.[112] Two matters transpired on 20 July that changed the position of the prime minister and led to the appointment of Webb. This was the perceived attitude of Abbott in his response to the invitation to the meeting and the printing by the *Sydney Morning Herald* of a secret document that had been tendered to the committee.

Abbott responded to the Secretary to the Parliamentary Committee, J. Q. Ewens' memorandum about the meeting, stating that he was unable to attend on that Friday due to a commitment to attend the annual meeting of the Australian Wool Board and that he would not sit on the Sunday. He could sit on the Saturday and then for the following two weeks. He was also unable to furnish a full list of the witnesses he desired to call.[113] In response, Evatt wrote to Curtin on behalf of the four ministers on the committee that there were indications that Abbott, 'acting together' with Foll and Cameron, held a 'desire to impede and unnecessarily prolong the enquiry'. This was based on the proposed witness list and the projection of two weeks of sitting when the ministers desired to be active in the referendum campaign. The letter also intimated that

[110] 'Dr Evatt Favours Cenorship Review Change', *Canberra Times*, 12 July 1944, 2.

[111] *CPD*, HR, Vol. 179, 20 July 1944, 339.

[112] *CPD*, HR, Vol. 179, 19 July 1944, 189; 20 July 1944, 379.

[113] NAA: A472, W22283, Part 2B , J.P. Abbott, Cth MHR to J.Q. Ewens, Secretary to the Parliamentary Committee on Censorship, 20 July 1944.

sensitive documents and statements had been released to the press by the opposition members without the committee's approval.[114]

The document in question was 'the categories of information sought from the postal and telegraph censorship by Commonwealth departments other than Navy, Army and Air', which was printed verbatim in the *Sydney Morning Herald*.[115] Ewens informed the attorney-general the following day that there had been a breach and that it was an offence under section 79 of the *Crimes Act*. Furthermore, Ewens suggested in a handwritten attachment to the minute paper draft that a judge take over the censorship inquiry due to the leak; this would benefit the ministers on the committee, who were busy with the referendum campaigns.[116] The prime minister was informed by the Attorney-General's Department in a minute paper that: 'it appears to me that there is justification for the appointment of a Commission of inquiry to investigate the circumstances in which the document came into the possession of the press'. The minute also warned that if a judicial inquiry were appointed to replace the parliamentary committee it would 'be a protracted one, it would not be wise and convenient to entrust to a Supreme Court Judge'.[117]

A decision was made at some point in the morning of the 21st before Curtin tabled the interim report of the parliamentary committee in the House of Representatives at 12.45pm, stating that the committee's recommendations were being acted upon by the government and adding that the committee's investigations would be continued by a

[114] NAA: A472, W22283, Part 2B , H.V. Evatt, Attorney-General and Minister for External Affairs to J. Curtin, Prime Minister, 20 July 1944.

[115] Refer to Appendix 7 for a reproduction of the list. 'Details sought from mail censors', *Sydney Morning Herald*, 20 July 1944, 5.

[116] NAA: A472, W22283, Part 2B Minute Paper, Attorney-General's Department, 21 July 1944.

[117] NAA: A472, W22283, Part 2B Minute Paper, Attorney-General's Department to the Prime Minister,

judicial inquiry.[118] After the tabling of a few other papers, the House adjourned until after the referendum, thus preventing any discussion of the interim report that had been in the government's possession for over a month. Furthermore, Curtin gave no indication of the government's decision to appoint a judge, although he had had an opportunity to do so earlier in the session. Holt had raised censorship in a question regarding whether complaints by businesses about having information removed from correspondence would be investigated by the committee.[119]

At 5.43 pm a telegram was sent to the Queensland Government requesting the services of Sir William Webb to continue the investigations into censorship. It was anticipated that the work would not last for more than three weeks, and the Commonwealth would pay for the salary of an acting judge.[120] This was accepted by the Premier, Edward M. Hanlon and Webb.[121] Macrossan acted as Chief Justice in Webb's absence, and E.J.D. Stanley continued as an acting justice, a position he was holding while Justice Philp was acting on the Fruit and Vegetable Commission.[122] Webb was already engaged in work for the Commonwealth with the War Crimes Commission and was hearing

---

[118] *CPD*, HR, Vol. 179, 21 July 1944, 379.

[119] Curtin responded: 'If they are due to censorship, I shall see that they are examined', *CPD*, HR, 21 July 1944, 365.

[120] NAA: A472, W22283 Part 1, Telegram from Prime Minister to the Premier of Queensland, 21 July 1944. The telegram was drafted by the Attorney-General's Department with the editing illustrating the political sensitivity being executed with a section of the original draft which read: 'Commonwealth Government has decided to substitute a judicial inquiry into censorship for the inquiry which has been undertaken by a Parliamentary Committee' and was replaced with: Commonwealth Government has decided that Censorship Inquiry which has heretofore been undertaken by a parliamentary committee should be continued by a judge of the supreme court of one of the states'. The latter certainly emphasises reluctance to replace the Committee while the former could be construed as political expediency being the motivation behind the appointment. NAA: A472, W22283 Part 1 'Memorandum for Prime Minister Department from the Attorney-General's Department', 21 July 1944,.

[121] NAA: A472, W22283 Part ,1, E.M. Hanlon, Acting-Premier to J. Curtin, Prime Minister, 25 July 1944.

[122] 'Judge Macrossan to Act as C.J.' *Courier-Mail*, 28 July 1944, 3. Stanley's initial appointment in May caused a sharp rebuke by Justice Brennan on the grounds that he had been 'viciously victimised' by being side-tracked to a regional court in favour of the acting-justice who was being paid more than the sitting justices, 'Judge Criticises Court Posting', *Courier-Mail*, 23 May 1944, 3.

testimony in Melbourne from *Centaur* survivors, which he planned to do in conjunction with the censorship inquiry.

The Webb Commission

Sir William Webb was appointed by Curtin on 25 July under the *National Security Inquiry Regulations* as commissioner to report on postal and telegraph censorship. The *Sydney Morning Herald* in an editorial criticised the appointment, stating that it was 'invidious', and this quality would only be heightened by the 'vague' terms of reference.[123] The terms of reference issued for the censorship commission to inquire and report to the Prime Minister on the following matters:

> (a) on all matters relating to post and telegraph censorship (including telephonic censorship) referred to the Parliamentary Committee on Censorship mentioned in regulation 127 of the National Security (Supplementary) Regulations which, in the opinion of the said commissioner, having regard to the interim report of the committee dated the 14th day of June, 1944, and the decision given to implement the recommendation made therein, require investigation or further investigation; and (b) on all matters which, in the opinion of the said commissioner, are relevant to any of the above matters or should, in his opinion, be dealt with or reported upon by him, and in pursuance of regulation 71 of the National Security (General) Regulations, the commissioner was authorised to require any person to furnish or produce to a person specified in any such requirement any information or article in his possession as is so specified, being information or an article which the said commissioner considers it necessary or

[123] 'New Start with the Censorship Probe', *Sydney Morning Herald*, July 27 1944, 2.

> expedient in the interests of the public safety, the define of the Commonwealth, or the efficient prosecution of the war to obtain or examine.[124]

A.M. Fraser, who was counsel assisting Clyne in the Hannan inquiry, was appointed counsel assisting the commissioner. In the opening of the commission, Fraser summarised Webb's role: 'to consider communications censorship, having regard to the recommendations made by the Parliamentary Committee and where the recommendations were considered valuable and worthy of immediate implementation, whether you think they require any further investigation, and if so to report thereon'.[125] Webb echoed this focus in his report, where he stated that the principal aim of the inquiry was to examine the quality of the censorship and liaison staff, the procedures they followed, and to determine if any misuse of censorship powers by any government authorities had occurred.[126] The commissioner also made it clear at the opening of the proceedings that although the terms of reference concerned the parliamentary committee, he would not be bound by that committee's findings if the evidence led him to a different view.[127]

The commission sat in the High Court in Melbourne for five days (3, 4, 8, 9 and 11 August). The brevity of the proceedings was a result of the limited number of witnesses who came forward in possession of evidence that satisfied the commission. The commissioner advertised nationally, calling for any person who had evidence that could be provided to the proceedings. However, the commission examined only 17 witnesses,

---

[124] Copies of the instrument of appointment are contained in NAA: A472, W22283, Part 1 and reproduced in *CPD*, HR, Vol. 179, 15 September 1944, 922-923.

[125] Transcript of the Censorship Commission of Inquiry Proceedings, 3 August 1944, 2. Transcript is contained in file, 'Parliamentary Censorship Committee - censorship Enquiry by Sir William Webb - Part I', NAA: A472, W22283. Forthwith, referred to as Commission Proceedings.

[126] Commission Proceedings, 2-3.

[127] Commission Proceedings, 2.

of whom only two were civilians who had complaints about the excessive use of censorship.[128] At the close of the second day's proceedings Fraser declared that he had no more witnesses to call after only five departmental witnesses were examined. Webb mused: 'Does that mean that this Inquiry is about to close at this early stage? I am inclined to keep it open a little longer'. Webb adjourned the proceedings until Tuesday 8 August, as he had to attend to business of the second war crimes commission.[129] After another two days of sittings the witness list was again exhausted; Webb decided to adjourn once more to wait for more witnesses. The commission had received letters from people with complaints, but they failed to identify the evidence they had to support their claims, or the mail was sent or received in 'areas of special operational importance', or their complaints were not the fault of the operation of censorship.[130] Therefore the inquiry mainly examined members of the government and the armed services who were involved in the administration of censorship. Three civilians came forward, two with complaints regarding an interrupted telephone conversation, and the other was the managing director of Monsanto Pty Ltd, E. F. Norris. Norris gave evidence to refute claims made in the press that his company had made complaints about censorship, as it had not.[131] Cameron was asked in the press why he did not provide evidence, since he instigated the controversy and the inquiries. He replied that he had provided all of his information to the parliamentary committees.[132] The limited

[128] See, Appendix 8. List of Witnesses Appearing before the Censorship Parliamentary Committee and the Judicial Commissions of Inquiry, 221.

[129] 'No Evidence by Private Citizens', *Argus*, 5 August 1944, 3; '"Telephone Snooping" Charges Denied', *Sydney Morning Herald*, 5 August 1944, 4; Commission Proceedings, 52-56.

[130] See Commission Proceedings, 52-55, 89-91 and; Exhibit 19. Limited correspondence relating to witnesses request to be heard by the commission is held in NAA: A472, W22283 Part 2A.

[131] Commission Proceedings, 70-71.

[132] 'Censorship Inquiry, "Vital facts not Disclosed", *Advocate* (Tasmania), 16 August 1944, 5; *The Herald*, 15 August 1944.

number of witnesses, (refer to appendix 8), especially citizens, provided substantial ground for criticism when the report was released, as will be discussed at greater length below.

The commission opened on 3 August with Ettelson providing evidence on the structure and procedures followed by the censorship offices. He reiterated that it was not logistically possible to scrutinise any sizable proportion of inland mails, but the office endeavoured to censor all overseas mail and correspondence with prisoners of war and internees. However, he stated that censorship acted as a deterrent, and therefore it could not be removed completely from inland mail.[133] Ettelson guaranteed the quality of the staff employed by censorship, who were required to submit extensive applications and to be vetted by the Security Service, adding:

> Under those conditions we have endeavoured to build up a staff of people who are entirely trustworthy and competent. In fact I have an intimate personal knowledge of the type of people employed in the censorship throughout Australia, because I have made it my duty to pay visits as frequently as I can to every censorship district – and not to rush in for a day and rush out again – to see something of the management of the district censorship officers, to talk to each of the personnel, to get to know them and see how they are for their jobs.[134]

Ettelson also discussed the procedures for the formulation of lists for scrutiny by the Security Service and intelligence branches of the military forces. He stated that a request with satisfactory reasons for surveillance must be rigorously established before the district censor will add a person to the list, and then only for a limited time. Therefore, the lists were kept relatively short, unlike the First World War, when 'about 15,000 persons were being systematically watched'.[135] Ettelson stressed that no member

[133] Commission Proceedings, 10-11, 18. Ettelson provided the figures of a '1000 million'.

[134] Commission Proceedings, 17.

[135] Commission Proceedings, 10-11; Scott, *Australia During the War*, 11: 83.

of parliament had been placed on the list for scrutiny or had their phone lines observed. Webb and Fraser questioned Ettelson over the matter of whether censorship was being used for political purposes and were assured that no such request had been made and would not be granted:

> Webb: Are those requests [by the security services or armed forces] directed at the enforcement of war legislation?
>
> Ettelson: Yes, otherwise the District Censor would not be prepared to accede to the requests.
>
> Fraser: All the censors make sure that the request is based on the war effort?
>
> Ettelson: I have maintained such a close personal touch with district censors that I know of my own knowledge they are very alive to their obligations in this regard. The censorship has never permitted itself to be utilised for any political purpose.
>
> Webb: You are clear about that?
>
> Ettelson: I assure you, Sir, that is so.
>
> Webb: And you can speak for your officers?
>
> Ettelson: I can. It has never been sought to use it. No pressure has been exercised to utilise the censorship for any political purpose. We just would not accede to them if they had been made. But we have not only assisted in policing such regulations as have been made under the National Security Act but an entirely separate one, and certain Customs proclamations which are made under the Customs Act but exist only for wartime purposes.[136]

Ettelson also summarised the procedures of the contentious liaison system between censorship and other government departments. The system operated with liaison officers who were appointed by the various Government Departments in each capital city. When the censor found information that may be of use to the war effort, it was

[136] Commission Proceedings, 19.

handed to a senior member of the censorship staff, who then decided whether to forward the information to the relevant department's liaison officer. The liaison officer then decided whether the information was of use to the department in question. The process followed strict guidelines to maintain secrecy.[137]

On the second day of the proceedings, the procedures of censorship, especially regarding liaison with other departments, was investigated further with the examination of George William Strachan Anderson (District Censor of Victoria), Gordon Frederick Massie (Officer in Charge of the Information Subsection of Censorship in Victoria) and Urlice Ruegg Ellis (Liaison Officer in the Department of Munitions).[138] The three witnesses were involved in the controversy regarding the widely publicised case of the plastic formula being extracted from a manufacturer's correspondence with its parent company in the United States, an incident that had been raised with the parliamentary committee. Massie gave evidence that a censor brought the correspondence to his attention for its potential worth to war production. Massie agreed that it was of interest and forwarded the correspondence to Ellis. Two other persons saw the correspondence in the Department of Munitions, the Director of Materials and the Assistant Controller of Materials, who deemed the information to be of no use. Consequently the correspondence was returned to the censor and continued on to the manufacturer. Webb and Fraser were satisfied with the operation and convinced that discretion had been used in the procedure. Furthermore, the company was not inconvenienced or had expressed any grievance.[139] The commission conducted further inquiries into the formation of security watch lists with five officers from government departments, the

[137] Commission Proceedings, 26-28.

[138] Commission Proceedings, 37-45.

[139] Commission Proceedings, 35 & 45.

Security Service and military intelligence examined. Their evidence corroborated the earlier evidence provided by Ettelson and Anderson regarding the size of security list being kept to a minimum and the strict observance of the procedures in place for the scrutiny of mail and telephones.[140] The witnesses stated that their departments could only receive information from private correspondence and have telephones observed only after making a formal request to the district censors, or if their liaison officer was approached by the censorship office when matters of possible interest were discovered. It was stated by all the witnesses that the only information provided by the censor to other departments and agencies was material that related directly to the war. Both Fraser and Webb appeared satisfied with their statements, but were hesitant to probe due to national security concerns.[141]

The commission called several witnesses to provide evidence that the procedures summarised by Ettelson were followed by all state offices. Anderson provided testimony that the procedures were followed in Victoria and Queensland, as he had spent several months in the Brisbane office. A.L. Campbell, District Censor of New South Wales and formerly South Australia, confirmed that procedures were rigorously followed in those states. Testimony from the Clyne Inquiry into the Hannan allegations by Rupert Hunter, successor to Campbell as District Censor in South Australia, supported evidence submitted. Campbell also told the commissioner that procedures followed in Western Australia were based on the New South Wales office, as his predecessor was district censor in that state.

---

[140] The five witnesses examined were: William Valentine Simpson (Director-General of Security), Patrick Cecil Greenland (Assistant Secretary in the Department of War Organisation of Industry), Robert Arthur Little (Assistant Director of Military Intelligence, Land Forces Headquarters), Reginald Alfred Smithers (RAAF Security Section, Branch of the Chief of Air Staff) and Zelman Cowen (RANVR, Naval Intelligence Division of the Australia Commonwealth Naval Board Headquarters).

[141] Commission Proceedings, 5-28, 31-41.

The quality and trustworthiness of the censorship staff had been the subject of wide public conjecture. Evidence provided by Ettelson and Anderson suggested that almost all liaison officers were senior and permanent public servants of trustworthy character. Ettelson also stressed that the censorship staff were scrupulously selected and were trustworthy. No staff members had active business interests, and all had taken the public service oath of secrecy. Many were practising lawyers before the outbreak of war, and some had experience in censorship in the previous war.[142]

The second day also heard evidence by Edgar Milton Dowse (Supervising Engineer of Telephone Equipment, Chief Engineers Branch, Postmaster-General's Department) who had thirty-five years of experience as a telephone technician. His testimony provided evidence regarding the widespread misconceptions regarding 'phone tapping'. It was a common belief that noises such as a clicking indicated that the phone was being tapped. However, Dowse told the Commission that the surveillance instruments were silent, providing no indication to the caller or receiver of a telephone conversation when the line was being observed. Equipment faults could explain the complaints mistaken for phone observations, such as the noises, and in the case of interrupted phone calls it may have been a crossed line. Furthermore, when Ettelson was recalled he added that it would not be in the interest of the censor or security services to indicate a phone line was being observed.

The two civilians to provide evidence at the commission made two separate complaints about telephone calls that were interrupted by a third party in late 1942 and early 1943. Mrs Hattie Martha Leckie, wife of Commonwealth Senator Leckie, and Mrs Beryl McElwee, claimed that in the middle of their conversations a third person interrupted

[142] Commission Proceedings, 5-7, 16-17, 35.

when they mentioned their sons, who were serving in operational areas. Mrs Leckie said that it was a female voice which sounded 'official', while the voice that interrupted McElwee was a male who identified himself as belonging to the Department of Information. Fraser vigorously examined both women to dismiss their claims that it was an act of censorship. He pushed two issues with the witnesses, firstly, how they could know it was an official and not someone who had crossed lines. Secondly, he queried them as to why they had not made a complaint at the time. Fraser was especially critical of Leckie on this due to her political connections. Evidence was brought forward by Ettelson to dismiss the allegations; he stated that there were no records of either line being observed, and T. L. Hoey from the Department of Information stated that his department had no involvement in postal or telegraph censorship.

Reception of Webb's Report

Webb's six-page report was completed on 11 August 1944, the last day of the proceedings.[143] In the report, Webb found that he was satisfied with the quality of the persons administrating censorship and the liaison officers who had been examined by the commission. He held that they had been carefully selected, were trustworthy and discreet in their duties. He could find no evidence of the misuse of censorship, neither was there evidence to support the claims of members of parliament having their mail scrutinised or phones tapped. Webb concluded that:

> I have no evidence warranting any adverse finding. On the contrary, communications censorship appears to have been exercised solely for the purposes for which it was introduced, that is, for national security and

[143] NAA A472, W22283 Part 1 Attachment, 'Inquiry by Sir William Webb into Postal, Telegraphic and Telephonic Censorship' Report of Commissioner appointed under National Security (Inquiries) Regulations. It was also printed in the Digest of Decisions and Announcements and Important Speeches by the Prime Ministers, No. 86, NAA: B5459, 86; Lloyd Ross, *John Curtin: a biography* (South Melbourne, Vic: MacMillan, 1977). 350-53.

> the successful prosecution of the war.[144]

The report was released publicly on Monday 14 August, with newspapers covering the story the following day. The press were critical of the report, with the most outstanding being the *Sydney Morning Herald* editorial which declared the investigation 'so limited as to have been perfunctory'.[145] The editorial argues that the report was written with the object to support the government's referendum. The limited duration and number of witnesses was a key complaint that was directed at Fraser:

> There was… no real attempt at any stage to probe beneath the smooth surface of the official testimony; nor was any effort made, by the Commissioner or counsel, to go beyond the formal accounts of censorship proceedings…
>
> …If, however, all the evidence procurable had been sought out the Commissioner might not have been able to report so promptly and favourably to the Government…[146]

Dr Frank Louat, president of the Constitutional Association of New South Wales, was asked his views of the findings:

> …owing to the uniquely adroit political handling this question has had, there is probably nothing left for the commissioner to do…
>
> The results of this [parliamentary committee] inquiry, by men not unduly scandalised by the revelations – since they were sitting in judgment on themselves – were that the worst aspects of the whole matter were carefully edited and filtered through to the public.[147]

When tabled in parliament on 13 September 1944, the report received wide criticism in parliamentary debates, with the opposition being led by Abbott, who identified many

---

[144] 'Inquiry by Sir William Webb into Postal, Telegraphic and Telephonic Censorship' Report of Commissioner appointed under National Security (Inquiries) Regulations.

[145] 'The Webb Report', *Sydney Morning Herald*, 15 August, 2.

[146] Ibid.

[147] 'Dr Louat's view', *Sydney Morning Herald*, 12 August, 1944, 3.

flaws in the inquiry. Webb was criticised for the inadequate number of witnesses, the short period of investigations and the failure to address the concerns raised by the members of parliament that prompted the inquiry; those concerns had included publicity censorship.[148] Abbott claimed that there were witnesses wanting to give evidence, but they were not called and the commission did not attempt to seek further witnesses. Abbott also asked why the evidence heard by the parliamentary committee and reported in the *Sydney Morning Herald* regarding information that the Commonwealth Bank and the Department of Trade and Customs provided concerning censorship was not investigated by Webb. Neither of the liaison officers from the departments was examined, and it was not established if the information the departments received related to the prosecution of the war or national security. Furthermore, Abbott desired to know what was done with the information once it was provided to a department and where it was stored.[149] Cameron and Holt supported Abbott, questioning why the suppression of the Sydney press was not included in the inquiry, as it was a matter to be investigated by the parliamentary committee. Curtin, on the other hand, supported Webb and his report:

> I considered that the inquiry ought to be conducted judicially by a man of reputation, such as a justice, who was accustomed to weighing evidence. Consequently, I endeavoured to obtain the services of a judge of the highest standing even among his own peers, and I was happy to get the Chief Justice of Queensland.[150]

The criticisms levelled at Webb and his commission have merit when the examination of the members of the government departments is compared with that of Mrs Leckie and Mrs McElwee. The questioning of the latter two was fitting for a criminal trial, with

[148] *CPD*, HR, Vol. 179, 13 September 1944, from 699.

[149] *CPD*, HR, Vol. 179, 13 September 1944, 700-6.

[150] *CPD*, HR, Vol. 179, 13 September 1944, 707.

repetitive questioning and scrutiny of inconsistencies in the answers, which was lacking in the other examinations. The repetitive questioning of Mrs Leckie by Fraser caused Webb to interject at one point: 'I think Mrs. Leckie has made it quite plain for my purposes'.[151] Another example of Fraser's curtness was in the following exchange:

> Fraser: Whether it was a Government regulation or not you were in a very favourable position to make enquiries about it?
>
> Mrs Leckie: I do not ever dabble in politics.
>
> Fraser: Just answer the question, please. The answer to that question is obviously "yes", is it not?
>
> Mrs Leckie: Yes.[152]

The tone in the Leckie and McElwee examinations is more inquisitorial; it appears that Fraser was trying to disprove their claims. This tone and manner was absent in the interrogation of the public servants and officials examined by the commission. The requirement of the commission undertaking cross examination of witnesses creating the 'danger of appearing to be hostile towards them'.[153]

It is evident that certain matters were not covered by the commission that would have been of interest to the public. The report and evidence submitted did not mention the reports on public opinion and morale that were prepared by the Post and Telegraph Censorship for intelligence officers and higher government members. The reports had been gathered from the beginning of hostilities.[154] This indicates that censorship of inland mail was wider than what Ettelson indicated, and that general information was

---

[151] Webb Inquiry Transcripts, 110.

[152] Ibid, 111.

[153] J.D. Holmes, "Royal Commissions," *The Australian Law Journal* 29(1955): 259.

[154] Hasluck, *Government and the People*, 2: 745.

provided to departments, rather than the specific matters discussed at the commission. Abbott raised the matter in the debate on the Webb report with regard to the evidence provided by Simpson, who was the Chairman of the Morale Committee: 'I do not know what the functions of that committee are, but I am told that it was given what amounted to full right to obtain extracts from censored mail in order to judge the morale of the community'.[155] However, it was claimed that the committee actually succeeded in having the weekly reports stopped.[156]

The commission failed to achieve one of the important functions of all public inquiries, namely to give a voice to members of the public. Although Webb assured in his report that there had been sufficient time for members of the public to bring evidence forward to illustrate misuse of censorship, the specific nature of the issues being examined and the type of evidence in which the Commission was interested, precluded an important avenue for the public to air its grievances resulting from the intrusion into their lives. Webb's appeal to the public was reported in the press; he 'would hear anyone who gave him an outline beforehand of evidence to be tendered'.[157] The commission received a number of letters from members of the public, however, in none of the cases were the claims supported by physical evidence, and those that were could be dismissed due to the letters being sent or received in areas that were under military control.[158]

---

[155] *CPD*, HR, Vol. 179, 13 September 1944, 705.

[156] Vickery, "Telling Australia's story to the world," 6. It would appear that the Prime Minister's Department also stopped receiving the reports in April 1942, Letter from Ettelson (Controller of Postal & Telegraph censorship) to the Secretary of the Prime Minister's Department, 13 April 1942, NAA: A461, B318/1/2, Australian Censorship Reports.

[157] 'Censor's Aid Ended Leak Over Petrol', *Courier-Mail*, 5 August 1944, 3. This report also stated that Webb had 20 witnesses to hear in Queensland. However, this was not the case and no evidence was gathered from the Commissioner's home state. Also refer to, 'No Evidence Yet by Private Citizens', *Argus*, 5 August 1944, 3.

[158] This correspondence is held in NAA, A472, W22283 Part 2A.

A letter received by the commission after the first week of the inquiry by an individual who had overheard a conversation between a group 'familiar with the subject', expressed concern that the inquiry was being intentionally misdirected:

> One wondered if you were 'whitewashing the Govt', if so, he said a storm would follow after the House met because some of the members had the 'Low down of the inner workings of the Censorship'. It was stated that the evidence of Heads was a complete understatement, carefully concealing the actual doings of the individual members of the various staffs in the different States who blandly delved into matters outside Security for the information of the various Depts who inspected the various extracts made from the letters and telegrams.[159]

The author of the letter also raised concerns with the appointment of staff, suggesting that many were from alien or enemy firms, and also that one was known to have a criminal record. The fear was expressed that the commission would 'be steered clear of any investigation' with 'a general statement that they were Lawyers, University Officials and retired staffs'.[160] Ettelson was also criticised:

> The Head Serang was one of the most Charming [sic] and capable men in Melbourne but the trouble was he put all his staff on his own level and naturally thought they carried out his conception of Censorship.[161]

Webb's report was unable to ease the mind of the public or prevent the 'No' campaigners' ability to exploit this unease in the final days before the vote. The day after the report had been released, Menzies made reference to the 'Fascist technique of mail censorship' in a column against the referendum in the *Argus*.[162] The *Sydney Morning Herald* cited the abuse of wartime powers, which included the 'rifling of the

[159] NAA, A472, W22283 Part 2A, Letter (unsigned) to Sir William Webb, CJ Supreme Court of Queensland, 5 August 1944.

[160] Ibid.

[161] Ibid.

[162] Menzies, R.G. 'Freedom in the Future', *Argus*, 15 August 1944, 3.

mails for purposes unrelated to security' as one of the ten reasons that voters should vote 'No'.[163] Similar notions were cited by citizens in correspondence with the government. M. M. Armstrong of Victoria, for example, wrote to Webb stating: 'Civil servants rule the general public with a rod of iron these days – is it any wonder we fear the giving of still more power to such bureaucrats?'[164] Consequently the referendum failed to be carried, with 53% casting a 'No' vote and majority for 'Yes' being achieved only in South Australia and Western Australia.[165]

The Censorship Commission and Judicial Independence

Censorship was a contentious political issue which was dramatically heightened by the referendum campaigns when Webb accepted the position of commissioner to the inquiry. A key principle of judicial impartiality is the avoidance of involvement in political controversy.[166] Webb's inquiry faced a number of insurmountable difficulties that would affect the credibility of the investigation. The findings of the commission reflected negatively on how Webb's impartiality and judicial independence were perceived with speculation raised in the parliamentary debates that followed the tabling of the report.

There were a number of reasons why the commission provoked controversy as it did. Firstly, the commission controversially replaced a bipartisan parliamentarian body that had exposed a scandalous misuse of the censorship regulations. This confirmed the

---

[163] 'Ten Reasons for voting "No"', *Sydney Morning Herald*, 18 August 1944, 4.

[164] NAA: A472, W22283 Part 2A, Letter from M.M. Armstrong to Sir William Webb, CJ of the Supreme Court of Queensland. The letter was complaining to the Chief Justice about the 'farcical' evidence collected at the Commission and requesting Webb to use whatever 'influence' he had with the Prime Minister to urge a review of the regulations.

[165] NAA: B5459, 86, Commonwealth Government, *Digest of Decisions and Announcements*, No 86, 1944, 29.

[166] "Judicial Impartiality - Extra Judicial Chores," *New Law Journal* 121(1971): 119.

widely held belief in the community regarding the wide extent of the invasiveness of the authorities, which had been previously supported by personal experience and speculation in the press. Secondly, the timing of the commission's report, whether by coincidence or design, provided substantial grounds for the allegations that its completion and release were politically motivated to garner support for the referendum proposals. Thirdly, the methodology employed by the commission in its investigation allowed scope to criticise its findings. Thus, the inadequacies of the report to satisfy critics led to indirect criticism of Webb and speculation regarding his partisanship.

The censorship commission did little to affect Webb's own perceptions of his judicial independence. Writing in reply to a letter conveying congratulations for his appointment to the High Court in 1946 from the Queensland Supreme Court Justice, J.B. Matthews, Webb wrote:

> I get press cuttings occasionally but not always those I want to see. I understand the *Sydney Morning Herald* was not too enthusiastic about my appointment, to say the least. But there is a personal grudge arising out of the Censorship Report behind that.[167]

Webb's perception may be shaped by being in Tokyo at the time and not being closely abreast of the controversy his appointment had generated in domestic politics, and he was perhaps overly sensitive to the selection of press articles that were reaching him abroad. Webb's appointment to the High Court was vigorously contested in the Commonwealth parliamentary debates. This was covered and commented upon by all the daily newspapers including the *Sydney Morning Herald*, which was not alone in questioning the motivation behind the appointment which enlarged the bench of the High Court. Prior to the appointment a *Sydney Morning Herald* editorial argued that

[167] NAA: M1418, 3, Letter from Sir William Webb, President of the IMTFE and Justice of the High Court of Australia to Justice B.H. Matthews, Supreme Court of Queensland, 16 May 1946.

members of the opposition were 'justly uneasy over the possibility of a new appointment being made to suit the political ends of the Government'.[168] However, it would not appear that this paper was outstanding in its criticism in comparison to other papers, and it did not carry any adverse comment on the appointment later when it was announced by cabinet.[169] Webb's appointment to the High Court is discussed further in Chapter Eight.

Summary

The Government attempted to control the discussion on censorship throughout the entire process in an attempt to limit the political impact on the referendum vote. The selection of members of the committees and the eventual appointment of Webb were attempts to keep a lid on the issue. The four reports were tabled strategically in parliament. The reports of the privileges committee and the parliamentary committee were tabled at the end of the parliamentary sessions to limit discussions in the debates. The reports by Webb and Clyne were tabled only after the referendum vote had been cast, although the findings were released to the press earlier.

By July the worst of the revelations regarding the practices of communication censorship had been revealed to the public, such as the extent of the information that was being extracted from correspondence by the censor. The crises in publicity censorship had also been resolved, with a new agreement with the press being announced; the government needed to close the discussion on censorship in the final weeks of campaigning. Webb was appointed three weeks prior to the vote on the

[168] 'Integrity of the High Court', *Sydney Morning Herald*, 11 April 1946, 2.

[169] 'High Court Judge. Sir Wm. Webb Appointed', *Sydney Morning Herald*, 13 April 1946, 5.

referendum, and the report was handed to the government a week prior to the people going to the polls.

Censorship continued to cause controversy in the Commonwealth Parliament with Spender and Abbott raising criticism and revelations. In March 1945, questions were raised regarding a matter where extracts from a communication from a bank was read out in parliament in 1943. The bank had claimed that the extracts had been supplied by the censor to the minister, who read them. The matter persisted in the House until the end of April, when Curtin declared that the minister had assured him that the information was not received through the censorship office.[170]

From the beginning of May 1945 pressure to reduce censorship arose in the House of Representatives, with the government indicating that there was a reduction in censorship staff and the regulations relaxed. On 22 June 1945 censorship of mail between the United Kingdom, Northern Ireland, Canada, South Africa and New Zealand had ceased.[171] Further reductions in the number of nations subject to mail censorship and in staff numbers were made throughout the year, until on 7 September 1945 Forde declared to the House of Representatives that all forms of wartime censorship had been abolished.[172]

After finishing the Censorship Commission, Sir William returned to investigating war crimes and prepare for his presentation before the United Nations War Crimes Commission. Evatt shifted the focus from the censorship reports two weeks after the heated parliamentary debate by making a statement in regards to his investigations into

[170] *CPD*, HR, Vol. 181, 27 April 1945, 1199.

[171] *CPD*, HR, Vol. 183, 22 June 1945, 3562.

[172] *CPD*, HR, Vol. 184, 7 September 1945, 5253.

war crimes and the request for the Chief Justice to present his findings in London.[173] The reports the papers carried were shocking and the importance of Webb's work in seeking post-war justice was made clear; his report on censorship largely forgotten.[174]

[173] *CPD*, HR, Vol. 179, 26 September 1944, 1383.

[174] 'Tribunal on War Crimes', *Sydney Morning Herald*, 27 September 1944, 3; 'Sir W. Webb for London', *Courie- Mail*, 28 September 1944, 3.

Chapter Six:
Third War Crimes Commission 1945-1946

> Personal independence… requires that a judge not accept, nor should the executive require that he or she fill, extra-judicial roles that would be likely to interfere with his or her exercise of judicial power. This potential for interference should be assessed both in fact and according to public perception. Impermissible roles would include jobs at a high, policy-making level of the executive or legislative branch (for example, as special policy advisor on matters relating to reform of the administration of justice).[1]

The third war crimes commission is the most interesting and dynamic of the three and posed many challenges to Webb and the government. Initially, it appeared that the Chief Justice would not continue with investigations as a result of his weariness, due to the length of time the first two inquiries had taken, which in turn had produced pressures for his focus to return to the bench of the Supreme Court and the Industrial Relations Court of Queensland. This resulted in a period of negotiation between the Queensland and Commonwealth governments to secure his services and after a suitable replacement to head the Australian War Crimes Commission (AWCC) could not be found. Furthermore, the third Webb Commission was constantly overtaken by events and had to continually adapt to the changing circumstances of the war and the requirements of how information would be gathered for the prosecutions to be pursued in the trials held after the war. The AWCC

[1] Rebecca Ananian-Walsh and George Williams, "Judicial Independence from the Executive," (http://www.jca.asn.au/wp-content/uploads/2014/07/P62_02_09-Judicial-Independence-from-the-Executive-June-2014.pdf: Judicial Conference of Australia, 2014).

received significant direction from London on the procedures and nature of inquiries to be made. One of the most important and pressing matters faced by the Commission was the interrogation of released POWs. Australia was seen as the principal agent for collecting evidence in the Pacific by its European allies. There were discussions of setting up a sub-committee of the UNWCC in Australia with Webb as the Chairperson to assist the collection evidence for the European nations. The third commission was also subjected to additional public scrutiny with the release of details regarding the atrocities that had occurred in the SWPA.

The last war crimes commission illustrates the limitation of judicial inquiries. It is evident that the task of administering the post-war investigations was beyond the capacity of three judges with the limited time in which they had to complete the investigations. Consequently, within three months of the close of the war, the commission's role became limited, and the army assumed control through the MI and DPW & I sections, which had larger administrative backing. The archival evidence highlights the difficulty and concerns Webb had in handing over the investigations and prosecutions to the army. Eventually, the third commission's function was to keep the Department of External Affairs and the Attorney-General's Department informed. Webb's desire to retain control over Australian war crime investigations is also played in the conflict which arose between Webb and Judge Kirby who was appointed as an additional commissioner. Finally, the third commission illustrates a growing difficulty of Webb in defining appropriate boundaries between proper judicial conduct and the extent that he should advise the government and shape policy. In the earlier commissions Webb displayed discretion in which areas were appropriate for him to consider, for example, as discussed in Chapter Four, when he

outlined the legal options for trials of war criminals he made it clear in his correspondence that it was for the government to decide. Webb became less concerned with such discretion during the third commission, as the government made more requests for his opinion on matters that would have been more appropriate to be considered by normal public policy channels.

Webb's Delayed Reappointment

Webb arrived back in Australia after reporting to the UNWCC on 22 February 1945 and went straight to Canberra.[2] A draft letter was prepared by the Department of External Affairs on 26 February to welcome Webb back to Australia and congratulate him on his presentation to the UNWCC which had been reported to the government as being praised highly by the other national members. Along with outlining the activities of the government of collecting incoming evidence in his absence which was anticipated to be increased due to the release of POWs and internees, the letter concludes: 'It will therefore be necessary to ensure the continuation of the work which you have so ably commenced, and I sincerely hope that the Government can count on you to continue to function as Commissioner for the Investigation of War Crimes until such time as the work is finalised'.[3] However, upon his returning to Australia, Webb furnished a report to debrief the attorney-general on his trip to the UNWCC in London and closed by declaring that: 'I should like to retire now from the position of Australian War Crimes Commissioner'.[4] His

[2] 'Sir William Webb Returns', *Argus*, 22 February 1945, 6.

[3] NAA: A1066, H45/580/2, Draft letter to William Webb, War Crimes Commissioner and CJ Supreme Court Qld, 26 February 1945.

[4] NAA: A1066, H45/580/2, Sir William Webb, War Crimes Commissioner and CJ Supreme Court Qld to H.V. Evatt Attorney-General and Minister for External Affairs, 27 February 1945.

decision is quite contradictory to the summary of the success he had in presenting the Australian cases to the UNWCC and the congratulatory praise he received from foreign dignitaries. He also outlined the importance of the continuation of the inquiries, stressing not to leave investigations to the army and the possibility of a sub-committee of the UNWCC being established for the SWPA which he had been asked to chair.[5] He had also made a commitment while in London to investigate war crimes against British nationals.[6] The Department of External Affairs considered it a matter of urgency to continue the war crimes commission due the new cases being brought forward.[7] Conversely, the Queensland Government was keen to have the Chief Justice return to the bench after his prolonged absence, and with other justices being tied up in Commonwealth duties there was mounting pressure of workload and criticism of the court. This was evident before Webb had left for England with the criticism from two justices of Webb's court regarding his and other absences from the court. Justice Brennan felt 'viciously victimised' when E.J.D. Stanley was appointed as an acting justice and that he was being 'side-tracked' by the Chief Justice.[8] Justice Douglas passed comments while sitting on a case when considering how to shorten the proceedings for claims against the Commonwealth. Douglas directly attacked the Chief Justice for his acceptance of executive positions that had increased the workload of the court which he linked to the issue of inadequacy of judge's pensions in the state:

> The Commonwealth government had saved many thousands of pounds by

[5] NAA: A1066, H45/580/6, various correspondence.

[6] NAA: A1066, H45/580/2, Sir William Webb, War Crimes Commissioner and CJ Supreme Court Qld to H.V. Evatt Attorney-General and Minister for External Affairs, 27 February 1945; also refer to NAA: A989, 1944/735/580/1 and; NAA: A2937, 222.

[7] NAA: A1066, H45/580/2, Memorandum for the Minister of External Affairs, 27 February 1945.

[8] 'Judge Criticises Court Posting', *Courier-Mail*. 23 May 1944, 3. Justice Brennan was also concerned that acting justices were paid more than an occupied judge.

> the utilisation of the Chief Justice as a royal commissioner with liberal expenses attached to his position on inquiries of different natures extending over some time. One King's Counsel, according to the Press, was alone paid £6000 for about a year's work, not perhaps his whole time. They were now sending the Chief Justice to Europe on a mission, to which, as published, light duties would be attached and some leisure and relief from work could be obtained. At the same time, they imposed extra-ordinary taxations, which they said, would be permanent.[9]

Webb replied, along with denying the accusations he was withholding information about a proposal regarding judicial pensions, that the task in England would be quite 'onerous' and that federal commissioners were paid at a far lower rate than state. The criticism of Webb's departure to Europe may have been somewhat unjustified as Webb stated in in an address to the International Relations Club in the Queensland University after his return that he had 'exchanged my summer vacation for a job in winter, but I have no regrets'.[10] However, it illustrates the criticism that can be levelled at a judge when acting on government commissions especially when there are allegations of financial benefits attached to the position. Whether the criticism of Justices Brennan and Douglas had any influence on Webb or the Queensland government the latter resolved to keep the chief justice in the state on his return and informed the Commonwealth attorney-general that Webb would be resuming his judicial duties on 12 March.[11]

---

[9] 'Judge's statement on extra-work', *Central Queensland Herald*, 19 October 1944, 17. His allegation regarding the wage paid to counsel assisting the commission may have been inflated, but the costs are considerably high . Edwin J. D. Stanley assisted the First Commission and his fees for the work was initially £3649.16 but was negotiated down to £3500 by the Deputy Crown Solicitor, AG Bennett. He was paid 20 guas. a day with travelling allowance, NAA: J1889, BL43895/1, DCS to CCS, 3 July 1944.

[10]NAA: A1066, H45/580/2, Letter from Sir William Webb, War Crimes Commissioner and CJ Supreme Court Qld. to John D. L. Hood, Acting Secretary, Department of External Affairs, 11 June 1945.

[11] NAA: A1066, H45/580/2, Letter from Frank A Cooper, Premier of Queensland to John Curtin, Prime Minister, 26 February 1945.

The matter of Webb not continuing was further complicated with the commission not having a secretary as J.M. Brennan had resigned on Webb's departure to the United Kingdom leaving the commission with no permanent staff. The matter was left unresolved when Evatt left Australia in mid-March for the United Nations Conference in San Francisco to be held on 25 April. Before leaving Evatt approached Sir William Glasgow, recently returned from being Australia's first High Commissioner to Canada where he represented Australia and was considered largely successful in the role. Sir William represented Australia's interests in the operation of the Empire Air Training Scheme, promoted Australia's war efforts through public lectures, negotiated a mutual aid scheme between the two nations and attended the Québec conference with Roosevelt and Churchill. Glasgow also had a distinguished military career from the First World War and with his international standing would have been an ideal replacement for Webb. However, after Evatt departed in late March, the Department of External Affairs was informed that Glasgow had declined the invitation, most likely due to his pursuit of business interests once he returned to Queensland.[12]

On 23 March 1945 the Department of External Affairs informed the Department of the Army that Webb had resigned, there was no successor at that point named and that the Department of the Army would have to collect information regarding reported atrocities in the meantime. Of particular interest to the DEA was the execution of three Santo Tomas internees, an Australian, Blakely Bothwick Laycock and two British citizens, Henry

[12] NAA: A1066, H45/580/2, Memorandum for the Acting Minister of External Affairs, John Curtin, 21 March 1945 and; Ralph Harry, "Glasgow, Sir Thomas William (1876-1955)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/glasgow-sir-thomas-william-6397. 'Gen Glasgow To Retire', *Courier-Mail*, 2 January 1945, 1.

Edward Weeks and Thomas Henry Fletcher. The executions were witnessed by three recently released internees and naturally were also of interest to the UK Government. The Army suggested that Brennan conduct the interrogations. However, on the 9 April the HQ AMF advised the attorney-general that the interrogation of these witnesses had been done by Webb.[13]

On 3 April 1945 Webb received a telegram from Evatt in London: 'I very much hope that you will continue the investigation of war crimes. You have established an outstanding reputation here in regard to the preparation and presentation of Australian charges and both Lord Wright and John O. Oldham advise me that it would be most regrettable if you were to give up after acquiring valuable knowledge of all aspects of this work'. The telegram added that 'I trust you will be able to send me an early and favourable reply in this matter as the Philippines cases, both the United Kingdom and our own, will require almost immediate attention.[14] Webb replied on 9 April that he was continuing work for the AWCC 'with concurrence from Acting Premier Hanlon… in conjunction with state duties.' He also responded modestly to their praises: 'However respectfully and sincerely suggest Australian Commissioner of quality Brigadier Gorman or Barry [most likely the Victorian barrister John Vincent Barry who had served on a number of inquiries for the Commonwealth Government] would dwarf my efforts'. Webb was beginning to examine witnesses from the Philippines on the weekend adding 'assume your Government will agree to further appointment acting judge should war crimes investigations require my

[13] NAA: MP742/1, 336/1/1145 '4 April AMF minute paper'. However, on the 9 April the HQ AMF advised the AG that the interrogation of these witnesses had been done by Webb.

[14] NAA: A2937, 222; A1066, H45/580/2 H. V. Evatt, Attorney-General and Minister of External Affairs, telegram to Sir William Webb, CJ Supreme Court Qld., 3 April 1945.

whole attention. State judicial work very heavy' and that his 'doctor advises heel operation and six weeks on crutches'.[15] Evatt responded: 'Many thanks for your wire. Will assist you and Queensland Government in every way possible. Best wishes from Wright and myself'.[16]

It is evident in the correspondence that Webb was of the mind that he would like to continue in the role as war crimes commissioner, he was continuing to gather information for the army and was in communication regarding his further appointment during this period. However, the Queensland government was not ready to release him. E.M. Hanlon (Acting Premier, Qld.) writing to Curtin on 30 April in response to a cable from Evatt requesting Webb be released from judicial duties for an indefinite period: 'I desire to inform you that this matter has been very carefully considered by the Queensland Government, which regrets that it is unable to accede to wishes of the Commonwealth Government'. They were not prepared for Webb to 'give the whole of his time to the work of the commission' which would mean further absences from Australia. The work of the Supreme Court was heavy and he would not be able to share his time with war crimes investigations, especially with the number of released soldiers and civilians that would be required to be interviewed in the coming months. There is a handwritten note: 'Webb informed A [army] Secretary by phone that he could undertake judicial duties concurrently with the investigations if & when secretary was appointed 17/5'.[17]

---

[15] NAA: A2937, 222; A10953, 1 and; A1066, H45/580/2, Sir William Webb, CJ Supreme Court Qld. to H. V. Evatt, Attorney-General and Minister of External Affairs, 9 April 1945

[16] NAA: A1066, H45/580/2, H. V. Evatt, Attorney-General and Minister of External Affairs to Sir William Webb, CJ Supreme Court Qld., 14 April 1945.

[17] NAA: A1066, H45/580/2, Memorandum for the Prime Minister's Department from the Department of External Affairs with a draft of a response to Hanlon's letter, 19 May 1945.

The Prime Minister's Department consulted with the Department of External Affairs who responded that the government was concern about the position the Queensland premier was taking, realising the difficulties that they had, but stressing the national and international importance of the investigations. It states that after discussions with Webb, the Chief Justice indicated that he would be able perform both duties with the assistance of a secretary and that there would not be an overseas trip for some time:

> I am sure you will agree that it is a matter of supreme importance to the country as a whole that those Japanese responsible for the perpetration of atrocities against our fighting men and civilians should be brought to justice. The Commonwealth Government feels that considering his previous experience in connection with War Crimes, Sir William Webb is the most competent to carry out the important duties of War Crimes Commissioner.

The letter sent by the Prime Minister and did not differ in the wording from the memorandum received from the Department of External Affairs.[18]

By mid-June Webb had been approved to continue his work as war crimes commissioner. Hanlon informed the Acting Prime Minister:

> …in reply desire to inform you that my Government has given consideration to your suggestion that an arrangement might be made for Sir William to carry on the investigation of war crimes concurrently with his work in the Supreme Court, with the aid of secretarial assistance for war crimes work. I have now to inform you that, for the time being, my Government has no objection to Sir William Webb's continuing to do war crimes work in conjunction with State work, if that can be arranged without prejudice to the State work.[19]

[18] NAA: A1066, H45/580/2, J. Curtin, Prime Minister to E.M. Hanlon, Acting Premier of Queensland, June 1945.

[19] NAA: A1066, H45/580/2, Hanlon reply to Curtin's 23 May letter, 13 June 1945 and Department of External Affairs to Sir William Webb, 22 June 1945

Webb was officially reappointed as War Crimes Commissioner on 13 June 1945 and from this point on, critical political and military events continued to overtake the commission making an impact on its conduct, form, role and processes. By June, the Prime Minister's health rapidly deteriorated and he passed away on 5 July. After a brief stint under Francis M. Forde, Ben Chifley was voted by the Party to take over the leadership of the party and consequently the government. Evatt returned to Australia from the San Francisco Conference after Curtin's death, having vigorously campaigned while in London for Australia's prominent representation in the post-war international relations and used the findings of Webb's war crimes report as leverage to illustrate Australia's sacrifice during the war. The military situation changed quickly. In Europe, Germany surrendered on the 7 May and in the Pacific, American forces captured Okinawa on 22 June. Liberation of POW and internee camps continued throughout the Pacific until the eventual official surrender of Japan on 2 September 1945. By late August, as Webb continued to conduct interviews, it became obvious that additional commissioners would be required to ensure that the work could be completed quickly so that trials could begin at the earliest possible stage.[20] There does not appear to have been a formal instrument of appointment made in this period while Webb continued the work of the commission. It may be that the authority of the previous commission was carried over or that the drafting of the instrument of appointment was being overtaken by events of the war, impacting on the work of the commission and shifting the functions and expectations between the government departments. Therefore, it

[20] NAA: A1066, H45/580/2, Memorandum to H.V. Evatt, 25 August 1945

was not until 9 September 1945 that the instrument establishing the third inquiry was signed by the acting Minister of External Affairs.

Impact on the Supreme Court of Queensland

Webb's re-appointment to the commission was not appreciated in some quarters as the court was already overburdened and was put under further strain with the appointment of Justice Alan Mansfield to the AWCC.[21] Two acting judges were appointed to the court in their absence, however, objection to this practice was expressed in the press and concerns were raised about the impact this would have on the independence of the judiciary in the state.

Webb was still hearing cases in the Supreme Court until the 26 September, until an acting justice was appointed. Two acting judges were eventually appointed after the court lost another judge with Justice Mansfield joining Webb on the War Crimes Board. E.J.D. Stanley, who had been Webb's secretary on the initial war crimes commission and was an acting justice in the previous year, was appointed to the bench on the 21 September with the Commission being signed by the Chief Justice in the role of Lieutenant Governor.[22] Benjamin Henry Matthews was also appointed as an acting judge. The *Courier-Mail* expressed its concern of what it saw as a growing trend in the state of using acting justices due to absences caused by extra-judicial activities of the members of the bench, which it viewed as 'not a good practice' and urged its discontinuance:

[21] Members of the Queensland legal profession expressed their concern that losing Mansfield from the bench would be 'unfair to the judges to be burdened with the additional pressure of work' as the court was already congested, 'New Job is Loss to Court', *Courier-Mail*, 27 August 1945, 3.

[22] 'Mr E.J.D. Stanley to be Acting Judge', *Courier-Mail*, 21 September 1943, 3.

> It is a well-established principle of British law administration that the office of a judge should be permanent and irrevocable except by Parliament itself.
>
> This is done to ensure complete independence in judicial offices, so that no judge will have anything to gain or fear from the Crown by re-appointment or advancement or termination of appointment.[23]

Matthews was also appointed as acting Justice on the Industrial Court, which was welcomed by the AWU.[24] Neal William Macrossan was appointed as acting Chief Justice, a position he held until being appointed permanently with Webb's accession to the High Court. Neal Macrossan came to the court in 1940 when he replaced his brother who died while Chief Justice of the state.[25]

Both Matthews and Stanley were eventually appointed permanently to the court, the former after Webb was appointed to the High Court and the latter when the bench was expanded to eight with the passing of the *Supreme Court Amendment Act* 1946. The legislation was commended by the *Courier-Mail* as being overdue with the concern of continued use of acting justices due to the prolonged absences from the bench:

> Appointment of an Acting Justice is an unsatisfactory palliative to which the Queensland Government has become far too inclined. The raising of an Acting Judge for a long period is as unfair to the appointee as it is to public faith in the legal system.
> It is difficult to avoid the consideration that a member of the Bar holding the temporary office might be conscious that his tenure was at the pleasure of an Executive that could be in litigation before him. That is bad for the Courts' reputation for independence'. [26]

---

[23] 'No Ties on Judiciary', *Courier-Mail*, 29 September 1945, 2.

[24] 'Arbitration Supported. Acting Judge Welcomed', *Courier-Mail*, 19 November 1945, 19

[25] Bruce Harvey McPherson, *The Supreme Court of Queensland, 1859-1960: history, jurisdiction, procedure* (Sydney: Butterworths, 1989). 381-82.

[26] 'Relief for Judges', *Courier-Mail*, 23 November 1946, 2

The article stressed that previous appointees have been of the highest calibre and closed with urging a reconsideration to provide satisfactory pensions to retiring judges to ensure the 'purity and dignity' of the court.

Shifting functions of the Commission

The terms of reference for the third commission were essentially the same as the previous one, see Appendix 5. There were a few additions to the terms of reference of what constituted a war crime. Significantly this included:

> (i) Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing…

This led Webb to drafting lists of major war criminals which is discussed in Chapter Seven regarding his position on the International Military Tribunal for the Far East. The UNWCC created three classes of war crimes. The B and C classes refer to breaches of the customs and rules of warfare established in international law and crimes against humanity, specifically against civilians. The B and C classes of war crimes were also referred to as 'ordinary' or 'minor' war criminals and are the focus of all three of Webb's reports. The other category of A class dealt with the new type of war crime, waging wars of aggression, the subject of the Nuremberg and Tokyo trials, the latter addressed in Chapter Seven. The accused under the A class category were referred to as 'major' war criminals and although not included in any of the reports, Webb became heavily involved in Australia's drawing up lists of accused that fit in this category during the third commission. There were also three other additions to the terms of reference as to what constituted war crimes – wholesale looting, cannibalism and mutilation of the dead. Ill-treatment of the wounded

and prisoners of war was also defined in the new terms and included transportation of prisoners of war under improper conditions, public exhibition or ridicule of prisoners of war, and failure to provide prisoners of war or internees with proper medical care, food or quarters.

Furthermore, while in London, Webb proposed an arrangement that the AWCC would investigate crimes committed against British nationals in the SWPA in return for the British government investigating crimes committed against Australian nationals in the European Theatre. This agreement was approved by the Australian government on his return.[27]

Due to the abrupt end of the war in the Pacific and Webb's request to have assistance in conducting the trials, two additional judges were appointed to the commission and were included in the terms of reference, Justice Alan Mansfield of the Queensland Supreme Court and Judge Richard Kirby of the New South Wales District Court. The last commission went under the title of the Australian War Crimes Board of Inquiry and was established in response to the capitulation of Japan, with its priority to obtain information from released POWs before they were discharged from the armed services. Judge Kirby went to Singapore and Justice Mansfield to Manila to obtain completed questionnaires

[27] NAA: A1066, H45/1/2,War Crimes Progress Report, prepared for the Minister of External Affairs, 3 August 1945. NAA: A2937, 222, Telegram from Department of External Affairs to External Affairs Office London, 11 October 1945; NAA: A10952, 2, 'Commissioners Personal Papers', Secretary of War Crimes Commission to Acting Secretary of the Department of External Affairs, 5 September 1945. Also see: NAA: A2937, 9, 'Atrocities against British Nationals in Philippine Islands [Japanese War Crimes], various correspondence. By the time Mansfield arrived in Manila to investigate crimes against British subjects as requested the interrogations had already been carried out to the satisfaction of the British Government by members of the United States military NAA: A2937, 222, A. Mansfield, War Crimes Commissioner and J of Supreme Court Qld. to Department of External Affairs and Office of External Affairs London, 23 October 1945.

from POWs upon their release. Between twelve and fourteen thousand were completed, and 248 witnesses were selected for further examination.[28] Webb remained in Melbourne to establish the legal mechanisms for the trial of B and C class offenders.[29] Before the collection of evidence had been finished, Mansfield was dispatched to London to assist Lord Wright with the preparation of the case against major war criminals, and Kirby became a royal commissioner in Tasmania. Justice Philp, of Queensland, was appointed as War Crimes Commissioner while Webb wrote the report with the assistance of J.V. Barry, which was completed on the 31 January 1946.

Webb's relationship with Judge Kirby

The third commission illustrates how personalities of judges serving together on extra-judicial activities can lead to difficulties, firstly, by adversely affecting the functioning of a commission and secondly, by causing potential animosity between its members. A recurring theme in judicial biography is the conflict of the subject with other members of their bench. It is common for relationships to be disagreeable and in some cases, brusque, while judges serve within a court. The judicial system is inherently adept in allowing judges to express their individualism and absorb conflict through the traditions and protocols that have been developed in the judicial system, as well as being facilitated by the

[28] Webb prepared the questionnaires before the appointment of the third commission. The British Government had used 'Q forms' in Europe which were inadequate to obtain the information required for further investigation to prepare prosecutions (NAA: MP742/1, 336/1/1145, Australian Army Representative in London to Department for the Army, 30 June 1945). An agreement was made between the AWCC and MIS-X attached to the US military to distribute the questionnaires (NAA: A1066, H45/580/2/6, various correspondence). This drew a sharp rebuke from General Blamey as he did not want a unit which was not under his command conducting interrogations in his area of command (NAA: MP742/1, 336/1/217, General Blamey, LANDOPS to LANDFORCES (CGS), information FORLAND, 8 September 1945, cited in Michael Carrel, "Australia's Prosecution of Japanese War Criminals: Stimuli and Constraints" (University of Melbourne, 2005), 108.)

[29] *CPD*, HR, Vol. 185, 26 September 1945, 5929; *CPD*, HR, Vol. 186, 10 April, 1946, 1294-1295. Justice Mansfield accompanied Webb to Tokyo in 1946 to serve as Australia's chief prosecutor on the IMTFE.

clear functions that judges are performing in courts which are limited to hearing and deciding cases through statutory interpretation and applying precedent. Furthermore, there is scope to disagree in deciding cases through separate opinions and when disagreements occur, there is a clear hierarchy on the bench and between the courts. However, these attributes that contain conflict on the bench, may be absent when judges act on executive tasks and, as the third war crimes commission demonstrates the potential to bring judges into conflict with each other while carrying out their duties. Webb already had a working relationship with Justice Mansfield who had been appointed to the Supreme Court of Queensland in 1940. This was not the case with Judge Kirby, whose flare of individualism and world view was significantly different to Webb and Kirby's actions while on the commission led to discord between the two judges.

Judge Kirby was the third judge appointed to the War Crimes Board. He was born in Queensland, but educated in New South Wales where, after some colourful years when he was uncertain of a career, he began to practise law in the 1930s. Later, he accepted an invitation by Evatt to join his collective of lawyers that specialised in representing the working class in industrial and other legal matters. After a brief stint in the army during the war, Kirby returned to practicing law before he was appointed to the District Court on 23 August 1944. It was partly due to Evatt's patronage that Kirby was invited to become a war crimes commissioner. Further, Evatt was under the misapprehension that Kirby's military experience included service overseas. The minister believed that having a commissioner with overseas service would add credential to the cases put forward by the board to the UNWCC. Kirby's military service from early 1942 to 1944 was with the education corps attached to the 3rd Australia Army Tank Brigade and he spent the duration of his service at

Singleton Army Camp where he established courses to teach illiterate members of the brigade.[30] Kirby was able to get an immediate start on the commission, while Webb and Mansfield were held to their judicial duties until the 26 and 21 September respectively. After a brief consultation with the Queensland justices and members of the Army HQ in Australia Kirby was dispatched to Singapore, whereupon he reported to Lord Mountbatten, Supreme Allied Commander, South East Asia Command.

Kirby's individualistic approach to the commission was evident from the first days. On 5 September Kirby contacted the Secretary for the Department of the Army, Frank R. Sinclair, expressing how he would approach his investigations after his discussions with the Secretary for the Army and the Chief of the General Army Staff. Kirby foresaw difficulties in the intended thorough investigation of war crimes due to the rapidity of the repatriation of released POWs:

> Consequently I am urging Sir William Webb to amend the original plan whereby I was to go alone and cover the whole field in a general way and to arrange now for one of my colleagues to proceed forward at once, divide the field with me and investigate selected cases in detail as well as the general review previously contemplated.[31]

Kirby also saw the benefit of using about a dozen shorthand writers/reporters to take notes on the spot, which would be desirable if they were Army personnel and this would be less complicated than taking civilians into forward areas.[32] Kirby's views on how the

---

[30] Sen, Veronica, 'Evatt Brains Trust Nurtured a Judge of Integrity', *Canberra Times*, 7 January 1978, 11; Blanche D'Alpuget, *Mediator: a biography of Sir Richard Kirby* (Carlton, Vic.: Melbourne University Press, 1977); Andrew Frazer and John Goldring, "Obituary: The Hon Sir Richard Clarence Kirby AC," *Australian Law Journal* 75, no. 12 (2001): 788-91.

[31] NAA: MP742/1, 336/1/1145 and; A1066, H45/580/2/7, R.C. Kirby, War Crimes Commissioner to F.R. Sinclair, Secretary for the Department of the Army, 5 September 1945.

[32]Ibid. The shorthand writers could not be supplied and it was later deemed that they were not required

international community should deal with war criminals were also remarkably dissimilar to that of Webb and the Australian Government. He was of the opinion that only the most notorious war criminals should be brought to trial to avoid drawing out the process which would prolong the bitterness between nations. While limited trials would enable a swifter rehabilitation of international relations between the belligerents. He expressed his views to Mountbatten at their initial meeting and being similar to those held the Supreme Commander, Kirby was invited to join his personal staff as a legal advisor.[33]

On 6 October Kirby contacted the acting Attorney-General and Minister for External Affairs, as Evatt was in London, outlining his communication with Mountbatten and the desire of SEAC to have an Australian liaison for war crimes. He also requested further information on the proposed statute to establish trials. He elaborated that Mountbatten:

> …suggested that it would be to a mutual advantage to both countries, if I assisted the local staff in the preparation of prosecution case and advised generally and at the same time watched Australian interests and act as Australian Representative here regarding the prosecution of Japanese criminals where Australian personnel are concerned. My personal opinion is that Australian representation and staff here are essential.[34]

Webb responded by sending a telegram to Evatt, who was in London, objecting to Kirby forwarding his proposal to three ministers without consulting the other members of the

[33] D'Alpuget, *Mediator: a biography of Sir Richard Kirby*: 40. Evatt Papers: R.C. Kirby, Australian War Crimes Commissioner to H.V. Evatt, Minister for External Affair (Australia House, London), 6 October 1945.

[34] NAA: A1066, H45/580/2/7, Judge Kirby, War Crimes Commissioner to Acting Minister for External Affairs, Acting Attorney-General and Sir William Webb, 6 October 1945 and; Evatt Papers: R.C. Kirby, Australian War Crimes Commissioner to H.V. Evatt, Attorney-General and Minister for External Affair (Australia House, London), 6 October 1945.

Commission. He was also concerned that the appointment would increase the amount of work of the other Commissioners:

> I have kept both Justice Mansfield and Judge Kirby fully informed by signals of developments in Australia since they left. Justice Mansfield has kept me fully informed of his activities in two lengthy communications but Judge Kirby has sent me only a short signal. The action of Judge Kirby in addressing three minsters about a matter which he should have referred to his colleagues alone in the first instance is regrettable. Only if we trust and cooperate with each other fully can we hope to make a success of our work. As long as a commissioner carries his full share of the burden it is no concern of the other commissioners where he is located but if Judge Kirby stays in Kandy then most if not all of the Australian evidence of war crimes in Burma, Thailand and Malaya as well as in countries further east will be collected by the other commissioners. This would reduce Judge Kirby's part to that of a mere Australian war crimes liaison officer on Lord Mountbatten's staff. However, it is for the federal government to decide. Personally I am far from happy about this development. As to the questions raised by Judge Kirby, obviously we will be prepared to assist the British in the conduct of their war crimes trials and we will expect the same help from them. In fact we have been proceeding on that assumption but that does not involve attaching a commissioner to Lord Mountbatten's or any other staff.[35]

Evatt was unable to intervene in the matter due to communication difficulties for being abroad. Evatt replied to Webb that he had not received any communication from Kirby, but hoped to sort out Webb's concerns.[36] The 'confusion' caused by the 'commotion' had been resolved by the time Evatt received Kirby's letter.[37]

---

[35] NAA: A1066, H45/580/2/7 and: A2937, 222, Sir William Webb, War Crimes Commissioner to H.V. Evatt, Attorney-General and Minister for External Affairs, 8 October 1945.

[36] NAA: A2937, 222, Telegram from H.V. Evatt, Attorney-General and Minster for External Affairs to Sir William Webb, War Crimes Commissioner, 9 October 1945.

[37] Evatt Papers: H.V. Evatt, Attorney-General and Minister for External Affairs to R.C. Kirby, Australian Mission SEAC, 7 November 1945. The letter was only received in November as Kirby gave it to Major General W.R.C. Perry to deliver, however, Perry became ill which delayed his arrival in London and Evatt had departed for the United States. Evatt Papers: Letter from Major General W.R.C. Perry to H.V. Evatt, Minister for External Affairs, 17 October 1945. Evatt was quite warm in his response to Kirby addressing him with familiarity, offering his support to the judge and expressing his joy in a potential appointment which they had previously discussed was coming to fruition.

In the meantime, Kirby communicated with the Department of External Affairs addressing Webb's concerns. In apologising for causing offence to the Chief Justice he stated that his intention was not to leave the other commissioners out of the loop and that he was not complaining about the lack of communication within the commission. He also refuted Webb's claim that he would be reduced to a mere liaison officer. Kirby wanted photographs of Japanese suspects to be a priority and taking sworn statements, but re-iterated he did not want ill-feeling between the Commissioners.[38]

The archival evidence is difficult to follow from this point as to Kirby's attachment with Mountbatten's staff. Webb remained unconvinced of the benefits of the appointment as he saw it as being focused on British cases and was concerned that the offences against Australians would be neglected. This would be complicated by the fact that many of the crimes perpetrated against Australians would be perpetrated by the same accused as the British cases which would receive priority. He did not make any further conclusion on the matter until he had seen further details of the intended role and left the decision in the hands of the Government.[39] The internal memos within External Affairs and the Department of the Army were receptive to the appointment for political reasons.[40] Kirby's biographer, Blanche d'Alpuget, writes that his proposal was accepted by the Australian Government after Mountbatten sent a 'suave' personal request to the Prime Minister.[41] Although the Department of External Affairs understood that the appointment had been

[38] NAA: A1066, H45/580/2/7, R.C. Kirby, War Crimes Commissioner to Norman J. Makin, Acting Minister for External Affairs, 9 October 1945.

[39] NAA: A1066, H45/580/2/7, Sir William Webb, War Crimes Commissioner to Norman J. Makin, Acting Minister for External Affairs, 12 October 1945.

[40] A1066, H45/580/2/7, various correspondence.

[41] D'Alpuget, *Mediator: a biography of Sir Richard Kirby*: 41.

made it appears that the department was not advised officially.[42] However, Kirby was seeking approval from Evatt and the other war crime commissioners on 15 October.[43] A week later, Webb advised Evatt that as there was very little further evidence to collect which could be completed by two commissioners and that Kirby would be free to head the Australian Legation at Singapore as Brigadier Rogers had advised him, and he was satisfied Kirby could be useful in that position.[44]

Kirby returned to Australia mid-November, as he later explained to his biographer, by taking the opportunity to leave Mountbatten once the Supreme Commander's regular legal advisor had returned to his post in Singapore. Kirby further admitted that he did not have the 'stomach for revenge on the defeated enemy' and was 'avoiding investigations and focussing on procedural aspects'.[45] Consequently, Evatt's recommendation of Kirby being sent to the UNWCC to assist Lord Wright was passed over by the acting minister for external affairs, Norman Makin.[46] Webb advised Makin against appointment Kirby to London and recommended that Mansfield fill the role on the UNWCC. Webb added: 'Judge Kirby has been in Kandy for over a month, but from papers handed me by Mr. Grigg, his secretary, I conclude that His Honour has achieved little at Kandy to help us'

[42] NAA: A2937, 222, 'Summary of Position of Japanese War Crimes as Affecting Australia', Department of External Affairs, 11 October 1945.

[43] NAA: A2937, 222, R.C. Kirby, War Crimes Commissioner to Department of External Affairs (forwarded to H.V. Evatt in London), 15 October 1945.

[44] NAA: A2937, 222, Telegram from Sir William Webb, War Crimes Commissioner to H.V. Evatt, Attorney-General and Minister for External Affairs, 22 October 1945.

[45] D'Alpuget, *Mediator: a biography of Sir Richard Kirby*: 41.

[46] NAA: A1066, H45/580/2/7, cable from H.V. Evatt, Minister for External Affairs to Norman J. Makin, Acting Minister for External Affairs, 7 November 1945.

and that he should remain with Lord Mountbatten to direct Australian cases.[47] Kirby returned to Australia before receiving the government's directions for him to stay in Kandy, although he did return with Mountbatten's praise.[48] On receiving Kirby back in Australia, Webb was 'only too glad' for him to continue investigating, however, he was unsure of his authority to direct the judge and advised him to contact the acting minister, Makin.[49] The matter was resolved in early December as the Commonwealth Government approved a request from the New South Wales attorney-general for Kirby to be released from the Australian War Crimes Commission to undertake an inquiry for the state.[50] Kirby did not contribute any further to investigations due to the rapidly changing circumstances that led to the Australian War Crimes Board becoming unnecessary. Justice Philp was appointed to complete some minor investigations.[51] A week after Kirby's appointment in Tasmania, Webb wrote to Makin, 'Judge Kirby seems anxious to join in the report, so I told him I would let him see a copy and sign it if he approved of it, that is to say, on the assumption that he is still a Commissioner when the report is ready'.[52]

---

[47] NAA: A1066, H45/580/2/7, telegram from Sir William Webb, War Crime Commissioner to Norman J. Makin, Acting Minister for External Affairs, 10 November 1945. Webb also made a request for J. V. Barry to be appointed to replace Mansfield as he had written a number of articles relating to war crimes. Also refer to letter from Norman J. Makin, Acting Minister for External Affairs to H. V. Evatt, Attorney-General and Minister for External Affairs, 14 November 1945.

[48] NAA: M1355, 31, Lord Louis A. V. Mountbatten, SACSEA to Joseph B. Chifley, Prime Minister of Australia, 29 October 1945.

[49] NAA: A1066, H45/580/2/7, Sir William Webb, War Crimes Commissioner to R.C. Kirby, War Crimes Commissioner, 27 November 1945 and; Secretary of the Department of External Affairs to Norman J. Makin, Acting Minister for External Affairs, 30 November 1945

[50] NAA: A1066, H45/580/2/7, Norman J. Makin, Acting Minister for External Affairs to R.C. Kirby, War Crimes Commissioner, 7 December 1945.

[51] NAA: A1066, H45/580/2/7, Norman J. Makin, Acting Minister for External Affairs to J.A. Beasley, Acting Attorney-General, 11 October 1945. Philp examined 33 witnesses in January 1946.

[52] A1066, H45/580/2/7, Sir William Webb to Norman Makin, Acting Minster for External Affairs, 13 December 1945.

Webb's reaction to Kirby's proposal to join Mountbatten's staff could have been influenced by the mounting pressure on the AWCC to have a presence in the preparation and conduct of trials which in the final months of 1945 was becoming increasingly a military affair. Certainly there was no residual animosity as Webb wrote to Kirby congratulating him on his appointment to the Commonwealth Arbitration Board.[53]

The 'Sidelining' of the Commission by the Army

While the British Government had enacted legal powers on 18 June for the military to conduct war crime trials under a Royal Warrant, a copy of which had been promptly forwarded to the Attorney-General's Department, Australia had not made any advances in this area when Japan formally surrendered on 2 September.[54] Evatt, who had provided the political leadership for Australia's war crimes policy up to this time, had left Australia for London two days after the signing in Tokyo Harbour, making communication with him difficult and often caused significant delay in his ability to respond to matters as they were raised. The acting ministers, Makin and Beasley as Minister for External Affairs and Attorney-General respectively, appeared irresolute regarding the process that should be followed and were initially hindered by waiting for confirmation of details from London. Consequently, this resulted in a power struggle between the AWCC and the army over who would have ultimate control over the operation of Australia's war crime trials. Webb desired that the board have an overseeing role while the army provided the machinery to conduct the trials. Throughout his war crimes work he was anxious to see that civilians had

[53] AWM , 3DRL/2481, Series 4, Wallet 2, Sir William Webb, President of the IMTFE and Justice of the High Court of Australia to Justice R.C. Kirby, Commonwealth Court of Conciliation and Arbitration, 15 September 1947.

[54] NAA: A472, W28681, Memorandum from Secretary of Department of External Affairs to Secretary of the Attorney-General's Department, 25 July 1945.

a role in the process. The army high command on the other hand wanted the trials to be a solely military affair and this position was championed by the C-in-C, General Blamey. Nevertheless, through October to December, the Australian War Crimes Commission attempted to retain an essential role in the nation's pursuit of justice in the post-war trials which brought Webb into a power struggle with the Australian Army and placed him in the realm of politics and policy beyond where a judge should tread.

There are a number of possible reasons why there was a delay in Australia establishing formal legal mechanisms; John Curtin's death and the change in Labor leadership; the delay in Webb's re-appointment to start the third commission; and that Australia was not being prepared for the abrupt end to the war in the Pacific with the dropping of the atomic bombs. The army throughout August had made several requests for clarification regarding who would be collecting evidence from released POWs and they were unsure if the War Crimes Commission was still functioning as they had not received any communication from Webb.[55] Consequently the Directorate of Prisoners of War & Internees (DPW & I) increased their inquiries into alleged war crimes.[56] The government announced the appointment of the third commission with fanfare at the beginning of September, and perhaps trusted that the commission would be able to quickly gather the required evidence and instigate the trials with the support of the UNWCC. The enormity of the task ahead of the third commission on its appointment was appreciated by the three judges. However,

[55] NAA: A1066, H45/580/2, minute paper for the Department of the Army, 2 August 1945 and; NAA: MP742/1, 336/1/1145, Sinclair, Secretary of the Department for the Army to the Secretary of the Department of External Affairs, 8 August 1945.

[56] MP742/1, 336/1/1145, various correspondence regarding the interrogation of recovered personnel.

they did not anticipate that the repatriation of POWs would occur as early as it did.[57] On the same day that it was reported in the press that the Webb Report would 'shock the world', the first POWs from Singapore were flown back to Australia and less than a month later, 2,000 officers and men of the 8th Division had returned.[58] The delayed start for Webb and Mansfield hindered the momentum of the Commission throughout September and the appearance of inaction on war crimes began to be raised by the opposition members of Parliament. Menzies raised his concerns that there did not seem to be any agency in charge of arresting individuals accused of war crimes and argued that it should be the responsibility of the army. The Prime Minister, Ben Chifley replied that the government was maintaining the principle that the war crimes commission would lead the trials.[59] Meanwhile Senator Foll raised his concern that the appropriate legislation would not be in place before parliament went into a prolonged recess.[60] The concerns of the members of the opposition were echoed by released POWs in Manila.[61]

By late September Beasley contacted Evatt, through Knowles, in London suggesting a Royal Warrant be enacted to enable Australian prosecutions to begin. Evatt replied that he

[57] NAA: A7711, Volume 1, 'Report on the Directorate of Prisoners of War and Internees, at Army Headquarters, Melbourne, 1939-1945', 386. One Commissioner, Kirby was aware of the enormity of the task ahead and was pressuring Webb to change the procedures to enable more efficient evidence gathering after making contact with members of the army, NAA: MP742/1, 336/1/1145, R.C. Kirby, War Crimes Commissioner to F.R. Sinclair, Secretary for the Department of the Army, 5 September 1945.

[58] 'Japan's Atrocities Listed, Webb Report "Will Shock World", *Sydney Morning Herald*, 11 September 1945, 1; 'First P.O.W.s to Fly Home To-day, Released from Singapore', *Sydney Morning Herald*, 11 September 1945, 1 and; 'POW's Take French Leave in Brisbane, 2 Transports Arrive', *Argus*, 5 October 1945, 3.

[59] 'Doubts About War Criminals, No Independent Action', *Sydney Morning Herald*, 21 September 1945, 4 and; 'Japanese War Atrocities, Place of Trial of War Criminals', *Advertiser* (Adelaide), 21 September 1945.

[60] Gollan, Ross, 'Parliament Tired of Sitting, Danger of Too Long Recess', *Sydney Morning Herald*, 24 September, 1945, 2.

[61] Warner, Dennis, 'POW Fear Many Tyrants Will Escape', *Daily News* (Perth), 18 September 1945, 12.

was not satisfied that a Royal Warrant would provide a legal basis for Australia's trials. He advised that an Act of Parliament be enacted, for the attorney-general to seek the views of Webb and urged trials to begin at the earliest possible stage.[62] On 3 October the *War Crimes Bill* 1945 was introduced in Parliament and General Blamey, not knowing of its introduction, wrote to Forde at this time questioning the limits of the AWCC and recommending complete army control over the trials through a Royal Warrant.[63] The *War Crimes Act* 1945 (Cth) was passed into law on the following day and assented to on the 11th. The act was essentially the same as the Royal Warrant that the British Government had enacted and which Webb had contributed to the drafting of earlier in the year.[64] The AWCC role was summarised in the second reading of the bill by the Acting Attorney-General, Beasley:

> To sum up, with the object of effecting the trial and punishment of war criminals, the Board of Inquiry presided over by His Honour Chief Justice Webb will make exhaustive inquiries and report as to the war crimes that have been committed, and the enemy subjects who have committed them. The report of the Board will be considered by the United Nations War Crimes Commission. That commission will determine in what cases charges

---

[62] A472, W28681, Sir George Knowles, Secretary for Department of External Affairs to H.V. Evatt, Attorney-General and Minister for External Affairs, 25 September; H.V. Evatt, Attorney-General and Minister for External Affairs to Sir George Knowles, Secretary for the Department of External Affairs, 30 September 1945.

[63] NAA: A472, W2861, T. Blamey, C-in-C of the AMF to F.M. Forde, Minister for the Army, 3 October 1945.

[64] See David Sissons, "Sources on Australian investigations into Japanese war crimes in the Pacific," *Journal of the Australian War Memorial*, no. 30 (1997). Philip R. Piccigallo, *The Japanese on Trial. Allied war crime operations in the east, 1945-1951*. (Austin: University of Texas Press, 1979). 139; Sissons, "Sources on Australian investigations into Japanese war crimes in the Pacific." See also, Department of External Affairs Australia, "War Crime Trials: Statement by the Prime Minister Rt. Hon. J. B. Chifley, 15 June 1948," *Current Notes on International Affairs* 19, no. 7 (1948).

It is interesting to note that the Australian government contacted the United States before drafting the WCA and was advised that the US did not have legislation, NAA: A47, W28681, various correspondence. This left the United States military tribunals having little guidance and scant precedent on the prosecution of war crimes. Tim Maga, "'Away From Tokyo:' the Pacific Islands War Crimes Trials, 1945-1949," *The Journal of Pacific History* 36, no. 1 (2001): 38.

are to be laid.[65]

The trials would then be conducted by military tribunals. Menzies raised concerns that the bill did not specify in detail the role of the army in investigations or the arrest of the accused, although, he was satisfied that the matters raised by him would be dealt with in subsequent regulations.[66] The following day Webb contacted Makin and Evatt recommending that authority should be invested in his Board to approve prosecutions for the army on behalf of the UNWCC. Webb added: 'Although the prosecutions can, I feel sure, be safely entrusted to army authorities it is desirable that they should be under civil control preferably that of a judge or leading counsel'.[67] He also directly contacted the army suggesting that the AWCC could focus on the cases of the accused that were in army custody and preparing the prosecution. He optimistically suggested that all the trials could be completed within six months if this procedure was followed.[68] However, Evatt, after seeking the advice of Lord Wright, advised the Australian Government that there was no requirement for the UNWCC to be advised of minor war criminal cases, only major criminals.[69] Webb met with Military officials the same day and from this point the AWCC

[65] *CPD*, HR, Vol. 195, 4 October 1945, 6511.

[66] *CPD*, HR, Vol. 195, 4 October 1945, 6511.

[67] NAA: MP742/1, 336/1/216 and; A472, W28681, Sir William Webb, War Crimes Commissioner to H.V. Evatt, Attorney-General and Minister for External Affairs, October 1945. It should be noted that Webb had sought authority for the AWCC to approve prosecutions prior to the *War Crimes Act*, NAA: A1066, H45/590/1, Sir William Webb, War Crimes Commissioner to the Secretary of the Department of External Affairs, 2 October 1945. See also, NAA: MP742/1, 336/1/217, J. Beasley, Acting Attorney-General to F.M. Forde, Minister of the Army, 10 October 1945, 'His Honour the Chief Justice has suggested that action might be taken with a view to the Board of Inquiry, of which he is Chairman, being empowered to authorize the trial of persons whom they find to have committed war crimes... Evatt has been advised of the proposal and they are awaiting his approval'.

[68] NAA: A472, W28681, Sir William Webb, War Crimes Commissioner to Secretary to the Department of the Army and the Solicitor-General (Cth), 5 October 1945.

[69] NAA: A2937, 222, H.V. Evatt, Attorney-General and Minister for External Affairs to the Secretary for the Department of External Affairs, 12 October 1945.

role was essentially re-instated to its terms of reference set out in the instrument of appointment.[70] The army, now with its leading position clarified, quickly sought delegation of the powers from the *War Crimes Act* to conduct trials, requesting that Cabinet approve the following powers to be delegated:

> (a) The power to convene military courts for the trial of war criminals;
>
> (b) The power to appoint officers to constitute those courts;
>
> (c) The power to confirm the finding of military courts;
>
> (d) The power to mitigate or remit the punishment awarded by those courts; and
>
> (e) The power to suspend the execution or currency of any sentence imposed by those courts.[71]

Webb was consulted on the request and agreed that the first two powers should be delegated to the army, but the last three regarding sentencing should be reserved.[72] The Minister for the Army did not agree, although the Attorney-General's Department recommended that the last three powers be limited to the C-in-C of the AMF.[73]

---

[70] NAA: A2937, 222, Sir George Knowles, Secretary to the Department for External Affairs to H.V. Evatt, Attorney-General, 10 October 1945; Minister for External Affairs to the Secretary for the Department of External Affairs, 10 October, 1945, 'In view fact that Conference with Webb, Milner and Army taking place Melbourne Friday morning 12 would appreciate urgent reply to my cable number 291 dated 4th October, 1945 concerning functions of Australian Board of Inquiry'. The personal Diary of Lt-General Frank Horton Berryman states that after meeting with justices of the AWCC they agreed the army should run trials, but Webb still wanted judges and direction from the mainland (cited by David Sisson's in his notes. NLA: Sisson's Collection, Box 55).

[71] NAA: A472, W28681, F.R. Sinclair, Secretary for the Department of the Army to Sir George Knowles, Secretary for the Department for External Affairs, 17 October 1945.

[72] A472, W28681, F.R. Sinclair, Secretary for the Department of the Army to Sir George Knowles, Secretary for the Department for External Affairs, 17 October 1945.

[73] NAA: 472, W28681, Minute Paper prepared by Sir George Knowles, Secretary for the Department for External Affairs for J. Beasley, Acting Attorney-General, 31 October 1945.

Following the passing of the legislation, 'War Crime Sections' were established under the Australian Army Headquarters to undertake investigations and prosecutions of war crimes. One section was established at Singapore in cooperation with the British, another was in Tokyo and collaborated with the Americans. The key agency of the army conducting investigations was the Directorate of Prisoners of War and Internees that had been established in 1940, but prior to 1945 the DPWI had a relatively low priority placed on collecting war crimes evidence. As the war drew to a close, the program was developed as it became 'responsible for the co-ordination of all action by the AMF to trace, apprehend and bring to trial alleged perpetrators of war crimes'.[74]

On 20 October, Webb conceded that the war crime trials would be an army affair and that his commission would focus on major war criminals:

> The Commission has now done all it can to expedite the trials of alleged Japanese war criminals in the custody of the Australian Army. The Commander-in-Chief takes the view that their trials are purely an Army matter.
>
> …
>
> As you know the necessary machinery has now been provided for the trials of these ordinary criminals and, further, Brigadier Lloyd is satisfied he has the legal assistance required to conduct the trials successfully, and is determined to expedite them.
>
> From now on the Commission will confine its activities to collecting evidence and report to the Minister for External Affairs; but, at the request of Brigadier Lloyd or other authorised officer, a copy of any evidence taken by the Commission will be

[74] NAA: A7711, Volume 1, 'Report on the Directorate of Prisoners of War and Internees, at Army Headquarters, Melbourne, 1939-1945', vii.

> supplied to him.
>
> I should like now to transfer to offices outside Victoria Barracks, say, to Dr Evatt's or to the Commonwealth offices in the city.[75]

It appears that this struggle had its toll on Webb who wrote to a friend four days later expressing his weariness of his continued role as war crimes commissioner and suggested his desire to 'drop out'.[76] On the same day, Beasley wrote to Webb assuring him that the Army has 'very efficient and experienced legal staff' and that the members of the government were united in the opinion that all preparation and running of prosecutions will be undertaken by the AMF.[77] On 12 November the War Cabinet approved the full delegation of powers to the army to carry out trials.[78] Carrel argues that Webb conceded to the army on the 10 December, citing the following correspondence with General Lloyd:

> The jurisdiction of the War Crimes Board of Inquiry extends to ordinary as well as major war criminals. By 'ordinary war criminals' I mean those now in the hands of the Army or who may hereafter come into the hands of the Army. Necessarily, the misdeeds of ordinary war criminals will be evidence against major criminals, but to avoid duplication of effort I think the Army should take all evidence against and conduct all the prosecutions of the ordinary war criminals, advise this Board of the results, and furnish such further evidence to the Board as it may require from time to time for the purposes of its report. This would mean that the Army and not the Board would so far as necessary or advisable examine those who filled in questionnaires. The questionnaires would be handed over to the Army for

[75] NAA: A1066, H45/290/1 and; NAA: MP729/8, 66/431/3 War Crimes Commission, 'letter from Sir William Webb, Chairman of the War Crimes Board to the Secretary of the Department of the Army', 20 October 1945.

[76] NAA: A10952, 2, 'Atrocities Commission. Personal Correspondence of Sir William Webb', letter from Webb to L.H. Pike, Agent-General for Queensland in London, 24 October 1945.

[77] MP742/1, 336/1/1637, J. Beasley, Acting Attorney-General to Sir William Webb, War Crimes Commissioner, 24 October 1945.

[78] War Cabinet Minute, Agendum No. 505/1945 – War Crimes Act – Delegation of Powers – 12 November 1945.

> that purpose.
>
> I intend to suggest this course to the Ministers concerned. The prospects of its adoption would be improved if the Army set up forthwith some central control over investigations and prosecutions.[79]

However, this correspondence is in relation to the commission's incapacity in gathering evidence, due to Mansfield leaving for London and Kirby being relieved of his commission, and Webb attempting to use the machinery of the army to undertake evidence gathering for the commission so that another Commissioner did not need appointing.[80] Nevertheless, in closing, the Chief Justice of Queensland re-iterated, perhaps provocatively, his concern about the Commission no longer having a role in the preparation of cases:

> I may add that, when I was appointed…Sir Thomas Blamey told me he desired a judge so that no question could be raised as to the reliability of the report. However, things have moved fast in the meantime and we now have Japanese convicted and sentenced to death on evidence not taken or reported on by a judge. These convictions, which will be used against the major war criminals, will, of course be given as much weight as those based on evidence which has passed through the Commission.[81]

---

[79] NAA: A1066, H45/580/2/7, Sir William Webb, War Crimes Commissioner to C.E.M. Lloyd, Adjutant-General, Victoria Barracks, 10 December 1945; Sir William Webb, War Crimes Commissioner to N.J.O. Makin, Acting Minister for External Affairs, 10 December 1945. As mentioned previously, J.V. Barry was asked to join the commission but was only able to do so on a part time basis and Webb requested that this be approved as 'I certainly would like to have his assistance as I regard him as a very able exponent of international law, perhaps the ablest practising at the Australian bar'.

[80] Webb's letter was most likely influenced by a memorandum from his counsel assisting the commission, Colonel T.B. Stephens who outlined in late November that the AWCC needed to stop making general inquiries due to the inordinate amount of information to shift through and write a prompt report to the government outlining the scale of Japanese breaches of the rules of warfare. He also proposed that the AWCC then acted on the advice of the army to take testimony from witnesses in Australia for testimony in trials as required to prevent the need of the witnesses being flown to the tribunals. NAA: A1066, H45/580/1/2, T.B. Stephens, Counsel for War Crimes Commission to Sir William Webb, War Crimes Commissioner, 26 November 1945.

[81] NAA: A1066, H45/580/2/7, Sir William Webb, War Crimes Commissioner to C.E.M. Lloyd, Adjutant-General, Victoria Barracks, 10 December 1945.

In what may have been a misinterpretation of Webb's request, the General gave a strongly worded rebuke in reply, defending the army's legal section and its ability to carry out all investigations and preparation of prosecutions.[82] Webb's main concern with the General's response was that Lloyd referred to 'major war criminals' which prompted a quick response of the War Crime Commissioner staking its claim to major war criminals and alerted the Acting Minister of External Affairs:

> Referring to my letter of the 10th instant, I enclose a copy of General Lloyd's reply and also a copy of my answer pointing out the true position. I thought you may be alarmed at General Lloyd's erroneous assumption that his jurisdiction was being extended to major criminals, so I have endeavoured to make the matter plain to him in my letter.[83]

There is no response from the Minister in the file. The conclusion can be drawn that the cooperation that Webb sort with the army was not agreed upon as it was intended to avoid the need for another commissioner to be appointed which occurred only a few days later with Philp being appointed to the AWCC. Webb also held onto the completed questionnaires which he told Lloyd he would 'eventually' hand over once the commission had completed use of them.[84]

As a final note on the AWCC's relationship with the army, in late December there was discussion about which authority should be charged with the responsibility for the confirmation of death sentences. Initially this was delegated to Divisional Commanders,

---

[82] NAA: A1066, H45/580/2/7, C.E.M. Lloyd, Adjutant-General, Victoria Barracks to Sir William Webb, War Crimes Commissioner, 12 December 1945.

[83] NAA: A1066, H45/580/2/7, Sir William Webb, War Crimes Commissioner to N.J.O. Makin, Minister for the Navy and Acting Minister for External Affairs, 13 December 1945.

[84] NAA: A1066, H45/580/2/7, Sir William Webb, War Crimes Commissioner to C.E.M. Lloyd, Adjutant-General, Victoria Barracks, 13 December 1945.

but F.R. Sinclair advocated that an independent authority to the army be empowered to confirm sentences. Forde consulted with Webb.[85] Consequently, Lloyd in summarising the option available added the AWCC in the mix of possible bodies to be delegated authority, while emphasising that the army had a capable legal section.[86] Judge Kirby, who was also consulted on the matter, supported the use of the AWCC or some other civilian body to oversee the confirmation of sentences.[87] Eventually, a compromise was reached where authority rested with the C-in-C or the Adjutant-General in consultation with the Judge Advocate General.[88] The AWCC again was not required.

Through December to January, Webb wrote the report largely by himself as Mansfield had left for London and Kirby had been relieved from the AWCC to undertake a commission of inquiry in Tasmania regarding the forestry industry. Justice Philp was commissioned to take evidence from a number of witnesses and J.V. Barry assisted in the drafting of the report regarding international law.[89] It was during this period that Webb was asked to be Australia's representative on the International Military Tribunal for the Far East and subsequently, the investigations into major war criminals discontinued and the report was confined to evidence provided by recovered POWs.

---

[85] NAA: A472, W28681, S.H. Crawford, Acting Secretary for the Army to Sir George Knowles, 28 December 1945.

[86] NAA: A472, W28681, C.E.M. Lloyd, Adjutant-General, Victoria Barracks to F.R. Sinclair, Secretary of the Department of the Army, 4 January 1946.

[87] NAA: A472, W28681, 'Notes on Telephone Conversations on 12th January 1946', 15 January 1946.

[88] NAA: A472, W28681, various correspondence. Also refer to: Emmi Okada, "The Australian Trials of Class B and C Japanese War Crimes Suspects, 1945-51," *Australian International Law Journal* 16(2009): 61, n 73; D.C.S. Sissons, "The Australian War Crimes Trials and Investigations (1942-51)," University of California at Berkeley - War Crimes Studies Centre, http://socrates.berkeley.edu/~warcrime/index.htm.

[89] Barry had written two articles in 1943 regarding the prosecution of war criminals, John V. Barry, "The Trial and Punishment of Axis War Criminals," *The Australian Law Journal* 17(1943): 43-49; John V. Barry, "The Moscow Declaration on War Crimes," *The Australian Law Journal* 17(1943): 248-50.

Australian War Crime Trials

As explained in the previous section, Webb did not have a role in the trial of minor war criminals, nevertheless, it is important to examine how the reports were used in the trials. How a judge's report from a commission of inquiry is used by the executive has the potential to raise complications for members of the judiciary and reflect on individual judges who have no control over the report once it is submitted to the government. The following section briefly outlines the conduct of Australian war crime trials, some key themes in the literature regarding their conduct and finally how the Webb Reports were used in cases, including Webb's reaction when a tribunal was reported in the press to have rejected his report as evidence.

Australia conducted 296 trials with 924 accused, of whom 280 were acquitted and 644 convicted. Of the convicted, 148 (23%) were sentenced to death and were executed (114 hanged and 34 shot), and 496 were sentenced to various lengths of imprisonment. The sentences tended to be between the two extremes of death and short terms of imprisonment. The trials were held at Singapore, Morotai, Labuan, Wewak, Rabaul, Darwin, Hong Kong and Manus. The trials began in December 1945 and did not end until May 1951. A summary of the trials is contained in Appendix 5. British, Dutch, French, Filipino, Soviet and Chinese tribunals tried thousands of other Japanese for war crimes throughout the Pacific.[90]

[90] For a general summary of the different national approaches refer to Piccigallo, *The Japanese on Trial*. For an account on the US trials on Guam see Maga, "'Away From Tokyo'."

There has been a steadily growing literature in regards to these war crime trials conducted by the Australian army and some common themes emerge. Overall, a common thread is examining the 'victors' justice' thesis and questioning how justice could be achieved in a political and social milieu of grief and vengeance dominating in Australia. Gavan McCormack argues that much of the Japanese literature tends to focus on the injustice of the trials.[91] Generally, the Australian research has shown that there were many instances of problems arising with procedural fairness due to the relaxed rules of evidence, however, the conduct of those involved attempted to process the cases in the spirit of fairness and due process. This was inhibited by the legal procedures that were embodied in the *War Crime Act* and subsequent regulations, language and cultural barriers between the prosecutors and the defendants, inadequate resources and precedent. These are issues that have been raised in the literature by participants in the trials[92] and later researchers in the field.[93] The primary concern was the admission of affidavits by the prosecution as primary

[91] Gavan McCormack, "'Apportioning the blame: Australian trials for railway crimes," in *The Burma-Thailand Railway: memory and history*, ed. Gavan McCormack and Hank Nelson (St. Leonards, N.S.W.: Allen & Unwin, 1993), 85-86. This is also raised by Brenton Brooks who argues: 'The Japanese and scholars of international law may well argue the case of post-war 'Victors Justice', but equally, the Australian nation and families of executed victims are entitled to ask whether justice was served', Brenton Brooks, "The Carnival of Blood in Australian Mandated Territory," *Sabretache* 4, no. 4 (2013): 31.

[92] George Dickinson, "Japanese War Trials," *The Australian Quarterly* 24(1952): 69-75; George Dickinson, "Manus Trials. Japanese War Criminals Arraigned," *Royal Australian Historical Society* 38(1952): 67-77; A. R. Moffitt and Australian Broadcasting Corporation., *Project Kingfisher* (Sydney: ABC Books for the Australian Broadcasting Corporation, 1995); Ian Spain, "Trials of War Criminals," *The Australian Law Journal* 20(1946): 71-73.

[93] Brooks, "The Carnival of Blood in Australian Mandated Territory," 327-47; Carrel, "Australia's Prosecution of Japanese War Criminals: Stimuli and Constraints."; Alan B. Lyon, *Japanese War Crimes. The Trials of the Naoetsu Camp Guards* (Loftus, Australia: Australian Military Historical Publications, 2000); Hank Nelson, "Blood Oath: A Reel History," *Australian Historical Studies* 24, no. 97 (1991); Okada, "The Australian Trials of Class B and C Japanese War Crimes Suspects, 1945-51."; Caroline Pappas, "Law and Politics: Australia's War Crimes Trials in the Pacific, 1943-1961" (University of New South Wales - Australian Defence Force Academy, 1998); Georgina Fitzpatrick, "War Crimes Trials, 'Victor's Justice'and Australian Military Justice in the Aftermath of the Second World War," in *The Hidden Histories of War Crime Trials*, ed. Kevin Jon Heller and Gerry Simpson (Oxford: Oxford University Press, 2013).

evidence; they were often second hand or hearsay yet were taken at face value by the court and were not required to be proven. As discussed previously, the relaxation of the rules of evidence was initiated by Webb from his first commission and drawn out during his visit to the United Kingdom. Recent research has indicated that some witnesses may have perjured themselves at tribunals to ensure convictions.[94] Another concern was that the defendants were not the 'real culprits', being at the lower end of the chain of command and were acting on superior orders which in the Japanese Army were strictly obeyed without question. The execution of perpetrators for some offences, like rape, that were not capital offences in Australia has been criticised.[95] Asian witnesses appearing before the tribunals experienced greater scrutiny to their veracity than others appearing, while, the conviction rate of crimes committed against the local population was slightly higher than the average.[96] George Dickinson, who assisted defence counsels during the trials, argues that the trials should have been conducted by a neutral authority to avoid the appearance of a 'revenge party'.[97] There have been two publications that are severely critical of the trials, but have since been discredited.[98] Certainly Webb foresaw issues with military tribunals

[94] Paul Ham, *Sandakan: the untold story of the Sandakan death marches*, [2013 edition] ed. (2012). 492-93.

[95] David Creed, Moira Rayner, and Sue Rickard, "'It will not be bound by the ordinary rules of evidence'," *Journal of the Australian War Memorial* 27(1995).

[96] Narrelle Morris, "Justice for 'Asian Victims': The Australian War Crime Trials of the Japanese, 1945-51," in *The Hidden Histories of War Crime Trials*, ed. Kevin Jon Heller and Gerry Simpson (Oxford: Oxford University Press, 2013), 366. Morris traces the interest by Australian authorities in atrocities committed against the Asian-Pacific population to the third Commission, however, Webb had reported acts that were committed against 'natives' in the first report and ironically drifted away from making further inquiries, as discussed in Chapter Four, as he argued that such inquiries would be best undertaken locally.

[97] Dickinson, "Japanese War Trials."; Dickinson, "Manus Island Trials."

[98] Ian Ward presents an argument that the trial of General Takuma Nishimura at Manus Island in 1951 for his role in the Parit Sulong Massacre was a miscarriage of justice fuelled by the public's demand for retribution and followed by a governmental cover up. Both Caroline Pappas and Lynette Silver later found many errors in his research. Lynette Ramsay Silver, *The Bridge at Parit Sulong. An Investigation of Mass Murder. Malaya 1942* (Sydney: Watermark Press, 2004). 399-409; Ian Ward, *Snaring the other tiger* (Singapore: Media Masters, 1996); Pappas, "Law and Politics: Australia's War Crimes Trials in the Pacific, 1943-1961," 74. Similarly, James MacKay's work has been criticised for the fabrication of documents and other

and attempted to retain some civilian, especially judicial, control over the tribunals. Whether this was logistically possible or would have abated the procedural problems that cast a shadow over the trials would be pure conjecture and beyond the scope of this thesis.

Although the commission did not have a direct role in the operation of trials, this did not prevent Webb from commenting to ministers on how they should be undertaken. For example, on 3 December 1945 he cabled the Secretary for External Affairs alarmed that the prosecution in Morotai had not made it clear in regards to the defence of superior orders that bayonetting was an 'outrageous method of execution'.[99]

The evidence collected by the Webb Commission was used in a number of war crime trials to avoid the necessity of bringing witnesses to the often remote areas in the Pacific where the trials were being heard. There were very few prosecutions from the evidence gathered in the first report which concerned the Papua campaigns of Kokoda and Milne Bay.[100] Webb commented at the time that most of the perpetrators had likely been killed before the war had ended. The evidence collected in the second and third commission, which had a particular focus on POWs was submitted as evidence before tribunals. A published account of how they were used is contained in Robin Rowland's *A River Kwai Story* which examines the Sonkarai Tribunal where seven defendants were tried in Singapore by the British (under SEAC) for their involvement in the running of one of the most notorious

questionable research, Gregory Hadley and James Oglethorpe, "MacKay's Betrayal: Solving the Mystery of the "Sado Island Prisoner-of-War Massacre"," *The Journal of Military History* 71(2007); James MacKay, *Betrayal in High Places* (Auckland: Tasman Books, 1996).

[99] NAA: A1066, H45/290/1, Sir William Webb, Chairman of the War Crimes Commission to the Secretary of External Affairs, 3 December 1945.

[100] Brooks, "The Carnival of Blood in Australian Mandated Territory," 31.

camps along the Burma-Thailand Railway.[101] In the trial of Sergeant Aoki Toshi, which began on 11 February 1946, neither the prosecution nor the defence attempted to obtain copies of the evidence gathered by the Webb Commission which provided mitigating circumstances for the accused.[102] However, at a later trial of Lieutenant Colonel Banno Hirateru and Others, portions of the transcript of the Commission were used by the prosecution and defence in presenting their cases.[103] The effect that the excerpts that were produced by the defence on behalf of Banno and Tanio had in the Tribunal's findings was not examined, but these two defendants received life sentences while four of the other defendants were executed.[104] As discussed previously, Webb was thorough in his investigation with a focus on finding individual blame and he made a valid attempt to find reasons for actions or redeeming qualities of the Japanese army.

The trial of Lieutenant-General Adachi Hatazo who was commander of the 18th Army in the New Guinea campaigns caught the attention of Webb in Tokyo when he was made aware of the *Courier-Mail* article that proclaimed 'Webb Report, Court Rejects Clauses'.[105]

---

[101] Robin Rowland, *A River Kwai Story : The Sonkrai Tribunal* (Crows Nest, N.S.W.: Allen & Unwin, 2007).

[102] Captain Benjamin Barnett (Signals 8 Australian Division) was interviewed before Webb on 23 October 1945 and provided evidence regarding Aoki refusing to send sick men to work and details of the chain of command. Ibid., 235-36.

[103] The testimony of Lieutenant Colonel Charles Henry Kappe (Signals 8 Australian Division), Major Atlee Bruce Hunt (13 Australian General Hospital) and Captain Benjamin Barnett (Signals 8 Australian Division). Kappe, who was still serving with the Australian Army was unable to attend the trial due to illness in Brisbane. Ibid., 261-69 and 353-54.

[104] Ibid., 363-69. 'Four Japs to Die, Slave-Drivers on Death Railway', *Singleton Argus*, 11 November 1946.

[105] 'Webb Report Court Rejects Clauses', *Courier-Mail*, 12 April 1947, 1. A couple of the regional papers carried more sensationalised headlines, for example, 'Webb Report Rejected in War Court', *Northern Star* (Lismore, NSW), 12 April 1947, 5, 'Trial of Jap General Adachi, Webb's Report Rejected', *Barrier Truth* (Broken Hill), 12 April 1947, 1 and; 'Webb Report Rejected as Evidence', *Cairns Post*, 12 April 1947, 1.

Disappointed and incensed, Webb wrote to the Minister for External Affairs for intervention on how his report was being used in prosecutions:

> Brisbane *Courier-Mail* of April 11th reports rejection by the War Crimes Court at Rabaul of passages from my atrocities report. You will recall that in all my reports I explained that the finding could not be used on trial of any Japanese. However, the evidence on which my report was based, was, as you know, placed before the United Nations War Crimes Commission in London presided over by Lord Wright. On such evidence the United Nations War Crimes Commission in London found *prima facie* cases and only such evidence should have been tendered at Rabaul, and then only in relation to particular charges approved by the United Nations Commission. Such charges and evidence were part of the records at Victoria Barracks, Melbourne, and should have been known to the Prosecution. If evidence only had been tendered no adverse comment was possible in view of findings and laudatory comments made by the United Nations Commission. In view of this attitude of the United Nations Commission which was prominently published in the Australian Press at the time, you may recommend that I should ignore the Rabaul court's observation and Press reports thereon, but the public have short memories and you may see fit to take steps to ensure that the public are not misled.[106]

The secretary of the Army emphasised to the Department of External Affairs that the whole of the Webb Report was not tendered and it was only some sections that the court ruled that the contents submitted could not be directly attributed to the defendant and were subsequently rejected.[107] This was relayed by the Department of External Affairs to Webb who added: 'The proper use to which the report should be put is well appreciated'.[108]

During the trial, the Counsel for the Prosecution, Lennard Campbell Badham (KC), explained in tendering the Webb Report that the prosecution intended to use sworn

---

[106] NAA: A1067, UN46/WC/8 Part 3, Sir William Webb, President of the IMTFE to H.V. Evatt, Minister for External Affairs, 24 April 1947.

[107] NAA: A1067, UN46/WC/8 Part 3, Secretary of the Department of the Army to the Secretary of the Department for External Affairs, 5 May 1945.

[108] NAA: A1067, UN46/WC/8 Part 3, J.W. Burton, Secretary of the Department of External Affairs to Sir William Webb, President of the IMTFE, 6 May 1947.

statements by witnesses made before the Commission to illustrate the widespread nature of the atrocities that were taking place under the command of the defendant. This was to prove that due to the nature and the frequency of their occurrence, the defendant must have known about the atrocities that were being committed under his command. A portion of the evidence that was not accepted because the area where the atrocities had occurred was under the command of the navy and not the defendant. In other cases involving cannibalism, there was a lack of specific evidence that the Japanese were responsible.[109] This was not the first time Webb had written to a minister to complain about articles in the printed press. In September of the previous year he had taken exception to articles in the press that stated that Evatt was presenting his report to the UNWCC. In writing to the Prime Minister he cites the praise he received from his presentation of the report earlier in the year.[110] Chifley replied that a statement addressing the issue had been released, to Webb's gratitude.[111] The first incident illustrates one of the concerns raised regarding

[109] AWM54, 1010/3/8 Part 1, [War Crimes and Trials - Transcripts of Evidence:] Lt General Adachi Hatazo, Commander 18th Japanese Army - Transcripts of evidence, summing up, biographical details, personnel correspondence - Reports following the Generals Suicide on 10th September 1947, while serving sentence.

Also refer to: NAA: B4175, 1 - Japanese war crimes - Miscellaneous legal papers relating to trials of Lieutenant -General Kato, General Imamura and Lieutenant-General Baba][Item consists of pencilled and annotated typed transcripts and statements, probably maintained by Judge Advocate J T Brock]; NAA: MP742/1, 336/1/398 – [War Crimes] – Lieutenant General ADACHI, Hatazo; NAA: MP742/1, 336/1/1264 – War Crimes – Trial of Lt/Gen Adachi Hatazo and; B4175, 29 - Trial of senior Japanese war criminals Rabaul March-May 1947 press cuttings [Relates to Lt-Gen Hatazo ADACHI, Maj-Gen Akira HIROTA, Colonel Masato SUWABE and others]. Edward J. Drea, *In the Service of the Emperor. Essays on the Imperial Japanese Army* (Lincoln: University of Nebraska Press, 1998). 91-109; Leonard A Humphreys, "[Review] In the Service of the Emperor: Essays on the Imperial Japanese Army," *Journal of Military History* 63, no. 1 (1999): 204-05.

[110] NAA: M1455, 47, Sir William Webb, War Crime Commissioner to B. Chifley, Prime Minister, 5 September 1945. He closed his letter: 'I would like you to let the public know the facts, but without publishing any of the eulogistic references to my work. It is most embarrassing to me to read these misstatements in the newspapers'.

[111] NAA: M1455, 47, correspondence between Sir William Webb, War Crimes Commissioner and B. Chifley, Prime Minister, 7 and 11 September 1945.

judges participating in extra-judicial activities in that they have no control over how their reports are used once they are submitted to the government.

Australia was the last of the Allied nations to cease war crime trials in the Pacific and was under great pressure from the United States from 1948 to wind down the trials. Britain had been eager to wind down war crimes prosecutions after the conclusion of the Nuremberg Trial. The focus of the British policy was pragmatism; limiting the number of cases due to shortage of resources and focus on post war rehabilitation. Therefore, crimes against British nationals were pursued and discussions centred on the question of what would be a 'politically acceptable' number of prosecutions. This approach was aided by British apathy towards the trials, and most of the population focussed on day-to-day survival rather than post-war justice as well as ignorance of the extent of crimes committed by the Axis powers.[112] However, the situation and the attitudes to the Japanese in Australia were quite different. The portrayal of the Japanese Imperial Army's barbaric treatment of Australian soldiers had fuelled intense antagonism and demand that all perpetrators were brought to justice.[113] Therefore, the Australian Government pursued the post-war trials well after its allies had shifted their policy to rehabilitation and reintegration of Japan into the international community that was dividing along the lines drawn by the Cold War. As the last trials drew to a close in 1951, it is evident that the Australian public had lost interest,

[112] Donald Bloxham, "Britsh War Crimes Trial Policy in Germany, 1945-1957: Implementation and Collapse," *Journal of British Studies* 42, no. 1 (2003): 105-10.

[113] An example of the Australian feeling immediately after the war was in the report of Prince Konoye's proposal that an 'apology mission' going to China could be extended to other nations, including Australia. The Australian Government response was a resound refusal to entertain accepting any apology from the Japanese Government on war crimes, viewing it as a face-saving gesture. 'Australia Will Not Accept Apology', *Townsville Daily Bulletin*, 25 September 1945, 1.

with only brief commentary in the press, and the final prisoner under Australian control was released in 1957.[114]

Publicity of the Webb Reports

As previously discussed, the Australian public first became aware of Webb's activities in February 1944 with little detail provided on his findings. Until then, the Australian government, in agreement with the British and United States governments, had prohibited publication of stories relating to Japanese atrocities to protect the relatives who had loved ones under captivity and to avoid repercussions for those in enemy hands. This view was shared by Webb, as discussed previously. However, the government knew the inevitability of the stories being reported and the propaganda potential that the information would exert on the public.[115] In November 1944, the POW experience in Malaya became publicly known. The lack of information provided by the government on Webb's findings frustrated some quarters of the public. The *Courier-Mail* urged the government to release more information after reports came from London of Webb's 'blood curdling' evidence provided to the UNWCC.[116] By the end of the year this hunger for detail was satisfied and reached saturation, as C.E.W Bean argued in an editorial, 'For two months the Press has been full of details of atrocities so shocking and continuous that many readers have opened their newspapers with dread and then thrown them away with horror. Many have even begun to ask whether it is right that these things should be published'.[117] The Third Report was

[114] Pappas, "Law and Politics: Australia's War Crimes Trials in the Pacific, 1943-1961," 70-90; Sissons, "The Australian War Crimes Trials and Investigations (1942-51)".

[115] Norman Abjorensen, 'Biting the lip on war crime', *Canberra Times*, 23 September 1995, 44.

[116] 'Why not tell the People', *Courier-Mail*, 3 February 1945, 2.

[117] C.E.W. Bean, 'Do Atrocities Mean Japanese Are Beyond Redemption?', *Sydney Morning Herald*, 3 October 1945, 2.

tabled in Parliament in April 1946, two weeks before the opening of the International Military Tribunal for the Far East.[118]

The details of the reports and the trials were kept secret to the public after the war from the public in the interest of national security and protection of the victims' families and friends from traumatization.[119] However, Margaret Reeson has argued that the secrecy served only to increase the trauma. With details being released to the press with names suppressed, victims' families had to deal with vivid imagery of what might have befallen their loved ones and naturally assumed the worst. When the Webb reports were released to the public, the names of many of the victims had been excised from the text. It was difficult for the families to achieve closure when their loved ones were still listed as missing.[120] Consequently, the commissions failed to reassure the public that the government had nothing to hide, with allegations of a cover-up and bitterness still held to the present day.[121] In some quarters it is speculated that the prolonging of the suppression of reports was to enable the growth of post-war trade with Japan.[122] It also illustrates the lack of control judges have over their reports that have a tendency to become tools of politicians.

---

[118] *CPD*, HR Vol 186, 10 April 1946, 1294-1297 and; 'Butchery of Australian Ps.O.W. [sic] by Japs. Horrifying Report', *Examiner*, 11 April 1946, 1.

[119] Pappas, "Law and Politics: Australia's War Crimes Trials in the Pacific, 1943-1961," 89-90.

[120] Margaret Reeson, "Searching for Dad. Unsolved mysteries of the war," in *From a Hostile Shore. Australia and Japan at War in New Guinea*, ed. Steven Bullard and Kieko Tumura (Canberra: Australian War Memorial, 2004), 162.

[121] Ibid., 160, 62.

[122] Alex Graeme-Evans, *Of Storms and Rainbows. The Story of the Men of the 2/12th Battalion A.I.F.*, vol. 2 (Hobart: 12th Battalion Association, 1991). 174-75.

Summary

The third commission was challenging for Sir William Webb. After gaining notoriety with his trip to the UNWCC he appeared to be willing for a continuation in the role as the nation's war crimes commissioner and the offer of chairing a sub-committee of the United Nations body in Australia. However, this plan was stonewalled as the Queensland government interceded by refusing to release the Chief Justice for almost the first half of the year. This was due to the pressure being placed on the Supreme Court and Industrial Court in his absence. Webb was aware of the impact that his absence was having on the court. In the report of the first commission he had requested additional commissioners be appointed to enable him to maintain his judicial duties in Queensland. As a result, appointments were made for additional commissioners and acting justices to the Supreme Court. However, as discussed in the chapter, the former resulted in conflict on the commission and the latter did not appease critics in Queensland illustrating wider difficulties that can arise when judges partake in extra-judicial activities.

During the third commission, Webb was enticed to step beyond his terms of reference and the proper functioning of a commission of inquiry. His motives appear to have been altruistic in ensuring that due process would be observed during the war crimes trials conducted by Australia which in his view could be guaranteed through the continuing presence of the judiciary. The third inquiry illustrates the hazard of an extra-judicial activity extending in duration and impairing a judge's primary duty to their court. Moreover, Webb was slipping further into the area of policy advice and active direction where previously he had shown restraint. He attempted to transform the AWCC into

something of a public prosecutions office, a distinct function of the executive, beyond the capacity of a judge and entering into a realm of policy, if not politics.

Webb's role in the War Crimes Commission made him the obvious choice to serve on the International Military Tribunal of the Far East. The *Australian Law Journal* wrote that the Australian War Crimes Commission was 'a post that fitted him for the position of the president' of the International Military Tribunal for the Far East.[123] However, Webb's suitability for his role IMTFE has been widely argued as not being the case. Chapter Seven examines how Webb's presidency is historically marked with controversy.

[123] "Sir William Webb," *The Australian Law Journal* 32(1958); "Obituary. Sir William Webb," *The Australian Law Journal* 46(1972).

Chapter Seven:
International Military Tribunal for the Far East 1946-8

> …the personality, behaviour and mannerism of President Webb were to make the most enduring impression upon those who witnessed the trial.[1]

Sir William Webb's participation on the International Military Tribunal for the Far East (IMTFE) is by far the most scrutinised and consequently criticised of his extra-judicial activities. Ironically, this was the task closest to him exercising normal judicial function out of all of his war-time duties. The trial began on 29April 1946 and concluded on 12 November 1948. In this period there were 417 days of proceedings, 419 witnesses examined, 779 affidavits admitted and the transcript extended over 48,000 pages.[2] The majority judgment was 1,218 pages in length and has been said to be valueless due to its length as a source for international law.[3] The trial has been, until recently, largely disparaged in the literature, being labelled as 'victors' justice' and a low point for international law. As president of the Tribunal, Webb's leadership, and his provision of the sole voice from the bench, often serves as a central explanation of the IMTFE's many

[1] Yuki Takatori, "America's' War Crime Trial? Commonwealth Leadership at the International Military Tribunal for the Far East, 1946-48," *The Journal of Imperial and Commonwealth History* 35, no. 4 (2007): 557.

[2] Philip R. Piccigallo, *The Japanese on Trial. Allied war crime operations in the east, 1945-1951.* (Austin: University of Texas Press, 1979). 23; Richard H. Minear, *Victor's Justice. The Tokyo War Crimes Trial* (Princeton, New Jersey: Princeton University Press, 1972). 5.

[3] Gordon Ireland, "Uncommon Law in Martial Tokyo," *The Year Book of World Affairs* 4(1950): 68.

failings. Consequently, severe criticism has been directed at how he performed his role and has led to questioning his motivations.

This chapter will firstly undertake a summary of the establishment of the tribunal and the controversy of the selection of Webb as a member and president. His selection was contested in Australia (notably by another Queensland justice), during proceedings by the defence and by various subsequent historical analyses of the trial. This criticism concerns his questionable partiality due to prior involvement in investigating Japanese war crimes. Webb's behaviour and relationship with other participants in the trial is examined and how this is significant source of criticism regarding his presidency of the IMTFE. It also highlights his attempt at maintaining the independence of the Tribunal by resisting overtures from the Supreme Commander and others.

During the trial Webb's conduct at various times alienated and exasperated members of the prosecution and defence teams as well as fellow members of the bench. While commentators on his domestic judicial career note his ability to produce cordiality in the courts over which he presided, the IMTFE is another example along with the IRC, discussed in Chapter Three, of harmony breaking down due to his personality and misuse of his authority.[4] This chapter examines Webb's approach to rules of procedure where it is argued that while he attempted at all stages to expedite the proceedings through altering the rules of procedure, he made a concerted effort to balance this with fairness to the accused.

[4] Michael Kirby, "The Five Queensland Justices of the High Court of Australia," *Australian Bar Review* 15(1996): 8-9.

As the IMTFE proceedings continued to be prolonged, Webb was pressured to return home to take his seat on the High Court of Australia. The consequences of his absence on the tribunal while he went to serve on his domestic bench were to shape the final stages of the IMTFE and add further criticism contained in the literature on the trial. The trial has also been criticised for omissions of war crimes, such as rape, biological weapons and cannibalism with one historian suggesting the latter should have been raised by the president of the tribunal.

Webb was also to his leave mark through a separate opinion in which he outlined his steadfast views on the guilt of the Emperor. This was not appreciated by the occupation authorities and has been interpreted in some sections of the literature as evidence of him being under political influence as it reflected the position of Australian Government. However, Webb's position was formed during his work as war crimes commissioner and his findings in the reports became the basis of Australia's war crime policy.

The contention in this chapter is that there are two levels of hazards present with the IMTFE as an extra-judicial activity. Firstly, the involvement with the Australian War Crimes Commission led to the possibility of bias or the appearance of bias on the bench of the IMTFE. Secondly, Webb's involvement in an international body that is considered to be politically motivated and his appearance of aligning to government policy has led to him being labelled a 'political judge' by commentators on the IMTFE at the time and since.

Establishment of the IMTFE

The IMTFE was closely modelled on the International Military Tribunal held at Nuremberg for German war criminals, however, on a number of critical factors it differed.[5] As previously discussed, the Allies were debating the punishment of war criminals from an early stage of the war. As the war proceeded to favour the Allies from 1943, the issue of bringing those responsible for the war came to the fore, expanding beyond the previously held concerns regarding merely conventional war crimes. In the case of Japan, the prospect of the establishment of an international tribunal was raised in the Cairo Declaration of 1 December 1943. The London Conference in January 1945 established the intention of prosecuting the leaders of the Axis powers for the newly defined crime of waging aggressive war. The Potsdam Declaration of 26 July 1945 was the first direct announcement by the Allies to Japan of the intention of prosecuting individuals for the actions of the nation. Paragraph 10 of the declaration stated:

> We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners.

The Japanese government accepted the terms on August 10 and the signing of the Instrument of Surrender on September 2, 1945 was Japan's official acceptance of the terms established in the Potsdam Declaration. General MacArthur as the Supreme Commander of the Allied Powers (SCAP) established the IMTFE by a proclamation on 19 January 1946. Furthermore, the occupation and trial were practically directed and controlled solely by the

[5] For comparisons between the two tribunals see; A. Frederick Mignone, "After Nuremberg, Tokyo," *Texas Law Review* 25(1947): 475-90. Robert B. Walkinshaw, "The Nuremberg and Tokyo Trials: Another Step Toward International Justice," *American Bar Association Journal* 35(1949): 299-300.

United States through SCAP. The major decisions were of American construction, such as the Charter and the establishment of the tribunal, exercised through the power of SCAP. The policy not to prosecute the emperor was also made in Washington. The prosecution and defence teams were dominated by American lawyers. Conversely, the occupation of Germany and the Nuremberg trial were established through consultation among the 'Big Four' of the United States, Britain, France and the USSR. Britain was the most reluctant of the four to use a judicial trial to punish the leaders of their former enemies. Summary executions were favoured by many in the British leadership and bureaucracy, with the main concern being the lack of precedent and the political nature of the proceedings. However, the Truman administration prevailed with the establishment of International Military Tribunals for the trial of major war criminals.[6] The IMTFE Charter was modelled closely on the one that established Nuremberg. The two major exceptions were that the individuals tried by the IMTFE were required to have committed crimes against the peace, (Article 5 (a)) and the bench was made up of eleven representatives of the Allied nations with no alternatives, (Article 2). Furthermore, Article 2 established that the Supreme Commander, MacArthur, would appoint members to the bench and (Article 3 (a)) to appoint the president of the tribunal. MacArthur made his selection of eleven representatives for the tribunal from a list of nominees provided by the respective Allied governments.[7]

[6] Donald Bloxham, "Britsh War Crimes Trial Policy in Germany, 1945-1957: Implementation and Collapse," *Journal of British Studies* 42, no. 1 (2003): 92-95.

[7] The eleven justices were: Sir William Webb (Australia), Edward Stuart McDougall (Canada), Ju-ao Mei (China), Henri Bernard (France), Radha M. Pal (India), B.V.A. Roling (Netherlands), Erima Harvey Northcroft (New Zealand), Delfin Jaranilla (Phillippines), Ivan Micheyevich Zaryanov (USSR), Lord Patrick (UK), John P. Higgins who was replaced during the trial by Major General Myron C. Cramer (US).

Early in January 1946, Justice Alan James Mansfield concluded that any trial in Tokyo was to be directed by the United States with limited input from their allies. Writing to Webb during his mission to London, Mansfield complained that his presentation of Australia's list of major war criminals to the UNWCC was being frustrated by the US members.[8] The influence of other nations, in particular from the British Commonwealth, on the shape and the procedures of the tribunal is often overlooked due to the overarching American presence in the trial. A strong presence of the British Commonwealth is seen in the jurisdiction, indictment and the judgment.[9] This is also evident in the process of how Webb became a member of the tribunal and his influence during the trial.

Selection and Appointment of Webb as President of the Tribunal

Webb's appointment to the IMTFE was the obvious choice by the Australian government due to his previous experience in war crimes. With the close of the war the United States Government took the lead in establishing international tribunals to try the Japanese major war criminals and sought nominations from their Allies to fill the positions on the bench.[10] Australia initially felt it was being sidelined by the American requests and with the support of the British Government, protested at the proposal for Dominion governments each having two fewer nominations:

---

[8] NAA: A6238, 3, Mansfield, A.J., War Crimes Commissioner and Justice of the Queensland Supreme Court to Sir William Webb, Chairman of the AWCC and CJ of Supreme Court of Queensland, 4 January 1946. Later Mansfield wrote: 'It is obvious to me that the Americans do not desire the list to be passed by the commission and will raise every obstacle to prevent that being done', NAA: A6238, 3, Mansfield, A.J., War Crimes Commissioner to Sir William Webb, Chairman of the AWCC and CJ of Supreme Court of Queensland, 10 January 1946.

[9] Takatori, "America's War Crime Trial?," 550.

[10] NAA: A1066, H45/590/3, Australian Legation, Washington to the Department of External Affairs, 'Policy of the United States in Regard to the Apprehension and Punishment of War Criminals in the Far East', 19 October 1945.

> …we cannot accept the United States proposal for differentiation in the number of nominees for International Courts to be made by each of the Allies concerned.
> Australia's contribution to the defeat of Japan, the sufferings of our nationals at the hands of the Japanese militarists, and our active participation and special concern in all phases of the task of bringing Japanese War Criminals to justice entitle us to equal representation with other powers in the constitution of International Courts.[11]

This encapsulates the attitude of the Australian Government asserting its independent role from Britain in the post-war international community and the importance of satisfactorily dealing with the defeated Japan and the perpetrators of crimes against Australians.

In November 1945 the Department of External Affairs advised the minister, H.V. Evatt in London the recommendations by Sir George Knowles and Webb for selection as the civilian representatives for Australia on the military tribunals for major war criminals. Six names were included, with Webb third on the list after the Justice Edward Aloysius McTiernan of the High Court and Chief Justice Sir Edmund Herring of the Victorian Supreme Court who was previously a Lieutenant-General in the Australian Army and commanded in New Guinea from late 1942. Two King's Counsels were listed, John Vincent Barry and Alan Russel Taylor. Academic lawyer Professor Kenneth Hamilton Bailey of Melbourne University, who was also serving with the Attorney-General's Department, was included on the list.[12] Evatt replied with his own list, stressing the need for someone with a background in criminal law and was headed by Lord Wright with

[11] NAA: A1066, H45/590/3, External Affairs, London to Secretary of State, Washington (undated). Also refer to 'Australia's Part at Tokyo Surrender', *Argus*, 25 August 1945, 5. Evatt statement protesting against the proposal that Australia's representatives at the surrender ceremony would be attached to the United Kingdom representatives.

[12] NAA: A1066, H45/580/2/7, Department of External Affairs to H.V. Evatt, Attorney-General and Minister of External Affairs, 27 November 1945.

Webb as a second selection, followed by seven other judges and Sir George Knowles.[13] Wright quickly declined the nomination due to his commitment to the UNWCC and judicial duties leaving Webb at the top of the list.[14]

Webb accepted the request for his name to be forwarded to SCAP by the Australian Government on 13 December 1945, stating:

> …Subject to my being qualified to act.
> Of course, I have so far made no finding against any major war criminal.
> The second part of the report, dealing with major criminals, could be completed by another commissioner.[15]

However, in early January the following year, Webb was still reluctant to accept a position on the war crimes tribunal, believing he was 'disqualified' and had expected Knowles to take the role.[16] Two days later Webb wrote to Mansfield that he believed he would qualify to try those accused of crimes against the peace and of aggression, but would not be for charges relating to how the war was conducted. Moreover, the Chief Justice only accepted his name being forwarded due to the persistence of the government and had not included

[13] The other judges included in order, Herring CJ (Supreme Court of Victoria), Hugh C.G. Macindoe (Victorian County Court), John Sydney Clancy (District Court of NSW), Roslyn Foster Philp J (Supreme Court of Queensland); Geoffrey Sanford Reed J (Supreme Court of South Australia) and Kenneth Whistler Street J (Supreme Court of New South Wales), NAA: A1066, H45/590/03, H.V. Evatt, Attorney-General and Minister for the Department of External Affairs to Secretary for the Department of External Affairs, 29 November 1945.

[14] NAA: A1066, H45/590/3, External Affairs Officer, London to Acting Minister and Department of External Affairs, 14 December 1945.

[15] NAA: A1066, H45/590/03, Sir William Webb, Chairman of the AWCC and CJ of Supreme Court of Queensland to the Secretary to the Department of External Affairs, 13 December 1945.

[16] Webb's preference was for Justice Philp or Judge Clancy to fill the position. NAA: A6238, 3, Sir William Webb, Chairman of the AWCC and CJ of Supreme Court of Queensland to Mansfield, A.J., War Crimes Commissioner and Justice of the Queensland Supreme Court, 6 January 1946.

his name in any of his recommendations to the nomination lists.[17] On 16 January it was reported in the press that Webb would be Australia's representative on the court which was 'Japan's Nuremberg' and that Mansfield would be an assistant prosecutor.[18] It was only after Webb had left for Tokyo that criticism was levelled at the Chief Justice for accepting the position.

Webb's participation on the IMTFE was questioned in Australia, initially being raised in the press then followed by the Commonwealth Parliament. Justice Frank Tennison Brennan of the Supreme Court of Queensland made a statement from the bench in Rockhampton expressing his concerns regarding the appointment:

> We justices of the Supreme Courts of the British Empire are exhorted to guard jealously the great bulwark of liberty which our system of justice always strives to uphold.
>
> Dr Evatt, our Federal Attorney-General, by his recommendation of Sir William Webb as judicial officer in the trials of major war criminals, may prove to have done a great disservice to Australia…What will foreign nations think of such a state of affairs? Could British justice allow a detective who had investigated crimes and made findings against a class preside as judicial officer to try other offenders of the same class? The issue will be surely raised, and Sir William Webb may be placed in a false and invidious position and Australia made to look stupid.
>
> I am perfectly satisfied that Sir William Webb, a courteous gentleman, would be just and impartial, but if he presides at the trials, then foreign nations will be in a position to point the finger of scorn at our conception of British justice in the circumstances. We have in Australia other excellent and brilliant jurists, any one of whom could fill the judicial role with dignity and distinction. I therefore, feel it is my duty to give a timely warning to

[17] NAA: A6238, 3, Sir William Webb, Chairman of the AWCC and CJ of Supreme Court of Queensland to Mansfield, A.J., War Crimes Commissioner and Justice of the Queensland Supreme Court, 8 January 1946.

[18] 'Webb for Tokio to Try Japs to Join Court on War Crimes', *Courier-Mail*, 16 January 1946, 1; 'Justice Webb to Adjudicate in Tokio', *Mercury*, 16 January 1946, 7 and; 'Australian on War Crimes Court', *Argus*, 16 January 1946, 20.

save our country from contemptuous ridicule.[19]

Mr Bowden raised the concerns expressed by Brennan and suggested that the issue of prejudice might emerge in regard to Webb's earlier involvement in investigations into Japanese war crimes. Bowden asked Evatt what he intended to do about the 'false and invidious position' to which the attorney-general had placed the judge. Evatt replied that Brennan was 'under a complete misapprehension as to the position'. He added: 'We nominated Sir William Webb, who, as he had nothing to do with the investigation of the crimes that will be tried in Tokyo, is completely free to give his judgement on all the matter that will come before that tribunal'.[20] However, this as will be discussed below, was not completely true.

According to Arnold Brackman, Webb approached the prosecution team stating that he did not want to take his seat on the bench without MacArthur informed of his prior activities. However, Joseph B. Keenan, Chief of Counsel of the International Prosecution Section (IPS) assured Webb that his prior involvement would not disqualify him from taking his seat.[21]

At the trial, the defence lawyers for the accused challenged his position at the first opportunity. As Webb was about to call upon the accused to plea, Kiyose Ichiro, deputy chief of the Japanese defence interjected: "Before making the Plea, we would like to

[19] 'Justice Criticises Jap Trials Appointment', *Argus*, 22 March 1946, 24; 'Judge's Doubts on Webb Appointed', *Sydney Morning Herald*, 22 March 1946, 3.

[20] *CPD*, HR, Vol. 186, 22 March, 1946, 533.

[21] Arnold C. Brackman, *The Other Nuremberg. The Untold Story of the Tokyo War Crimes Trials* (New York: Quill-William Morrow, 1987). 70-71.

challenge the judge".[22] Kiyose went on to argue that if all reference to offences committed in New Guinea be stricken from the indictment he would withdraw his challenge. The New Guinea atrocities would have come under count 54 of the indictment that charged the accused of authorising breeches of the laws and customs of war. The references to New Guinea were not removed and after a short recess the court resumed with Justice Northcroft presiding and declaring that the Tribunal could not make any decisions regarding the members as Article 2 of the Charter stated that this was the sole responsibility of the Supreme Commander.[23] The Australian evidence submitted to the IMTFE included nine witnesses and a number of affidavits regarding incidents in New Guinea, Singapore, Malaya, the Burma-Thailand railway, Borneo, Ambon and other areas.[24] Furthermore, throughout the proceedings depositions taken by Webb were submitted by the prosecution and the matter arose during a cross-examination by the defence of a witness who had been interviewed by Webb as war crimes commissioner.[25] The Philippines representative, Justice Jaranilla was also challenged by the defence for being a victim of the Baatan Death March as a civilian internee of the Japanese. However, this challenge failed on the same grounds.[26] Furthermore, during the war General Cramer, the second United States

---

[22] IMTFE 92

[23] IMTFE 92-98. Brackman, *The Other Nuremberg*: 64-7, 94; Minear, *Victor's Justice*: 83; Robin Kay, ed. *The Surrender and Occupation of Japan. Documents on New Zealand External Relations*, vol. 2 (Wellington: P.D. Hasselberg, 1982), 1585; Ireland, "Uncommon Law in Martial Tokyo," 67; Sarah Finnin and Tim McCormack, "Tokyo's Continuing Relevance," in *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, ed. Yuki Tanaka, Timothy McCormack, and Gerry Simpson (Leiden, The Netherlands: Martinus Nijhoff Biggleswade, 2011), 372-76.

[24] Clem Lack, *Three decades of Queensland political history, 1929-1960* (Brisbane: Govt. Printer, 1962). 611 (2).

[25] Dayle Smith, *MacArthur's Kangaroo Court. The Tokyo War Crimes Trial* (Brisbane: Envale Press, 2000). 117.

[26] Brackman, *The Other Nuremberg*: 116-17.

representative, served on an inquiry into the attack on Pearl Harbour. Within the chambers Webb expressed the view that individual justices should decide their own fitness to sit on the bench, Minear argues that Webb believed that Jaranilla should have disqualified himself from the bench.[27] Many other commentators on the IMTFE have cited Kiyose and Minear's objections to Webb as discrediting the IMTFE.[28]

Terry Hewton concluded from his analysis of Webb's papers held by the Australian War Memorial that there was no evidence of direct political influence towards Webb to conduct the trial to reach a predetermined conclusion for the defendants. Furthermore, Webb's resolute regard to his independence convinced Hewton that Webb would not have been coerced or tolerated any overtures of the executive in carrying out his duty. Certainly, Webb's defensiveness regarding his independence on the other extra-judicial activities examined previously in this dissertation supports Hewton's interpretation of Webb as 'self-willed man of strong character'.[29] One example of Webb maintaining the independence of the tribunal was reproaching MacArthur when he suggested that he would direct the interpretation of the Charter. Webb sternly stated that the Supreme Commander was 'the

[27] Minear, *Victor's Justice*: 82-83.

[28] Dower cites Minear and incorrectly asserts that Webb had also served on prosecuting Japanese on other military tribunals John W. Dower, *Embracing defeat: Japan in the wake of World War II* (New York: W.W. Norton & Co., 1999). 465. Other works to cite Minear's objection of Webb's 'disability' are: Yves Beigbeder, *Judging war criminals: the politics of international justice* (Houndmills, Basingstoke, Hampshire, New York: Macmillan Press ; St. Martin's Press, 1999). 63; Kelly Dawn Askin, *War crimes against women: prosecution in international war crimes tribunals* (The Hague, Cambridge, Mass.: M. Nijhoff Publishers; Distributed in the USA and Canada by Kluwer Law International, 1997). 172. Behr wrote that Webb had presided over a trial in the Philippines although he had not, Edward Behr, *Hirohito: Behind the Myth* (London: Hamish Hamilton, 1989). 408.

[29] Terry Hewton, "'Webb's Justice': The Role of Sir William Flood Webb in the Tokyo Trial, 1946-1948" (University of Adelaide, 1976).

Tribunal's exclusive province to determine the meaning of the Charter'.[30] Similarly, Webb kept the Australian Government at arms-length. Writing to Evatt he illustrated discretion: 'I wish I could take you into my confidence about the attitude of my colleagues on the legal aspect. In some cases it is simply amazing.'[31] There is certainly no evidence to suggest that he was being directed by the executive; conversely, in line with his other duties, he illustrates an acute awareness and resistance to any direction.

The question then turns as to whether he should have disqualified himself for perceived or actual prejudice or bias to the defendant appearing before the tribunal and the evidence is not as favourable. Dayle Smith has perhaps provided the most detailed analysis and concludes on the balance of evidence that Webb should not have retained his position on the bench. Smith states that the principle followed in Britain and the Dominions is '[i]f a reasonably probable ground for alleging bias exists, the justice should not act and, if present, should withdraw from the bench'.[32] This would have been sustained by common law if Webb was sitting in Queensland. Further, Smith argues that Webb could be disqualified on two other grounds as well, that '[n]o man was entitled to be a judge in his own cause' and that he 'had indicated partisanship in relation to one of the issues before the tribunal'.[33] Webb had been occupied for the previous three years on investigating war crimes for the Australian government and was required to form views regarding Japanese

[30] NAA: M1418, 6, Sir William Webb, President of the IMTFE and J of HCA to General D. MacArthur, Supreme Commander of the Allied Forces, 22 April 1946.

[31] NAA: M1418, 2, Sir William Webb, President of the IMTFE and J of HCA to H.V. Evatt, Attorney-General and Minister for External Affairs, 3 July 1946.

[32] Smith, *MacArthur's Kangaroo Court*: 111-12.

[33] Ibid., 116.

military policy which lends support to these two grounds. Smith also discounts the argument that Webb's vote did not determine the end result for the defendants.[34]

The archival evidence indicates that Webb had formed an opinion on a number of matters that would come before the tribunal and by his third commission he was involved in making a case against potential major criminals. Initially, Webb contemplated whether the atrocities were part of a policy of the military and by the end of 1945 he was considering the extent to which the Japanese government could be held accountable for the manner in which the war was conducted. Webb's first war crimes report was limited to finding individual culpability of those who perpetrated atrocities while he acknowledge that his report could be used to make representations of protest to the Japanese government during the war and later as a basis for compensation. There was no consideration of the criminal liability of Japanese military or civilian leadership. Webb began to advise the government on the responsibility of military leaders after the second report and his visit to the UNWCC in 1944-45. In his second report he concluded that the Japanese Army 'did not act like the disciplined army of a civilised power'.[35] While Evatt drew the conclusion from the second report that the Japanese army had 'a policy of systematic terror', Webb's view was more moderate. He argued that: 'atrocities strongly suggest that the Japanese armed forces were to say the least badly disciplined and that but for the fact that there were some humane Japanese officers he would conclude that the atrocities were the policy of the Japanese

[34] Elwyn Spratt, *Eddie Ward, firebrand of East Sydney*, Seal books (Adelaide: Rigby, 1978).

[35] NAA: A2937, 222, Sir William Webb, War Crimes Commissioner to H.V. Evatt, Minister for External Affairs and Attorney-General, 1 February 1945.

Government'.[36] By November his view was that he believed the Japanese people were not sadistic and that it was the Japanese Army's system of discipline based on brutality that was to blame for the atrocities.[37] Thus, Webb certainly had preconceived ideas regarding count 54 and 55 of the indictment before accepting his nomination.

Webb spent the second half of 1945 considering the question of who should be included in the list of major war criminals of the Japanese military, political and industrial leadership. In June 1945, Webb's views on Japanese major war criminals were requested by the UNWCC as to whether charges could be laid and the nature of the machinery to try them. Webb replied that the Japanese Cabinet had to have been informed on projects of the scale of the Burma-Thailand Railway and therefore, members could be indicted and tried by the military courts that had already been conceived. Webb was also considering how the emperor should be tried and therefore had taken the stance that the nominal ruler of Japan had a case to answer.[38] On 23 August 1945 John E. Oldham, External Affairs Officer, London, advised the Department of External Affairs 'that active steps be taken by our national office now to prepare charges against major Japanese war criminals so that Australia may be ready to make contributions expected of her'.[39] With further urging from London the Department of External Affairs advised Oldham on 12 October that the first list

[36] NAA: A2937, 222, External Affairs Office, London to the Department of External Affairs, Canberra, Statement of the Minster for External Affairs, H.V. Evatt, 13 September 1945 and; Sir George Knowles, Secretary to the Department of External Affairs to H.V. Evatt, 26 September 1945.

[37] NAA: A1066, H45/580/2/7, Sir George Knowles, Secretary to the Minister of External Affairs to H.V. Evatt, Minster for External Affairs and Attorney-General, 15 November 1945.

[38] NAA: A1066, H45/6/2, J.D.L. Hood, Acting Secretary to the Department of External Affairs to Sir William Webb, War Crimes Commissioner and Chief Justice of the Supreme Court of Queensland, 8 June 1945 and; Sir William Webb, War Crimes Commissioner and Chief Justice of the Supreme Court of Queensland to J.D.L. Hood, Acting Secretary to the Department of External Affairs, 25 June 1945.

[39] NAA: A1066, H45/6/2, Oldham, John Egerton, External Affairs Officer, London to Dr H.V. Evatt, Minister for External Affairs and Attorney-General, 21 August 1945.

had been provided to Webb for his consideration, although it took to the end of the month for the list to be finalised.[40] This shift in focus was reflected in the terms of reference for the third commission which included the planning, preparation, initiation or waging a war of aggression as a crime to be investigated (refer to Appendix 5). In the first list of major Japanese war criminals forwarded to the UNWCC the cover note stated that the list had 'been passed by' Webb with consultation with those who compiled the information referred to as 'Australian experts in Japanese affairs'.[41] This document also outlined the case against the Emperor in which the argument put forward was similar to that Webb pursued later in his separate opinion. As discussed in the previous chapter, as the AWCC became sidelined by the Australian army after the close of hostilities, Webb shifted the commission's focus to major war criminals. The purpose of the third report was to construct a case against the major criminals for their responsibility for the atrocities that were committed by their military forces during the war:

> I will try and make it as general and as brief as I can because it will be used only against the major war criminals merely to show the kind of war for which they were responsible. The actual perpetrators and those closely associated with them will be dealt with by the army.[42]

A week later Webb's view had shifted as to offering his opinions on major criminals to the Department of External Affairs and he declined to approve a second list of major war

[40] NAA: A2937, 222, various correspondence. In separate correspondence Webb expresses his concern that a complete list may be impossible due to the extent of the crimes committed and the difficulties of finding the necessary evidence to prove responsibility, NAA: A1066, H45/580/6/3, Sir William Webb, War Crimes Commissioner and CJ of Supreme Court of Qld to Secretary of the Department of External Affairs, 22 October 1945.

[41] NAA: A6838, 3, 'First List of Major Japanese War Criminals', undated.

[42] NAA: A6238, 3, Sir William Webb, Chairman of the AWCC and CJ of Supreme Court of Queensland to A. J. Mansfield, War Crimes Commissioner and Justice of the Queensland Supreme Court, 8 January 1946.

criminals, a draft of which he had already approved, citing his nomination for the international tribunal.[43] This belated distancing of himself from the process at this stage does not lend itself to absolving the allegations that he had preconceived views on the defendants prior to accepting his position on the IMTFE. Webb wrote in his introduction to David Bergamini's *Japan's Imperial Conspiracy* that he would not have accepted the position of the IMTFE had the Emperor been indicted due to his conviction of the emperor's responsibility. Once again, this does not resolve the problem of Webb taking the role on the IMTFE while having prejudged the responsibility of the Japanese government as war crimes commissioner. Further, his position on the emperor's responsibility formed the basis of his separate opinion, discussed later, which had been formed prior to his appointment.

Webb may have been the best option for the government at the end of the day considering the alternatives that were listed by the Department of External Affairs in October and November 1945. As the trial was of international importance it required individuals who were highly ranked in their profession, it was requested that military nominees have a rank of Brigadier-General and civilian nominees needed to be judges from the nation's superior court. With Lord Wright declining the invitation, the next name on the list of seniority was McTiernan J, who, as a Labor appointee to the High Court, the government would not have wanted removed from the bench with the legal challenges to post-war reconstruction legislation coming before the court in the following year. Herring CJ was a recent appointee to the Victorian Supreme Court and due to his military leadership in the New

[43] NAA: A1067, UN46/WC/1, Secretary of Department of External Affairs to Sir William Webb, Chairman of the AWCC and CJ of Supreme Court of Queensland, 15 January 1946 (with handwritten notes from telephone conversation with Webb).

Guinea campaign, similar questions would have been raised regarding his impartiality. Judge Macindoe and Judge Clancy were members of lower ranked courts and the latter's biographer comments that he made little contribution to the law.[44] Philp J would have made an adequate member of the tribunal due to his military service and mastery of criminal law; his wide reading of judgments from the United States would have been beneficial dealing with the American lawyers.[45] His involvement with the third war crimes commission, although minimal, still may have drawn criticism. Reed J would have been a non-controversial appointment, he had a limited time on the bench which weakens any role in Tokyo, but his participation on a number of government inquiries on national security would not have prejudiced his impartiality. Street CJ was perhaps, the strongest candidate that would have avoided criticism. He had been appointed to the Supreme Court of New South Wales in 1931 and had served with the AIF in World War I. He was described as possessing 'a personal charm which commended him to all who appeared in his court', a quality that was required on the tribunal on Tokyo.[46] However, whether any of the other options would have made a difference to the acceptance or performance of the IMTFE lies in the realm of history that might have been. Tanaka has rightfully concluded that the Australian Government thoroughly considered their options before nominating Webb and Mansfield and they were considered the most qualified to fill these duties that were

[44] J.W. Shaw, "Clancy, Sir John Sydney James (1895-1970)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/clancy-sir-john-sydney-james-9749.

[45] James B Thomas, "Philp, Sir Roslyn Foster Bowie (1895-1965)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/philp-sir-roslyn-foster-ross-11389.

[46] J.M. Bennett, "Street, Sir Kenneth Whistler (1890-1972)," Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/street-sir-kenneth-whistler-11790.

fundamental to Australia's post-war foreign policy. Webb along with Cramer and Bernard should be considered as war crimes experts.[47]

It is not clear why Webb was appointed as the president. He was one of the first national representatives to arrive in Tokyo along with Justice Mansfield and the New Zealand nominated judge, Justice Erima Harvey Northcroft. The three met with MacArthur and Keenan in early February.[48] Under the charter, the Supreme Commander had power to appoint the members of the court from those nominated by the member states and select the president (articles 2 and 3). Bergamini wrote that the appointment, made on February 14, 1946 was by 'prior political arrangement', but did not go into any further detail.[49] Webb's early arrival in Japan may have a facilitated the appointment as there was some delay in other nations nominating their representatives. Further, MacArthur and Keenan desired to have a senior member of a national bench fill the role. Keenan was dissatisfied with the US nominee having been drawn from a state court, and it is believed that there was a misconception that Webb's position on the Supreme Court was the highest court in Australia, as it is in the United States, New Zealand and other jurisdictions.[50] In fact, the New Zealand judge, Northcroft, was Webb's judicial senior and may have filled the role

[47] Yuma Totani, *The Tokyo War Crimes Trail: The Pursuit of Justice in the Wake of World War II* (Massachusetts: Cambridge, 2008). 42.

[48] E. H. Northcroft J, New Zealand Member, IMTFE to Nash, Acting Prime Minister (NZ), 7 February 1946, reproduced in Kay, *The Surrender and Occupation of Japan.*, 1520-21.

[49] David Bergamini, *Japan's Imperial Conspiracy* (London: Heinemann, 1971). 177. Roling also stated that the appointment was 'political' B. V. A. Roling and Antonio Cassese, *The Tokyo Trial and Beyond: reflections of a peacemonger* (Cambridge, UK: Polity Press, 1993). 29.

[50] Smith, *MacArthur's Kangaroo Court*: 108 & 27; Finnin and McCormack, "Tokyo's Continuing Relevance," 376-77.

more satisfactorily as he was extremely critical of Webb's performance.[51] It is also plausible that Webb's appointment was similar to that of William Macmahon Ball to the Allied Control Council. Ball was appointed to appease the Australian government and their dissatisfaction of being excluded from contributing to formulation to the occupation policy of Japan by the United States.[52] There was only one other Australian to sit on a bench established by SCAP. Brigadier J. W.A. O'Brien sat for the trial of Admiral Toyoda, the last Chief of the Naval Staff of the Imperial Japanese Navy, in September 1949.[53] The president was an important position on the Tribunal having the casting vote in all deadlocked decisions by Article 4 (b) and was the only member allowed to address those presenting before proceedings due to the size of the bench. How Webb preformed in this role has left an indelible mark over the tribunal and his reputation as a judge.

The Defendants

The defendants were men who were involved in the direction of policy regarding the war in their national governments, otherwise classified as 'Class A' suspects. The indictment consisted of twenty-eight former Japanese leaders on 55 counts, of which 36 were in relation to crimes against the peace or planning to wage a war of aggression.[54] The

[51] See Ann Trotter, "Justice Northcroft (New Zealand)," in *Beyond Victor's Justice: The Tokyo War Crimes Trial Revisited*, ed. Yuki Tanaka, Timothy L.H. McCormack, and Gerry Simpson (Biggleswade, Leiden: Martinus Nijhoff, 2011).

[52] The monopolisation of the occupation of Japan was due to the deteriorating relationship between the United States and the Soviet Union. The United States was cautious not to repeat what happened in Germany. Furthermore, Australian policy of deconstructing Japan's industrial capabilities conflicted with the United States. Roger Bell, "Australian-American Disagreement over the Peace Settlement with Japan," *Australian Outlook* 30, no. 2 (1976); W. Macmahon Ball, "Emperor and Government in Japan," *The Australian Outlook* (1948); N. D. Harper, "Australian Policy Towards Japan," *The Australian Outlook* 1, no. 4 (1947).

[53] The decision of acquittal was controversial with the judgement seemingly overturning the principle of command responsibility, Peter Dennis, *The Oxford companion to Australian military history* (Melbourne ; New York: Oxford University Press, 1995). 642.

[54] The defendants were: Genaral Sadao Araki; General Kenji Diohara; Colonel Kingoro Hashimoto; Field Marshal Shunroku Hata; Baron Kichiro Hiranuma; Baron Koki Hirota; Naoki Hoshino; General Seishiro

indictments were far more complicated than those of Nuremberg; the period was longer (1931 to 1945) and there was no equivalent to Hitler or the Nazi Party as the positions of power constantly shifted in Japan. Therefore, the Prosecution argued that the defendants were involved in a common plan or conspiracy to wage aggressive war. The prosecution contended that the military had slowly gained control of the government through deceit and assassination and by the end of the 1920s was directing all policy matters relating to the waging of war. There was no equivalent to the Holocaust in that there was not a program of extermination initiated by the Japanese against another group. The defendants were charged with crimes against humanity as the atrocities committed against civilians and POWs by the Japanese military were so widespread and consistent to suggest that there was at least official sanction of the behaviour. The most notable and recognisable defendant was Tojo Hideki, Prime Minister during the Pearl Harbor attack. The Prosecution relied heavily on the diaries of Kido Marquis Koichi, chief secretary to the lord keeper of the privy seal (1930-7 lord keeper of the privy seal (1940-5) and held three ministerial positions at various times and was the closest adviser to Hirohito. Kido voluntarily provided his diaries to the Prosecution after his arrest and at a critical time when the prosecution was severely suffering from a lack of material to indict any of the accused.[55] Due to political and military considerations Emperor Hirohito was not indicted and remained as the head of state. This was a United States policy decision to ensure a peaceful

---

Itagaki; Okinori Kaya; Marquis Koichi Kido; General Heitaro Kimura; General Kuiaki Koiso; General Iwane Matsui; Yosuke Matsuoka; General Jiro Minami; General Akira Muto; Admiral Osami Nagano; Sdmiral Takasumi Oka; Shumei Okawa; General Hiroshi Oshima; General Kenryo Sato; Mamoru Shigemitsu; Admiral Shigetaro Shimada; Toshio Shiratori; General Teichi Suzuki; Shigenori Togo; General Hedeki Tojo and; General Yoshijiro Umezu. For a summary of the defendants on the findings of the tribunal refer to appendices 9.

[55] Brackman, *The Other Nuremberg*: 57-58; Solis Horwitz, "The Tokyo Trial," *International Conciliation* 465(1946): 494.

occupation.[56] No industrialists were indicted which, as was explained by a member of the Prosecution, was due to fear that a likely acquittal would exempt all industrialists symbolically.[57] The defendants were given attorneys from the United States at first to assist the Japanese lawyers in preparing the defence in an alien legal world as the trial was based on Anglo-American procedure. However, the US attorneys gradually took over the proceedings and defended their clients to the utmost of their ability.[58]

Webb's Leadership: Rules of Procedure

Rulings on evidence and procedure during the IMTFE have received sharp criticism in the literature and are levelled at the president of the Tribunal. Webb stated in the opening of the IMTFE: "To our great task we bring open minds both on facts and the law…The onus will be on the prosecution to establish guilt beyond reasonable doubt".[59] The Charter of the Tribunal stated in Section IV, Art 13 (a) that the proceedings 'would 'not be bound by technical rules of evidence'. The argument forwarded by Robert H. Jackson of Nuremberg and reiterated by Webb was that there was no jury and justices could be trusted to discriminate the evidence properly.[60] Many commentators contend that this resulted in bias and inconsistent rulings that favoured the prosecution with no way of knowing what would

---

[56] See, Yoriko Otomo, "The Decision Not to Prosecute the Emperor," in *Beyond Victor's Justice? Tokyo War Crimes Trial Revisited*, ed. Yuki Tanaka, Timothy L.H. McCormack, and Gerry Simpson (Leiden, Biggleswade: Martinus Nijhoff, 2011), 63-78; Robert Harvey, *American Shogun: General MacArthur, Emperor Hirohito and the American Duel with Japan* (New York: Overlook Press, 2006). 315-20.

[57] Horwitz, "The Tokyo Trial," 498.

[58] *The American Bar Association Journal* noted that this was 'an outstanding demonstration of the lawyer's performance of the traditions of his profession to say all that can be said in behalf of his clients cause, to the end that justice may be done according to the law'. Ben Bruce Blakeney, "International Military Tribunal. Argument for Motions to Dismiss," *American Bar Association Journal* 32(1946).

[59] IMTFE, 22-23. Piccigallo, *The Japanese on Trial*: 18.

[60] Webb stated during the proceedings: "I do ask you to remember, we are not a jury; we are eleven judges trained in the law, trained to give decisions, trained to weigh evidence". IMTFE 7,204, 7,863. Minear, *Victor's Justice*: 119.

be admissible from day to day.[61] Webb explained the inconsistency was a result of who was present on the bench, as justices were frequently absent at various times throughout the trial, and this would impact on voting on admissibility. It must also be stressed that the proceedings lacked precedent, apart from Nuremberg which had four judges (with four alternatives) rather than eleven justices from diverse legal, cultural and linguistic backgrounds to manage. Furthermore, most of the important documents required by the prosecution had been destroyed by Allied bombing and intentionally disposed or falsified by the Japanese in the interim between the acceptance of the Potsdam Declaration on 10 August and the signing of the Instrument of Surrender on 2 September 1945.[62] As mentioned previously, the prosecution relied heavily on the diaries of Marquis Kiochi Kido, Lord Keeper of the Privy Seal and closest confident of the Emperor. Another source of evidence was the information gained from interrogations, which were submitted to the tribunal in the form of affidavits. The tribunal favoured written testimonies and other documentary evidence due to the difficulties in the translations between Japanese and English. This was complicated by affidavits in absence which prevented cross-examination. Moreover, it is argued that the tribunal unfairly disallowed some of the evidence submitted by the defence while being more liberal with the prosecution's case.[63] The reasoning behind the inconsistencies was partly due to time constraints as the proceedings dragged.

---

[61] Ibid.; Brackman, *The Other Nuremberg*: 211; Walkinshaw, "The Nuremberg and Tokyo Trials," 301. Dower wrote 'The use of loose rules of evidence as defined by the victors proved, however, to be a gateway through which arbitrariness and unfairness entered the trial' Dower, *Embracing defeat: Japan in the wake of World War II*: 466.

[62] Brackman, *The Other Nuremberg*: 39-42.

[63] An example cited is when Webb used his casting vote in refusing to allow the admittance by the defence of passages of the book, *My 25 Years in China* by John B. Powell concerning Japanese activities in China Minear, *Victor's Justice*: 121; John Alan Appleman, *Military Tribunals and International Crimes* (Indianapolis: Bobbs-Merill Company, 1954). 253-54.

Webb and the other justices were concerned about the potential length of time that the defence would take to present their case. The prosecution took seven and half months and it was feared that the defence could take over a year. Webb initially remained optimistic, 'I am hoping for the best and doing all I can shorten the proceedings'. He added that he knew such measures would draw criticism: 'Whatever I do I must displease some powerful interest… I am resigned to that'.[64] This was in response to a London *Times* story that suggested the new rules of evidence being adopted by the tribunal in an attempt to expedite the defence phase of the case would be prejudicial to the defendants. Conversely, the Soviet judge sent numerous complaints to Webb during the defence case concerning the presentation of evidence which he believed had no probative value.[65] The changes to the rules of evidence led the defence to appeal to Webb to clarify the Tribunal's position during the presentation of their case to resolve the difficulties they had in obtaining evidence. For example, the defence sought clarification on whether the same courtesy extended to the prosecution of allowing sworn statement without cross examination would be extended to the defence due to the inability to subpoena foreign dignitaries to appear before the Tribunal.[66] Overall, the correspondence between the members of the tribunal illustrates that while they were interested in shortening the trial, they were conscious of ensuring that the rights of the defence were not abridged to ensure acceptance of the

[64] NAA: M1418, 8, Sir William Webb, President of the IMTFE and J of the HCA to John Oldham, Department of External Affairs, 8 July 1947.

[65] AWM: 3DRL/2481, Series 4, Wallet 12, various correspondence between I. M. Zaryanov, member of the IMTFE and Major-General of Justice (USSR) and Sir William Webb, President of the IMTFE and J of HCA. Also refer to, NAA: M1418, 10, Sir William Webb, 'Length of Trial', draft memorandum to the members of the IMTFE, 23 June 1947.

[66] AWM: 3DRL/2481, Series 4, Wallet 16, Franklin E. N. Warren, Roger Cole and George Furness, Defence Counsel to Sir William Webb, President of the IMTFE and J of HCA, 15 August 1947.

judgment.[67] The changing rules of evidence form the basis for the criticism the trial has received in the literature and the support the view of it being victor's justice. Consequently this image of the tribunal largely falls upon Webb as the only public spokesperson for the bench of the tribunal.

Webb's Leadership: Interaction with Other Participants

Webb's relationship with other participants in the trial is another prominent aspect in the literature which is critical of his performance with his numerous public and private clashes with other participants recounted. These incidents are cited as an illustration of how dysfunctional the trial became and undermines its historical standing. The original member for the United States, John P Higgins, after praising Webb's ability to foster working relationships, warned the president early in the trial not to delve into verbal clashes 'for there can only be one loser in such incidents, and that is you'.[68] This warning was largely unheeded by the president.

Webb's performance on the IMTFE was affected by personal and professional factors that would likely to have influenced his behaviour during the trial. A shoulder injury caused significant discomfort early in the trial to such an extent he wanted to withdraw; this would have contributed to his irritability.[69] Webb was close to his family, he threatened to resign when entry to Japan was declined for his wife, Beatrice, and it is evident in his

[67] AWM: 3DRL/2481, Series 4, Wallet 12, Sir William Webb, President of the IMTFE and J of HCA to M. Zaryanov, member of the IMTFE and Major-General of Justice (USSR), 6 May 1947; NAA: M1418, 10, Sir William Webb, 'Length of Trial', draft memorandum to the members of the IMTFE, 23 June 1947

[68] NAA: M1418, 8, John P. Higgins, CJ Massachusetts Superior Court (former judge of the IMTFE) to Sir William Webb, President of the IMTFE and J of HCA, 8 October 1946.

[69] NAA: M1418, 1, Sir William Webb, President of the IMTFE and J of HCA to Department of External Affairs, 25 May 1946.

correspondence as the trial became prolonged that he became frustrated by the delays to his return to Australia.[70] The prolonging of the trial also prevented him from performing in his new position on the High Court during a period of a significant number important constitutional cases being heard and being unable to alleviate the workloads on his brethren which was the primary reason he had been appointed. Fatigue was also a factor due to Webb haven forgoing summer vacations to complete extra-judicial activities for the state and commonwealth governments.[71] From early 1945 he was expressing his weariness for war crimes work. Nevertheless, the traits of Webb that drew criticism in Tokyo were evident in his domestic positions and he could be brusque to representatives appearing before his courts, in particular if he felt he was being undermined. This was illustrated in previous chapters, for example, the breakdown of the Industrial Relations Council and the clash with the Australian Meat Workers Union.

Webb constantly clashed with the head of the prosecution, Joseph B. Keenan, who was a known alcoholic and has been compared with the Australian justice as being a poor selection for the IMTFE.[72] Webb was also noted for aiding the prosecution in presenting

---

[70] For appeal to have his wife in Tokyo refer to NAA: M1418, 6, Sir William Webb, President of the IMTFE and J of HCA to General D. MacArthur, SCAP 28 June and 28 October (no year on correspondence, most likely to be 1946); M1418, 7, 'Lady Webb – Authorisation to enter Japan', various correspondence. For correspondence to his family refer to, NAA: M1418, 5, various correspondence. His longing for home was exasperated by the birth of his first grandson, writing to Beatrice: 'I love that grandson and am sure that his father will not be able to prevent me from taking possession of him on my return', 7 February 1947.

[71] See for example, NAA: M1418, 11, Sir William Flood Webb, President of the IMTFE and J of HCA to Department of External Affairs, 28 October 1947, in which he states: 'I have had no vacation for fifteen years because of extra State and Federal duties'.

[72] For the comparison refer to, Finnin and McCormack, "Tokyo's Continuing Relevance." The animosity between the Chief Prosecutor and the President was evident to all staff and defendants, Sato commentats on it in his memoirs, *Prospect and Retrospect of the Greater East Asia Wars*, cited in Brackman, *The Other Nuremberg*: 344. See 97, 109, 15, and 352-53 for clashes between the two; Minear, *Victor's Justice*: 14, 84-85; Behr, *Hirohito: Behind the Myth*: 408. See also Webb's comments: NAA: M11418, 8, Sir William Webb, President of the IMTFE and J of the HCA to John P. Higgins, CJ Massachusetts Superior Court, 1 October 1946.

their evidence and defending their arguments. Poelgeest wrote that Webb 'acted as the guardian angel of the Dutch' prosecution who were presenting dubious charges that Japan waged a war of aggression against the Netherlands when it was the Dutch who declared war.[73] Webb conflicted with other participants of the trial, notably M. Robert Oneto, the French representative on the Prosecution, over a matter of the use of French in presenting evidence.[74] Webb has also been criticised for his mannerism towards the defence lawyers. The relationship had a poor start as Webb refused to entertain preliminary motions raised in chambers on 28April 1946 by the American defence lawyers appointed by SCAP before the indictment was presented. Webb's ground was that the Japanese accused had not appointed the lawyers, moreover, the prosecution had not even selected the accused. Webb had notorious confrontations with Owen Cunningham, American counsel for Ambassador Oshima and David Smith, Hirota's American counsel. Webb took offence to their mannerism when addressing the tribunal. The president halted proceedings when apologies did not arrive and this led a heated discussion in chambers with the defence representatives. Cunningham was excluded for contempt after delivering a scathing attack on the tribunal to an American Bar Association meeting.[75] Minear contends that 'abuse of defense counsel was a regular feature of the trial'.[76] Webb admitted at the time that he experienced

---

[73] L. van Poelgeest, "The Netherlands and the Tokyo Tribunal," in *Aspects of the Allied Occupation of Japan*, ed. Ian Nish (London: Suntory-Toyota International Centre for Economics and Related Disciplines, 1991).

[74] This became quite a serious matter as Webb refused to hear Oneto in French although his English was not understandable. The French contingent threatened to walk out on the proceedings and the Russians joined them in their threats. Quilliam (New Zealand representative on the Prosecution) reported to his government that Webb 'did not deal with the matter tactfully' Kay, *The Surrender and Occupation of Japan.*, 1642-44. See also: Brackman, *The Other Nuremberg*: 215-16; Ireland, "Uncommon Law in Martial Tokyo," 69.

[75] Brackman, *The Other Nuremberg*: 82, 124, 43, 219, 71, 96-98, 306-07; Ireland, "Uncommon Law in Martial Tokyo," 68, 69-70.

[76] Minear, *Victor's Justice*: 83-84. Minear cites Appleman and quotes: "The attitude of the president of the tribunal throughout toward defense counsel was one not consistent with the standards commonly observed in court of the United States" Appleman, *Military Tribunals and International Crimes*: 243. Cryer and Boister

difficulties with the counsel of both sides which he believed got better throughout the trial and he did receive friendly correspondence from various members of the defence.[77] There were over forty counsel at Tokyo which the president concluded caused a 'fair amount of objections'.[78] One would also add that this number of personalities in a tense environment would increase the potential for clashes.

Webb's relationship with the other members on the bench was on occasions tense. Brackman believed that Webb got along rather well with the Chinese representative on the tribunal, whom he sat next to, which is also evident in the correspondence the two exchanged.[79] The British member, Lord Patrick reportedly had a good working relationship with Webb, although they differed significantly on some points of law.[80] The Dutch judge, Roling, was the most public about his complaints of Sir William, stating in an interview

---

argue that although the tribunal refused to hear him, Cunningham did not have a substantial defence to his contempt, Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: a reappraisal* (Oxford; New York: Oxford University Press, 2008). 91.

[77] NAA: M1418, 8, Sir William Webb, President of the IMTFE and J of HCA to John P. Higgins, CJ Massachusetts Superior Court, 3 March 1947 and: For example, Webb in responding to birthday wishes to a member of the defence wrote: 'The Defence have cooperated very well with the Tribunal throughout this long trial and none better than yourself'. Samuel Klieman wrote after returning to the United States: 'Believe it or not, despite all the fighting I did with Your Honor, I cherish my experience before you and your Tribunal', AWM 3DRL/2481, Series 4, Wallet 2, Sir William Webb, President of the IMTFE and J of HCA to Lt-Commander Harris, Adm. and Legal Liaison Supervisor, Defence Panel, IMFTE, 6 February 1948, Samuel J. Klieman, Defence Panel and counsel for Hiranuma to Sir William Webb, President of the IMTFE and J of HCA, 11 May 1948, and; Sir William Webb, President of the IMTFE and J of HCA to John P. Higgins, CJ Massachusetts Superior Court, 9 June 1948, where Webb writes, 'There is complete cooperation between the Tribunal and counsel. How different in your day when we were just starting and there was no team work!'. William Logan also stayed in correspondence with Webb.

[78] NAA: M1418, 8, Sir William Webb, President of the IMTFE and J of HCA to John Oldham, Department of External Affairs, 2 August 1947.

[79] Brackman, *The Other Nuremberg*: 72.Also refer to NAA: M1418, 8, various correspondence between Sir William Webb, President of the IMTFE and J of HCA and Justice Ju-ao Mei, Member of the IMTFE (China).

[80] This difference was on the basis for crimes of aggression which Lord Patrick thought Webb had taken the application of natural law beyond acceptable limits, Lord Iain Bonomy, "Justice Patrick (United Kingdom)," in *Beyond Victors Justice? The Tokyo War Crimes Trial Revisited*, ed. Yuki Tanaka, Timothy McCormack, and Gerry Simpson (Leiden, The Netherlands: Martinus Nijhoff Biggleswade, 2011), 106.

decades later that the president was unsociable to the other justices by not ever having breakfast with them and that he was dictatorial on the bench.[81] Webb wrote despairingly to his wife Beatrice regarding the difficulties of presiding over an international bench, confessing that he found difficulty in avoiding saying things that offended the other members and that and his attempts to alleviate the trial with humour was often not appreciated. Language and cultural barriers made it a tenuous position:

> Then, there are all sorts of "caves", to use the expression of one judge who seems to be a master at making them. If I consult judges on the bench who are English speaking, I am accused by the foreigners of making an Anglo-American or a British "bloc". Yet, I don't think any of them dislike me, but they make my position very difficult.[82]

At one point Lord Patrick felt that 'anarchy' was about to erupt in chambers with Northcroft and McDougall threatening to resign during the early part of 1947. Patrick appealed to the British Foreign Office for intervention and an appeal was made to MacArthur.[83] Northcroft, who initially got along with Webb, gradually began to see himself in opposition, blamed him for prolonging the trial and found him offensive in his rebuke of suggestions made by his brethren.[84] Tension arose between the members during discussions throughout January 1947 when revisiting the defence motion of dismissal of the indictment that they had ruled against the previous year. The members were unable to

---

[81] B. V. A. Roling, "The Nuremberg and Tokyo Trials in Retrospect," in *A Treatise on International Law. Crimes and Punishment*, ed. M. Cherif Bassiouni and Ved P. Nanda (Springfield, Illinois: Charles C Thomas, 1973), 29-30.

[82] NAA: M1418, 5, Sir William Webb, President of the IMTFE and J of HCA to Lady Webb, 1 July (no year indicated, most likely to be 1946).

[83] van Poelgeest, "The Netherlands and the Tokyo Tribunal," 35-36; ibid.

[84] Boister and Cryer, *The Tokyo International Military Tribunal*: 82; Trotter, "Justice Northcroft (New Zealand)," 82-84.

come to a majority decision to explain their ruling due to Webb's inability to manage the differing opinions of the judges and an unwillingness to alter his own views. This lack of consensus led the two Commonwealth justices requesting to be relieved of their positions which was denied by their governments. [85] The two disaffected members were likely to have been relieved when Webb returned to Australia in late 1947.

Return to Australia

Absence from the bench is a frequent criticism raised in the literature regarding the IMTFE for undermining the procedure fairness for the defendants during the trial. Webb's sudden return to Australia was one of the more controversial aspects of the tribunal and cited in the literature as another event that detracts from the legitimacy of the trial. At the Nuremberg trial there were only four justices, with four alternatives. The IMTFE Charter circumnavigated the need for alternatives in Article 4 (c) 'If a member at any time is absent and afterwards is able to be present, he shall take part in all subsequent proceedings; unless he declares in open court that he is disqualified by reason of insufficient familiarity with the proceedings which took place in his absence'. Article 4 (a) provided that the tribunal could convene when at least six members were present. Consequently, often members were often absent during the proceedings. For example, Pal missed half of the defence's individual case presentation as he had to attend to his ill wife in India.[86] However, Webb's absence in 1947 when he returned to Australia to sit on the High Court is perhaps considered the more controversial due to his position as president of the court.

[85] Trotter, "Justice Northcroft (New Zealand)."; John Stanton, "Canada and War Crimes. Judgment at Tokyo," *International Journal* 55(2000): 392-93.

[86] Brackman, *The Other Nuremberg*: 376.

There are a number of explanations forwarded as to why Webb returned to Australia in the closing months of 1947, and the interpretation is often dependent on the focus of the researchers, whether they are examining the IMTFE or the High Court of Australia. The argument in the literature on the IMTFE is that the motivation to recall Webb to Australia came from Tokyo. Firstly, it is argued that Webb's return was engineered to resolve the conflict between the president and the Canadian and New Zealand judges who threatening to resign from the tribunal due to Webb's resolute position to write one judgment on behalf of all members. The New Zealand Prime Minister made an appeal to the Australian Government during a conference in Canberra in August which resulted with the request for Webb's return in October.[87] The second explanation is that Webb's return was contrived by the IPS and SCAP in order to allow the court, with Webb's absence, to pass a decision against the emperor testifying before the court. The president's attitude on the culpability of the Japanese head of state was well known and the occupation authorities were anxious to avoid complications that could arise if Hirohito appeared before the court. Webb's absence allowed for the more 'malleable' United States representative, Cramer to preside over the tribunal when the decision not to involve the emperor was made.[88] Both propositions have merit, but were incidental from the main force behind the recall. The Australian government was more likely motivated by domestic affairs as key post-war

[87] Boister and Cryer, *The Tokyo International Military Tribunal*: 95-96; Trotter, "Justice Northcroft (New Zealand)," 86-88.

[88] Minear notes that some Japanese commentators suggested that the emperor question was the cause of Webb's recall to Australia. Minear, *Victor's Justice*: 116, n85. This argument was also forwarded Edward Behr but he does not provide details of the nature of the decision that was made, Behr, *Hirohito: Behind the Myth*: 415.

legislation was about to be challenged in the High Court and the desire was to have their recent appointee back to take his place on the bench.

There had been pressure throughout 1947 for Webb to get back to the High Court and he suggested it to the Minister of External affairs in April and June.[89] It would appear that Webb initiated the discussion of his return in September when he asked External Affairs to make contact with the Chief Justice to inform him that he would likely return to the High Court after the summer vacation.[90] The Prime Minister's Department replied to Webb on 2 October 1947 that the Chief Justice was not concerned about his return, yet the government desired it for the November sittings and asked if it was possible for him to expedite or re-organize the trial. The reasons outlined were that the trial far exceeded expectations in time and that the High Court was experiencing a continued heavy workload which was complicated by absences on the bench. This had the potential of not have the required number of justices to hear constitutional cases.[91] Webb left the matter of whether he should

[89] In June Webb wrote: 'Had I known how long it was going to take, I would not have accepted appointment. The Government may wish me to return at any time, and I shall be happy to do so. NAA: M1418, 2, Sir William Webb, President of the IMTFE and J of HCA to H.V. Evatt, Attorney-General and Minster for External Affairs, 25 April 1947. In April: 'As to my movements, I am prepared to do as the Australian Government wishes. They may think that I would be more usefully employed on the High Court than in Tokyo. On such a matter I am entitled to consider the wishes of my Government. I have no superior duty to the Allied Powers or the Japanese, beyond conducting a fair and expeditious trial while I am on the Tribunal. In my view, the Australian government could withdraw its representative as it might withdraw, say, a Minister', NAA: M1418, 2, Sir William Webb, President of the IMTFE and J of HCA to H.V. Evatt, Attorney-General and Minster for External Affairs, 6 June 1947. In August of 1947 Webb made inquiries regarding the fact that he had not been sworn in on the High Court and how that effected his position, NAA: AA1980/642, NN, Sir William Webb, President of the IMTFE and J of HCA to K.H. Bailey, Solicitor-General, 1 August 1947.

[90] Webb was anticipating that not all the defendants would present an individual case and that the trial would be concluded at the end of December, NAA: M1418, 11, Sir William Webb, President of the IMTFE and J of HCA to the Department of External Affairs, 29 September 1947.

[91] Evatt was out of Australia at the time and Chifley was acting Minister of External Affairs and Senator Nicholas McKenna was acting Attorney-General. NAA: M1418, 11, 'Department of External Affairs to Australian Mission in Tokyo for Sir William Webb, President of the IMTFE and J of HCA, 2 October 1947.

continue in Tokyo in the hands of SCAP and the Australian government.[92] MacArthur was 'livid', stating: 'In my opinion it would amount to an international calamity to have the presiding magistrate relieved at this late date from his seat on the tribunal'. Adding, 'Sir William's relief at this decisive stage would tend to demoralize the entire proceedings'.[93] Chifley was alarmed at the misunderstanding by Webb that he was being removed from the IMTFE by the government, leaving the prime minister to appeal to the attorney-general to intervene.[94] Evatt responded to MacArthur stating that the government desired for Webb to remain on the tribunal and only returned to enable him to be sworn into office and return to Tokyo as necessary.[95] There is some support for the arguments that the Australian government was recalling Webb for other reasons than addressing the numbers of the High Court. Certainly, the Chief Justice did not see his presence on the court as necessary, and Webb advised SCAP that he was not under the impression that any vital constitutional case was about to heard.[96] The Australian Mission in Japan was concerned with the

[92] NAA: M1418, 11, Sir William Webb, President of the IMTFE and J of HCA to the Department of External Affairs, 6 October 1947 and; NAA: A1067, UN46/WC/8 Part 3, Sir William Webb, President of the IMTFE and J of HCA to John Burton, Secretary to the Department of External Affairs, 15 October 1947, in which Webb states that he is taking a neutral stance as he believed that this was the correct course to take.

[93] NAA: M1418, 11, General D. MacArthur, SCAP to B.J. Chifley, Prime Minister of Australia, 7 October 1947.

[94] NAA: AA1980/642, NN, B. Chifley, Prime Minister of Australia to H.V. Evatt, Attorney-General and Minister of External Affairs, undated.

[95] Evatt messaged Tokyo: 'We have the highest opinion, as you know, of Sir William's ability and are most anxious for him not to abandon the Chairmanship of War Crimes Tribunal in Japan. It should be possible for Sir William to reconcile these two problems and we would be greatly helped by your intervention'. NAA: M1418, 11, H.V. Evatt, Attorney-General and Minister for External Affairs to General D. MacArthur, SCAP, October 1946.

[96] AWM 3DRL/2481, Series 4, Wallet 2, Sir William Webb, President of the IMTFE and J of HCA to J. Mansfield, J of the Qld Supreme Court, 22 October 1947, Webb wrote 'just as a token, I think, because there is no big case coming on; so I would judge from Latham's letters'. Webb also sought clarification from the Department of External Affairs at this time as he was not aware of any important cases coming before the court. He also outlines the difficulty in determining how long the trial would last and that he was aware of the 'unsatisfactory state of affairs', NAA: A1067, UN46WC/8 Part 3, Sir William Webb, President of the IMTFE and J of HCA to John Burton, Secretary to the Department of External Affairs, 21 October 1947.

repercussions on the IMTFE, which they viewed the president was holding together, and of offending MacArthur. They were not convinced of the necessity of Webb's presence on the High Court and stated that Webb was 'most loathed to interrupt his work'.[97] A draft reply, 'Your point of view is appreciated by expressed in paragraph 2', regarding the lack of evidence supporting the necessity for Webb's return, suggested that 'it is for the Government to weigh all considerations, some of which it may not wish to express'.[98] This could lend support to the idea that Webb was recalled for strategic purposes relating to the Tokyo Trial. The government was also forwarded a disparaging news article from China at this time and Webb was impelled to defend his conduct.[99] On the other hand, the government would not have wanted to put in writing its desire to increase its support on the bench of the High Court. Irrespective of which motivation was behind the government, the recall of Webb was political and questionable. It highlights the hazard of extra-judicial activities having the potential to cast doubts on the independence of a member of the judiciary.

Webb made the formal announcement in the IMTFE on November 7, 1947. The defence raised its objection asking for the court to be adjourned or Webb to be dismissed entirely. The defence's protest was noted but rejected.[100] Webb sat on only one compensation case

[97] NAA: M1418, 11, Australian Mission in Japan, Tokyo to Department of External Affairs, 20 October 1947.

[98] NAA: A1067, UN46/WC/8 Part 3, draft cablegram from Department of External Affairs to the Australian Mission Tokyo, 21 October 1947, it is unclear if this was sent.

[99] NAA: A1067, UN46/WC/8 Part 3, Secretary of Legation to China to John Burton, Secretary to the Department on External Affairs, 9 October 1947 and; Sir William Webb, President of the IMTFE and J of HCA to John Burton, Secretary to the Department of External Affairs, 16 October 1947.

[100] Cunningham for the defence exclaimed: "The privilege of absence has been so abused during the trial that it is necessary at this time that the record show a protest", cited in Minear, *Victors' Justice*, 88; IMTFE Proceedings, 32662.

that was not of significant constitutional importance, *Nelungaloo v Commonwealth* (1948). During his absence the United States representative, General Cramer sat as president of the IMTFE and Webb missed the individual defences of Matsui, Minami, Muto, Oka, Oshima, Sato, Shigemitsu, Shimad, Shiratori and Suziki.[101] He was concerned that he would miss the testimony of Kido and Tojo whom he considered 'the two most important accused', but with the wrangling prior to his departure he heard Kido and he managed to be back in time for Tojo.[102] During his absence, the United States representative, Cramer acted as president, after Patrick declined the position and Northcroft being the next senior judge being overlooked due to New Zealand's limited international standing. Brackman writes that Cramer's interjections were rare compared to Webb.[103] Webb returned to Tokyo by December 15, 1947. His short absence has been cited as discrediting the IMTFE.[104]

The Australian government requested his return in early 1948, while Webb initially oscillated between obliging the government and remaining in Tokyo, he eventually decided to stay. After Webb had returned to Tokyo in December 1947 he was initially optimistic that he may be able to return to the High Court early the following year. This optimism lapsed less than a week later due to '[u]nexpected heavy pressures of work' at the IMTFE. Latham replied that Webb should leave it until the middle of January to decide.[105] The

---

[101] Brackman, *The Other Nuremberg*: 337-39; Ian Callinan, "Sir William Webb," in *The Oxford Companion to the High Court*, ed. A. R. Blackshield, Michael Coper, and George Williams (South Melbourne: Oxford University Press, 2001), 707.

[102] NAA: M1418, 11, Sir William Webb, President of the IMTFE and J of HCA to the Department of External Affairs, 26 October 1947 and; Brackman, *The Other Nuremberg*: 338.

[103] Ibid., 341.

[104] Ireland, "Uncommon Law in Martial Tokyo," 71. and; Minear, *Victor's Justice*: 116 (85). Northcroft argued that Webb should have disqualified himself which is supported in Boister and Cryer, *The Tokyo International Military Tribunal*: 96.

[105] Webb believed that he would be able to attend to the business of both courts as it had been decided that the summations of the defence and prosecution at the IMTFE had to be written and it did not matter if he read

record from this point is not particularly clear. On 5 January Webb informed MacArthur that he would not return to Australia until the end of the trial, yet the solicitor-general replied four days later that he was delighted to hear from Webb that he may return for six weeks to hear the bank case starting at the end of January.[106] By the end of January Webb was convinced that he should not return to Australia. This was supported by the Australian Mission in Japan in a draft telegram to the Australian Government, which argues that the problems faced by Webb the last time he returned and: 'In addition some grip on the Tribunal has been lost resulting in recent majority decision to accept new Prosecution evidence which Sir William opposed'. Patrick Shaw also added, '[i]n the circumstances, Sir William Webb does not see how he can contemplate absenting himself further from the Tribunal despite personal anxiety to return to Australia as soon as possible.'[107] Webb added in a proposed telegram to send to the Government that due to the difficulties he had keeping up with the reading of the IMTFE and writing High Court judgements that:

> This experience satisfied him that he could not risk another visit to Australia without serious prejudice to the trial in Tokyo and incurring the antagonism of his colleagues and losing his influence with them. It is utterly futile to try to convince his colleagues that the Australian work bears any comparison

them in Australia while sitting on the High Court and when he returned to Tokyo he could write the reserved High Court judgments. Latham was not supportive of this is as he was concerned about the possible delays in preparing judgments for the High Court if Webb was commuting between the courts. AWM: 3DRL/2481, Series 4, Wallet 10, various correspondence between Sir William Webb, President of the IMTFE and J of HCA to Sir John Latham, CJ of the HCA, 18-30 December 1947

[106] The Solicitor-General was most likely responding to information from the conversations between Latham and Webb in December. AWM: 3DRL/2481, Series 4 Wallet 10, Sir William Webb, President of the IMTFE and J of HCA to General D. MacArthur, SCAP, 5 January 1948 and; K. H. Bailey, Solicitor-General Cth, 9 January 1948.

[107] AWM: 3DRL/2481, Series 4 Wallet 10, P. Shaw, Australian Mission in Japan, Tokyo to J.W. Burton, Secretary to the Department of External Affairs, draft telegram, January 1946

with that in Japan.[108]

The Australian Government made a formal request to MacArthur on 25 January that Webb be released from the IMTFE to enable him to serve on the banking case which was of constitutional importance and the Chief Justice desired to have a full bench.[109] Webb's reply to Australia dissuaded the government from insisting that he leave the IMTFE:

> General MacArthur has advised me that the Prime Minister desires my return to Australia for the Banking Case stop I am prepared to go but must resign as president of the tribunal stop the plaintiff banks should know that my return is at the request of the government so that they may object to my sitting if they are so advised stop.[110]

The threat of the international calamity that Webb's resignation would cause led the government to retreat from the demands to have the justice return to Australia. Moreover, the political backlash of the plan to recall Webb for the banking case was also a contributing factor and will be discussed in the following chapter. Later in the year he offered to return while the majority wrote their judgment; the government did not take up his offer.[111]

The controversy surrounding Webb's return to Australia while he was sitting on the IMTFE highlights the hazards of a sitting judge participating in extra-judicial activities. His role in Tokyo was extensive and extended for a far longer period than the government had

---

[108] AWM: 3DRL/2481, Series 4 Wallet 10, Sir William Webb, President of the IMTFE and J of HCA to P. Shaw, Australian Mission in Japan, Tokyo, 21 January 1948.

[109] AWM: 3DRL/2481, Series 4 Wallet 10, P. Shaw, Australian Mission in Japan, Tokyo to General D. MacArthur, SCAP, 25 January 1948.

[110] AWM: 3DRL/2481, Series 4 Wallet 10, Sir William Webb, President of the IMTFE and J of HCA to the Department of External Affairs, 27 January 1948.

[111] NAA: M1418, 11, Sir William Webb, President of the IMTFE and J of HCA to Sir John Latham, CJ of the HCA, 29 June 1958.

desired and prevented Webb from effectively fulfilling his obligation to the High Court of Australia for three years.

Omission of Cannibalism from the Trial

There have been a number of criticisms levelled at the IMTFE based on certain atrocities and offences being insufficiently represented or omitted from the trial, such as the use of comfort women by the Imperial Army in all operational and occupied areas, the use and development of biological weapons, Japan's opium trade in China as well as Allied war crimes such as the bombing of Japanese cities with conventional and atomic weapons.[112] This criticism is typically not directed personally at the president of the Tribunal. In the case of cannibalism being omitted from the IMTFE proceedings, however, Yuki Tananka does allege that Webb did not do enough to ensure that these acts were pursued by the prosecution. This highlights the difficult position in which Webb was placed in the historical analysis of the trial due to his involvement in the war crimes commissions and raises questions regarding his independence.

[112] There is an increasing volume of literature concerning comfort women, but in reference to criticism refer to: Yuki Tanaka, "Poison Gas: The Story Japan Would Like to Forget," *Bulletin of the Atomic Scientists* 44, no. 8 (1988): 10-19; Christine M Chinkin, "Women's international tribunal of Japanese military sexual slavery," *The American Journal of International Law* 95, no. 2 (2001): 335-41; Shreyas Jayasimha, "Victor's Justice, Crime of Silence and the Burden of Listening: Judgement of the Tokyo Tribunal 1948, Womaen's International War Crimes Tribnunal 2000 and Beyond," *Law, Social Justice and Global Development* 1(2001); Hal Gold, *Unit 731 Testimony* (Tokyo: Yenbooks, 1996); Sheldon H. Harris, *Factories of Death. Japanese biological warfare 1932-45 and the American cover-up* (New York: Routledge, 1994); John. W. Powell, "Japan's Germ Warfare: The U.S. Cover-up of a War Crime," *Bulletin of Concerned Asia Scholars* 12, no. 4 (1980): 2-16; Nicola Henry, "Memory of an Injustice: The "Comfort Women" and the Legacy of the Tokyo Trial," *Asian Studies Review* 37, no. 3 (2013): 362-80; Yasushi Higashizawa, "When Will Justice Be Relized?," *Law Asia Journal* (2005): 83-108. Yuki Tanaka, Timothy L.H. McCormack, and Gerry Simpson, *Beyond Victor's Justice: The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff, Biggleswade: Leiden, 2011). 175-350.Six chapters are dedicated to forgotten war crimes with a particular focus on comfort women and includes two chapters on Allied atrocities, the use of atomic weapons and the firebombing of Tokyo.

Yuki Tananka dedicates a chapter of his *Hidden Horrors* to Webb's investigations into cannibalism and the complications resulting from Webb's desire not to have the matter raised at the International Military Tribunal for the Far East (IMTFE).[113] Tanaka concluded that responsibility for the troops resorting to cannibalism lay with the Japanese High Command, who after the supply lines had been cut enacted a 'self-sustaining policy', basically abandoning 100,000 men. The issue was not pursued at the Tokyo Trial, and Tanaka argues that Webb should have used his influence on Justice Mansfield, the Australian representative on the IPS, to have it included on the indictment.[114] Tanaka believes that Webb made the decision not to pursue cannibalism at the IMTFE to avoid unnecessary hardship on the victims' families, as the trial was internationally covered. Although Webb encouraged the prosecution of cannibalistic atrocities at the B and C trials, however, these trials did not have any significant coverage in the press.[115] The majority judgment of the IMTFE only mentioned cannibalism being practiced at the end of the war and that it was tolerated by the Japanese army if it was the enemy being consumed. Adding that high ranking officers had taken part in cannibalism on occasion and that the 'horrible practice was indulged in from choice and not of necessity'.[116] This small passage in the

---

[113] Yuki Tanaka, *Hidden Horrors. Japanese War Crimes in World War II* (Boulder, Colorado: Westview Press, 1996). 111-34.

[114] Ibid., 112.

[115] A few notable cases did make the press in Australia where cannibalism charges were laid. For example, First Lieutenant Takehika Tazaki's death sentence had been commuted on the basis that cannibalism was not a crime under the English criminal code, 'Jap Not to Die for Cannibalism. Five Years' Gaol', *Argus*, 7 February 1946, 3. There were numerous reports on the trial and life sentence handed down to Lieutenant-General Hatazo Adachi for crimes committed by his subordinates which included cannibalism. 'Another Jap General to be Tried', *Argus*, 8 April 1947, 5; 'Death, No Trial. Jap General's Order', *Sydney Morning Herald*, 9 April 1947, 1; 'Jap General in Dock', *Sydney Morning Herald*, 15 April 1947, 4 and; 'General Preferred Death, But Given Gaol', *Sydney Morning Herald*, 24 April 1947, 1.

[116] IMTFE Judgment 4 November 1948, 49,675-49,676, reproduced by R. John Pritchard, Sonia M. Zaide, and Donald Cameron Watt, *The Tokyo War Crimes Trial* (New York: Garland Pub., 1981).

large judgment had disproportionate reporting in the press in Australia.[117] Without the adequate explanation that would have been provided at the IMTFE for why the Imperial Army resorted to cannibalism, Australians held the belief that the Japanese people were sadistic and the Japanese people were not informed of the responsibility of the Imperial High Command for the starvation of 100,000 troops.[118]

Tanaka's judgement of Webb is unjust, as he was under considerable pressure not to allow his experience on the War Crimes Commission to intrude on the proceedings of the IMTFE. Webb was concerned that the New Guinea evidence would be omitted at trial due to his involvement. This concern formed a part of an appeal from Webb to be relieved from the tribunal, mostly due to the injured shoulder which was significantly impacting on his comfort, but he also cited his concern that his report could not be submitted as evidence and a significant portion of the testimony collected by the commission had been misplaced.[119] Furthermore, his sense of independence would have precluded him from influencing Mansfield, even though they associated with each other outside of court. Webb frequently stated in his correspondence to the Australian Government that he was unable to gain any additional insight into the length of the trial as he was not in contact with anyone on the prosecution or defence and did not know what evidence they intended to present.

---

[117] See for example, 'Sentences on Japanese, Special Session of Tribunal To-day', *Sydney Morning Herald*, 12 November 1948, 3, which carried the sub heading 'Vivisection, Cannibalism'. While the *Argus* ran with the headline 'Court's "horrible story of cannibalism"', 12 November 1948, 3.

[118] Tanaka, *Hidden Horrors*: 130-33; Peter Brune, *A Bastard of a Place: Australians in Papua, Kokoda, Milne Bay, Gona, Buna, Sanananda* (Crows Nest, N.S.W.: Allen & Unwin, 2003). 241, 587; Paul Ham, *Kokoda* (Pymble, N.S.W.: HarperCollins, 2004). 346, 48, 501, 15-17; Laurence Rees, *Horror in the East* (London: BBC Worldwide, 2001). 92-96; Mark Johnston, *Fighting the Enemy: Australian soldiers and their adversaries in World War II* (Cambridge: Cambridge University Press, 2000). 99-100.

[119] NAA: M1418, 2, Sir William Webb, President of the IMTFE and J of HCA to Department of External Affairs, 25 May 1946.

However, this does illustrate the difficulties that can arise when judges participate in extra-judicial activities, as Webb's judicial function became blurred by being an investigator and then sitting in judgment on war crimes.

Judgment and Webb's Separate Opinion

There were four separate opinions at the IMTFE by Webb, Jaranilla, Pal, Bernard and Roling. The latter three were dissenting judgments. Roling and Bernard objected to various aspects of law, while Pal dismissed all the charges. The separate opinions of Webb and Jaranilla essentially supported the majority judgment while taking exceptions to some components of the majority judgment.[120] The core group of the judges took seven months to write the majority opinion and reputedly there was minimal consultation, with the four justices writing separate opinions. Some commentators have suggested that the lack of consultation by the majority in writing the judgement and the separate opinions was an unusual procedure and many were surprised when the verdicts were announced on 12 November 1948.[121] There were no separate opinions at Nuremberg, although a consensus would have been more easily achieved amongst four compared to eleven. Initially it was hoped that a single decision would be achieved, however, Pal undermined this initially by

[120] For Pal's judgment refer to, Ashis Nandy, "The Other Within: The Strange Case of Radhabinod Pal's Judgment on Culpability," *New Literary History* 23, no. 1 (1992): 45-67; R. Pal, *International Military Tribunal for the Far East. Dissentient Judgment of Justice R.B. Pal* (Calcutta, 1953); R. Pal, *Crimes in international relations* (University of Calcutta, 1955).

[121] William J. Sebald and Russell Brines, *With MacArthur in Japan. A Personal History of the Occupation* (London: The Cresset Press, 1965). 164; Dower, *Embracing defeat: Japan in the wake of World War II*: 459.

The French and the Netherland's representatives wrote letters of protest to Webb in July 1948 about not being consulted about the majority judgment. Roling viewed it as violation of the Charter of the Tribunal to which Webb disagreed. AWM: 3DRL/2481, Series 4, Wallet 15, various correspondence between Sir William Webb, President of the IMTFE and J of HCA, Henri Bernard, Representative for France, IMTFE and B.V.A. Roling, Representative for the Netherlands, IMTFE, July 1948.

indicating that he would be writing a dissenting opinion. Unity became unachievable once again largely due to the attitude of the president. [122]

Webb had indicated his approach at the end of 1946 to the other members in preparing the judgment to dismiss the defence's motions on jurisdiction:

> I understand it was the wish of nearly all the Judges that there should be a majority judgement if one were possible. Personally, it will suit me to write my own judgement. In the Australian courts, and I believe, in all British courts, the Chief Justice writes the leading judgement, although that is not invariably so; that is to say, he covers all the law and the facts, leaving other judges to agree with him or to write their own judgements.[123]

This was the practice in the High Court under Sir John Latham as Chief Justice, and it was rare that all the justices came together in conference to discuss a case. In the Latham Court individual judgements were 'prepared and circulated and concurrences were a matter of individual arrangement'.[124] This is the process that Webb followed at the IMTFE, although there is no justification for it being the process followed in Tokyo, and the judges from continental Europe found it unusual.[125] On 14 January 1947 Webb advised the members that he was writing his own judgment of dismissal after he became aware that Patrick, Northcroft and McDougall were writing a separate judgment.[126] Lord Patrick was

---

[122] Boister and Cryer, *The Tokyo International Military Tribunal*: 98; Roling and Cassese, *The Tokyo Trial and Beyond*: 61; Stanton, "Canada and War Crimes," 392-93.

[123] AWM: 3DRL/2481, series 4, wallet 20, memorandum from Sir William Webb, President of the IMTFE and J of HCA to all members of the IMTFE, 11 December 1946.

[124] Cowen, *Sir John Latham*, p 34-35 cited in Russell Smyth, "Judicial Interaction on the Latham Court: A Quantitative Study of the Voting Patterns on the High Court," *Australian Journal of Politics and History* 47, no. 3 (2001): 335.

[125] Boister and Cryer, *The Tokyo International Military Tribunal*: 100-01.

[126] AWM: 3DRL/2481, series 4, wallet 20, memorandum from Sir William Webb, President of the IMTFE and J of HCA to all members of the IMTFE, 14 January 1947.

extremely critical of Webb delaying the judgment on jurisdiction, as the president hesitated in taking the opportunity of having a unanimous judgment on the issue which could have been achieved in 1946, but the president had waited for the decision in Nuremberg. This allowed those who were vacillating to drift further from agreeing to support a joint decision. Webb wrote a proposal soon after the delivery of the Nuremberg judgment and circulated it amongst the judges. The other Commonwealth representatives, dissatisfied with the legal form based on principles of the Law of Nature, provided the critiques, which was met with hostility by the president. His second attempt met with the same result.[127] With the other justices unable to form a majority judgment independent of Webb, the decision on jurisdiction was left to the final judgment.[128] The majority judges, consisting of Northcroft, Patrick, McDougall and to a lesser extent Cramer began writing their judgment in the early part of 1948, independent of Webb, who decided in March that there was no need for a conference, as the majority were 'committed to the view that conspiracy is a crime', a position that Webb did not share.[129] Webb appealed to the members again on 14 May to adopt his judgment to save time, outlined his thoroughness in the summations of the evidence and observed that reference to Natural Law had been removed. He closed that he was 'quite prepared to receive any suggestions'.[130] The following week Webb circulated

[127] Trotter, "Justice Northcroft (New Zealand)," 86-87.

[128] Meirion Harris and Susie Harris, *Sheathing the Sword: the demilitarisation of Japan* (London: Hamish Hamilton, 1987). 166; Trotter, "Justice Northcroft (New Zealand)," 86.

[129] AWM 3DRL/2481, Series 4, Wallet 19, memorandum from Sir William Webb, President of the IMTFE and J of HCA to all members, 24 March 1948.

[130] AWM 3DRL/2481, Series 4, Wallet 19, memorandum from Sir William Webb, President of the IMTFE and J of HCA to all members, 14 May 1948.

a short and long version of his judgment, adding that he was considering the necessity of him filing a separate opinion.[131]

Webb's main departure from the majority judgment was his belief in the culpability of the Emperor, whose absence from the trial mitigated the defendants. As discussed previously, Webb formulated his views on the Emperor during his investigations as War Crimes Commissioner in Australia and had placed Hirohito as 'the number one war criminal' on Australia's list that was submitted to the War Crimes Commission in London.[132] The Australian government became aware that Hirohito would be immune from prosecution prior to Webb and Mansfield's departure to Tokyo.[133] Webb became more convinced during the proceedings even with Keenan's often drastic attempts to absolve Hirohito.[134] Bergamini wrote that these views were shared by the British Prosecutor, Arthur Strettel Comyns Carr, and the two often 'indulged in a game of gentle mockery concerning Hirohito'.[135] In 1947 Webb protested to MacArthur regarding omissions in the press reports regarding the evidence relating to the role of the emperor in policy decisions that

[131] AWM 3DRL/2481, Series 4, Wallet 19, memorandum from Sir William Webb, President of the IMTFE and J of HCA to all members, 20 May 1948.

[132] There were those in the Australian Government that supported the view that Hirohito should not be removed or tried as a war criminal, for example, William Macmahon Ball, the Commonwealth representative on the Allied Council for Japan and Australian Minister to Japan (1946-1947) supported the retention of the Emperor, Ball, "Emperor and Government in Japan," 67.

[133] NAA: MP7421/1, 336/1/216, W.D. Forsyth, Australian Services Mission in Tokyo to Department of External Affairs and Sir William Webb, Chairman of the AWCC and J of Supreme Court of Qld, 23 January 1946.

[134] This was most evident during the examination of Tojo, which recounted in most analyses of the IMTFE, when he stated while being examined by Kido that an order of the emperor would not have been disobeyed. Keenan was forced to respond as Webb commented to the court regarding the implications of the statement and cross-examined Tojo the following day to 'clarify' the situation. See, Behr, *Hirohito: Behind the Myth*: 415-16; Minear, *Victor's Justice*: 114; Harvey, *American Shogun: General MacArthur, Emperor Hirohito and the American Duel with Japan*: 372-77.

[135]Bergamini, *Japan's Imperial Conspiracy*: 177.

was being raised throughout the trial. The president contended that it was the duty of the occupying powers to ensure this information was shared with the public as the terms of the Charter directs the tribunal 'to insure that the Japanese people are told the truth about the war'.[136] Webb unsuccessfully attempted to influence the majority judges to include a mention of the role of the emperor in their judgment.[137] In his separate opinion Webb held that there should be no death sentences due to the Emperor's absence:

> The authority of the Emperor was proven beyond question when he ended the war…a British Court in passing sentence would, I believe, take into account, if it could, the leader in the crime, though available for trial, had been granted immunity.[138]

The separate opinion, although not read out in court but widely distributed, caused concern at SCAP headquarters and led to discussions regarding Hirohito's abdication. It was rumoured that Webb's opinion was an indication that the Emperor would have to face trial. William J. Sebald, MacArthur's political adviser and Chairman of the Allied Control Council suggested that SCAP should release a statement to refute the 'entirely gratuitous' opinion and 'cheap politics' of Webb. The State Department advised him against such action to avoid a 'verbal joust' with the president.[139] Another problem for SCAP was that MacArthur could not commute the death sentences as it 'would have given credence to Webb's opinion on the Emperor.[140] Bernard in his separate opinion also raised the

---

[136] NAA: M1418, 6, Sir William Webb, President of the IMTFE and J of HCA to General D. MacArthur, SCAP, 6 August 1947.

[137] Totani, *The Tokyo War Crimes Trial*: 205.

[138] Separate Opinion, 18. Webb's original Opinion was over 600 pages, but shortened it to 21as many of his views were the same as the majority judgement, AWM 3DRL/2481, Series 2, Wallets 1-3.

[139]Dower, *Embracing defeat: Japan in the wake of World War II*: 163-5, 68; Minear, *Victor's Justice*: 164-5; Brackman, *The Other Nuremberg*: 396.

[140] Dower, *Embracing defeat: Japan in the wake of World War II*: 460.

exclusion of the Emperor from the trial as a factor in his dissent. The role that the Emperor played in Japan's wartime policy has remained a contentious debate in literature. There has been an increasing recognition that Hirohito did play an active role in directing Japan's war, but his individual accountability remains contentious.[141] The emperor question raises concerns relating to Webb acting on the IMTFE. Firstly, Webb should not have accepted the role on the tribunal due to his belief of the Emperor's war guilt, and secondly, as Webb's position reflected the position of the Australian government, the views expressed in his separate judgment has raised questions in some quarters whether he was acting under political direction. Both issues illustrate the hazard of a judge acting on an extra-judicial activity and undermine the principles of judicial independence.

Other key findings of Webb's in his opinion were that aggressive war was outlawed by the Pact of Paris, the charge of conspiracy had not been established at international law and warning that to recognise conspiracy would be 'judicial legislation'. Horwitz wrote that it appeared Webb based his opinion on natural law rather than 'rigid positivism'.[142] He also held reservations on the handing down of the death penalty to the defendants and argued that there were no limits on holding individuals of any rank or status within a state of their

[141] Behr, *Hirohito: Behind the Myth*; Bergamini, *Japan's Imperial Conspiracy*; Herbert P. Bix, "Emperor Hirohito's War," *History Today* 41(1991): 12-19; Herbert P Bix, "The Showa Emperor's "Monologue" and the Problem of War Responsibility," *Journal of Japanese Studies* 16, no. 2 (1992): 295-363; Herbert P Bix, *Hirohito and the Making of Modern Japan* (New York: Harper-Collins, 2000); Robert J. C. Butow, "[Review] The Dual-Image of the Emperor," *Journal of Japanese Studies* 16, no. 1 (1990): 178-84; Matsumoto Ken'ichi and Shoji Jun'ichiro, "Critquing Herbert Bix's "Hirohito"," *Japan Echo* 29, no. 6 (2002): 64-68; Charles D. Sheldon, "Scapegoat or Instigator of Japanese Aggression? Inoue Kiyoshi's Case Against the Emperor," *Modern Asian Studies* 12, no. 1 (1978): 1-40; Michelle Yost, "Hirohito: Dunce or Duplicitous Leader?," *Aegis* (2006): 96-103.

[142] Horwitz, "The Tokyo Trial," 546.

responsibility for waging aggressive war.[143] His views have been affirmed through the Rome Statute 1998 establishing the International Criminal Court. [144]

There were no acquittals at Tokyo, unlike Nuremberg, where three of the defendants were found not guilty. However, three of the defendants at the IMTFE were not convicted or sentenced by the IMTFE due to death and mental illness.[145] Seven of the defendants received the death sentences, all were convicted on crimes against humanity charges, sixteen received life sentences, one 20 years and another 7 years. However, all of those imprisoned were released by 1956 on parole, and Mamoru Shigemitsu, sentenced for seven years, was paroled in 1950 and appointed foreign minister in 1954. It was the only time in Webb's judicial career that he handed down a death sentence. The seven defendants who received the death sentence appealed on a writ of *habeas corpus* to the Supreme Court of the United States. The Supreme Court refused to hear the case beyond preliminary procedure, stating that the IMTFE decision was outside of United States jurisdiction. The seven condemned men were hung on December 23, 1946 at Sugamo prison Tokyo.

Summary

It is evident that Sir William Webb should not have accepted this role on the IMTFE based on his previous experience as a war crimes commissioner and the speculation of his pre-

[143] Webb, Separate Opinion

[144] Fujita Hisakazu, "The Tokyo Trial: Humanity's Justice v Victors' Justice," in *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, ed. Yuki Tanaka, Tim McCormack, and Gerry Simpson (Biggleswade: Leiden: Martinus Nijhoff, 2011), 20-21.

[145] Yosuke Matsouka died early in the trial of tuberculosis and Admiral Osami Nagano died of natural causes during the trial. Shumei Okawa who was involved in assassinations, the Mukden Incident and advocate for war against the West was declared medically unfit for trial after he hit Tojo over the head and became uncontrollable in the first day of the proceedings. Okawa was placed in a psychiatric ward and was released soon after the trial had finished. He died in 1957. Brackman, *The Other Nuremberg*: 113-17.

judgement of the defendants which overshadows the trial. Perhaps this would have been less of an issue if he had not been president, a position which he appears to have been ill-suited to fill as illustrated by the overwhelming criticism levelled at his performance at the time and since. It would appear that he was out of his depth in overseeing this historic trial that required a dynamic, adaptable and diplomatic president. Some analyses of the trial, especially in the first three decades following, have concluded that he was nominated by the Australian government for political reasons. There is no direct evidence to support this proposition. The Australian government believed he was a strong candidate due to his experience and study of the relevant international laws on war crimes. It also illustrated, as it is in the other extra-judicial positions he held, that he strongly resisted any appearance of political influence. The fact that his separate opinion, with its advocacy to prosecute the emperor echoed the Australian government's position is largely to do with Webb formulating this position and advising the government as war crimes commissioner in 1945. His treatment of the defence counsel which often lurched to being abusive, lends to the view that he had predetermined guilt for the accused, although it is quite evident that this extended to members of other parties; the prosecution, judges and press.

There were a number of factors that contributed to his irascibility. Webb had personal issues that may have influenced his performance on the bench, such as his injured shoulder at the beginning of the trial and the concerns he had about being away from his family. His absence from the High Court and the pressure from the government to return would have added to his frustration. The nature of the trial contributed, with the often insurmountable difficulties of running an international courtroom involving representatives from a dozen different nations, each with their individual legal backgrounds and practices. Language

barriers plagued the trial. The sheer size of the trial, with the number of defendants and the complexity of linking them to a common criminal conspiracy without the one who Webb thought was the thread that combined them all, the emperor, became a frustration to the president. However, Webb had illustrated in his previous extra-judicial duties, in particular the Industrial Relations Council, a tendency to evoke his judicial authority rather than employing diplomacy to control members which made it impossible to resolve conflicts when they arose. Consequently, his role has been a key factor in explaining the failings of the IMTFE and has led speculation towards his independence and integrity as a judge.

Two of the most significant issues arising from the Webb's role on the IMTFE are connected and undermined his standing on the domestic bench of the High Court. Firstly, the length of the trial made it impossible for him to take his seat on the High Court for eighteen months after his appointment. While Webb's absence evidently was not an issue that perturbed the Chief Justice, the government found it an embarrassment that their most recent appointee was not sitting to hear the cases arising from the legislation enacted in their post-war reconstruction. The attempts to achieve his early return in 1947 not only had a significant impact on his position on the IMTFE, as discussed in this chapter, but led to allegations concerning his partisanship being raised in the Commonwealth Parliament.

Chapter Eight:
High Court and After

> Of perpetual frustration to judges is that they are not the sole masters of their destiny. They are whether they like it or not, beholden to politicians. Politicians appoint judges, so, by definition, the appointments are political.[1]

Sir William Webb's appointment to the High Court is considered to be one of the more controversial in the court's history. This is largely due to his appointment being undertaken by the Labor Party, which added an additional member to the bench while embarking on a process of social reform with the likelihood of key legislation inevitably being challenged. The causal links could be made easily by critics that the appointee was predisposed to the ideology of the government. The events of the Industrial Relations Council and Censorship Commissions contributed to the apprehension of the opposition. The concern that Labor was 'stacking the bench' was largely circumvented due to Webb's commitment in Tokyo, leaving him absent on most of the cases that challenged Labor's post-war reconstruction policies. The attempt to secure Webb's return around the time of the bank nationalisation case caused a political storm and is a glaring example how extra-judicial activities can negatively impact on the functioning of the court and have the potential to undermine its independence. A consequence of his absence was that Webb served his tenure during the Menzies era of conservative politics and participated in a limited number of landmark constitutional cases; the *Communist Party Case* and *Boilermakers* decisions are the notable

[1] Robert Thomson, *The judges* (Sydney: Allen & Unwin, 1987). 61.

exceptions. He is also known for taking a controversial position in the *Whose Baby Case* which gathered wide public attention. His unremarkable impact on the bench is illustrated by Webb being one of the least cited justices of the High Court. He refrained from any extra-judicial activities while on the High Court, apart from the role on the IMTFE which he accepted prior to the appointment. Lastly, Webb would be drawn into the political fray with his retirement which occurred with the passing of an increase in judges' pensions that sparked an outcry by Labor members who were sitting in opposition. Webb continued to serve in non-judicial positions after his retirement. His two royal commissions for the Queensland government on parliamentary salaries were non-eventful. Conversely, the acceptance of positions on two corporate boards was seen to be undermining the independence of the judicial office or a misuse and debasement of the title of justice. This chapter illustrates that extra-judicial activities have a significant impact on the perceptions of a judge's independence. These roles were an important and central aspect in Webb's career, he viewed them as part and parcel of his position and being brought into the political fray did not deter his acceptance and participation in such roles.

Appointment

Judicial appointments are part of the political process, it is the government of the day that decides who will get promoted to the bench and inherently there will be speculation as to the motivations behind their selection. Typically Labor appointees are more suspected for being 'political appointments', yet appointments by conservative governments are no

different in appointing judges who share their conservative backgrounds. The difference is that there is a deeper pool of talent for the conservative government to draw upon.[2]

During the last year of the war Webb had been linked to several promotions to high government posts. In July it was speculated that he was going to be appointed as Governor of New Guinea or the Chief Administrator of one of the Australian protectorate islands in the Pacific.[3] As Chief Justice, he acted as Lieutenant Governor of Queensland throughout 1945. Even after his appointment to the High Court it was still being speculated that he was being considered for the post of Governor of Queensland along with William Forgan Smith and Frank Arthur Cooper.[4]

Throughout 1945 there was also talk within the government of making changes to the composition of the High Court. As discussed in Chapter Five on Censorship, the government had been set back in implementing post-war reconstruction reforms with the failure of the referendum. Therefore, the reforms would have to be passed through legislation and it was anticipated to be challenged in the High Court. There was also the pretext that the work in the court was being delayed due to the absence of justices from ill health and serving on government duties, such as Owen Dixon J in the United States. In June, Cabinet decided that the Acting Prime Minister and the Acting Attorney-General

---

[2] Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne: Melbourne University Press, 1967). 64; Michael Coper, "Court as Political Institution," in *Oxford Companion to the High Court*, ed. A. R. Blackshield, Michael Coper, and George Williams (South Melbourne: Oxford University Press, 2001), 539. Cited in Russell Smyth, "Explaining Historical Dissent Rates in the High Court of Australia," *Commonwealth and Comparative Politics* 41, no. 2 (2003): 96.

[3] 'Forgan Smith Next State Governor', *Sunday Mail* (Brisbane) 8 July 1945, 3.

[4] 'Topics of the Day', *Morning Bulletin* (Rockhampton), 27 April 1946, 10.

would submit a proposal about addressing numbers in the High Court.[5] The matter was raised twice more in Cabinet by Arthur Calwell in July and September with the recommendation of amending the *Judiciary Act* to enable the appointment of additional members.[6] Calwell had long been a critic of the High Court which escalated in 1944 during the press censorship controversy.[7] Cabinet met the following month, when it was decided to increase the bench by three with the amending legislation to be approved on Evatt's return.[8] The desire to increase the number of judges intensified after the High Court invalidated the government's first health reform in the *First Pharmaceutical Benefits Case* which indicated that there would be potential obstruction by the court to the government's proposed post-war reconstruction reforms.[9] The return of the attorney-general led to a fiery Cabinet meeting on 17 January 1946. Evatt guarded the reputation of the High Court and opposed the plan as stacking the bench and making it unworkable. He managed to convince Cabinet to abandon the three appointees and only restore the court numbers to seven.[10] The

[5] NAA: A2703, 107, Minutes of meeting of full cabinet held at 2.30pm, Monday, 18th June 1945 at Parliament House, Canberra.

[6] NAA: A2703, 108, Minutes of meeting of full cabinet held at 2.30pm, Monday, 2nd July 1945 at Parliament House, Canberra and; NAA: A2703, Minutes of meeting of full cabinet held at 2.30pm, Monday, 24th September 1945 at Parliament House, Canberra.

[7] During a parliament debate on the reforms to the censorship regulations Calwell accused two justices of 'throwing away their wigs' in their judgment. CPD, HR, Vol. 180, 2145-2146; Arthur A. Calwell, *Be just and fear not* (Hawthorn, Vic.: Lloyd O'Neil in association with Rigby, 1972). 91.'Calwell Attacks Judges' *Courier-Mail*, 25 November 1944, 3; 'Disallowance Move, Mr Calwell Attacks Judges', *Sydney Morning Herald*¸25 November 1944, 5 and; 'Bitter Censorship Debate, Minister Criticises High Court Judges', *Argus*, 25 November 1944, 8.

[8] NAA: A2703, 117, Minutes of meeting of full cabinet 11am, Tuesday, 2nd October 1945 at Parliament House, Canberra.

[9] *Attorney-General (Vic); Ex re Dale v Commonwealth* (1945) 71 CLR 237; Brian Galligan, *Politics of the High Court: a study of the judicial branch of government in Australia* (St. Lucia, Qld.: University of Queensland Press, 1987). 153.

[10] NAA: A2703, 121, Minutes of meeting of full cabinet held at 11am on Thursday, 17th January 1946, et seq. at Parliament House, Canberra; ibid.; Kylie Tennant, *Evatt; politics and justice* (Sydney: Angus and Robertson, 1970). As an austerity measure from the Great Depression the Court was reduced to six in 1930 after it was decided not to replace Justice Isaacs.

amendment still was opposed in Parliament. The leader of the opposition, Robert Menzies, argued that he could not apprehend the legal or logistical requirement, especially with the return of Dixon and the decrease in demands placed upon judges in wartime.[11] Hubert Anthony accused the government of attempting to appoint someone 'who had given good service' to the government, naming J.V. Barry as the likely candidate. He concluded 'that it is impossible for persons appointed to judicial positions… to divest themselves of their previous views', adding that '[s]uch views must necessarily colour their judgments'.[12] Suspicion was also aroused with a minister declaring the previous week that he would like to curtail the power of the court.[13] An editorial in the *Sydney Morning Herald* decried that the High Court's integrity was being undermined.[14] In response, the Committee of Counsel Practising at the Victorian Bar released a statement deploring the speculation regarding the appointment to the High Court.[15] Consequently, the potential appointee's integrity was being questioned before they were made known to the public. This may have assisted in Webb's selection, but also cast this shadow over his appointment.

[11] *CPD*, HR, Vol. 186, 10 April 1946, 1301-1303.

[12] *CPD*, HR, Vol. 186, 10 April 1946, 1318; 'High Court Bench to be Seven', *Argus*, 11 April 1946; 'Politics and High Court. New Appointment Opposed', *Sydney Morning Herald*, 11 April 1946, 4. Barry had been alluded to in an earlier article, 'High Court to Have Extra Judge', *Argus*, 28 March 1946, 4

[13] 'Wants Power of Court Curtailed. Mr Ward's Hope', *Argus*, 8 April 1946, 3; 'Court "Upsets" Policy. Mr Ward's Complaint', *Sydney Morning Herald*, 5. The Prime Minister stated to Parliament that the views of Ward did not represent the government, 'Mr Ward Spoke Only for Himself', *Sydney Morning Herald*, 10 April 1946, 7; *CPD*, HR, Vol. 186, 9 April 1946, 1164.

[14] 'Integrity of the High Court', *Sydney Morning Herald*, 11 April 1946, 2.

[15] The statement declared: 'Words spoken by public men which engender in the minds of the people distrust or even doubt of the integrity and honour of the bench, or which suggest improper motives or prejudice in its pre-eminent task, tend in this discretion and are, therefore, dangerous and evil', 'High Court's Integrity', *Sydney Morning Herald*, 15 April 1946, 6. The statement was prepared and issued in the absence of J.V. Barry who was a member of this committee, M. Finnane and J. Myrtle, *J V Barry: A Life* (Sydney: UNSW Press, 2007). 133.

There were only two people considered for the position when Cabinet met on 12 April, J.V. Barry and Webb. A number of factors contributed to Sir William's appointment. First, the Labor government was looking for a safe option to prevent a public backlash on the eve on an election and not substantiate the accusations of 'stacking the bench' made by opponents during the debate on the *Judiciary Act*. Although Webb was accused of having Labor sympathies due to all of his appointments to royal commissions and to the Industrial Relations Council, he did not have any real sympathies towards Labor, unlike Barry who had stood as a Labor candidate in 1943.[16] A second explanation was that Webb was tiring of his role regarding war crimes that appeared to have no end and threatened to return to the Supreme Court of Queensland as chief justice. Evatt 'was keen to maintain a high profile in the international sphere' and offered Webb the High Court position.[17] Fricke adds that along with international considerations, Evatt was also motivated by his aspiration to be prime minister. Therefore, the attorney-general backed the more conservative and politically acceptable appointment in Webb over Barry who would have been more controversial due to his outspokenness and connections with the Labor Party.[18] It may not have been a coincidence that Webb's third report was tabled on the same day as the *Judiciary Act* was debated.[19] Arthur Calwell in his autobiography claimed that Webb was

[16] Eddy Neumann, *The High Court of Australia: a collective portrait, 1903-1972*, ed. Sydney University of, Government Dept. of, and Administration Public, 2nd ed., Occasional monograph; no. 6 ([Sydney]: Dept. of Government and Public Administration University of Sydney, 1973). 90-91; Galligan, *Politics of the High Court*: 147-48; Philip Ayres, *Owen Dixon* (Carlton, Victoria: Miegunyah Press, 2003). 343n.

[17] Bruce Harvey McPherson, *The Supreme Court of Queensland, 1859-1960: history, jurisdiction, procedure* (Sydney: Butterworths, 1989). 327; Ian Callinan, "Sir William Webb," in *The Oxford Companion to the High Court*, ed. A. R. Blackshield, Michael Coper, and George Williams (South Melbourne: Oxford University Press, 2001), 707.

[18] Graham Fricke, *Judges of the High Court* (Melbourne: Hutchinson of Australia, 1986). 157-58.

[19] *CPD*, HR, Vol. 189, 1294-1296.

appointed on the insistence of Evatt to capture the Catholic vote and that he was not regarded as the 'best judicial brain that was available'.[20] Calwell and some of the other Labor ministers who were also Catholic, supported Barry and resisted the campaigning of influential Catholics such as the Brisbane Archbishop James Duhig. Calwell also notes that Herbert Victor, Minister for the Interior was pressured by the Australian Workers' Union for Webb's appointment. John Dedman, Don Cameron, Jack Holloway, Eddie Ward and Calwell supported Barry's appointment over Webb. Evatt refused to budge in Cabinet and Calwell states that at one point Evatt was 'reduced to tears' over the matter.[21] Chifley sided with Evatt and the Cabinet supported the appointment of Webb despite Barry receiving 11 votes to 6.[22]

The furore regarding the appointment seemed to settle with the announcement and was reported with due respect to the position and without criticism. Webb, who was sensitive to representations made in the press, noted one exception:

> I understand the Sydney Morning Herald was not too enthusiastic about my appointment, to say the least. But there is a personal grudge arising out of the Censorship Report behind that.[23]

Webb had not seen the article, and it is not clear as to which one may have caused offence. The article reporting his appointment carried no commentary, and he may have been

[20] Calwell, *Be just and fear not*: 197.

[21] Ibid.

[22] NAA: A2703, 127, Minutes of meeting of full cabinet held at 9.50am, Friday, 12th April 1946, at Parliament House, Canberra; Ayres, *Owen Dixon*: 181, 343n; Finnane and Myrtle, *J V Barry: A Life*.

[23] NAA: M1418, 3, Sir William Webb, President of the IMTFE and J of HCA to B.H. Matthews, J of Supreme Court of Queensland, 16 May 1946 and; NAA: M1418,5, Sir William Webb, President of the IMTFE and J of HCA to Lady Webb, 30 April 1946.

referring to the editorial questioning increasing the number on the bench.[24] Nevertheless, it illustrates awareness by him of the impact that his commission had on how he was perceived by a section of the press.

Sir William was the seventeenth appointment to the Court and the third from Queensland. The *Judiciary Act* was assented to on 18 April 1946 and commenced 16 May. On the announcement of his appointment on April 12, 1946 to the High Court Webb was described by *The Australian Law Journal* as having a 'distinguished' career, but on his retirement the phrase 'a varied career' was the favoured description.[25] Webb has not been considered one of Australia's prominent jurists on the High Court. Fricke described him as 'not an intellectual of the stature of Dixon and Latham' and thought that the other option of Barry would have been a better choice.[26] This certainly illustrates the danger of extra-judicial activities being perceived as the cause behind judicial promotion which has commonly been the explanation of Webb's elevation to the High Court. Therefore, it can be argued, and was at the time of Webb's appointment, that such views 'impair the dignity and esteem in which the court should be held'.[27]

---

[24] 'High Court Judge. Sir Wm. Webb Appointed', *Sydney Morning Herald*, 31 April 946; 'Politics and High Court. New Appointment Opposed', *Sydney Morning Herald*, 11 April 1946, 4 and; 'Integrity of the High Court', *Sydney Morning Herald*, 11 April 1946, 2.

[25] "Sir William Webb," *The Australian Law Journal* 20(1946); "Sir William Webb," *The Australian Law Journal* 32(1958).

[26] Fricke, *Judges of the High Court*: 153.

[27] Robert B. McKay, "The Judiciary and Non-Judicial Activities," *Law and Contemporary Problems* 35(1970).

Return to Australia from the IMTFE

The previous chapter discussed the impact that Webb's return to Australia in 1947 had on the operation of the IMTFE. The return was as significant in Australia as in Japan, in not more so, and damaging to his judicial reputation. Philip Ayre's argues that it is one of the clearest examples of a government 'fiddling with the Court'.[28] Webb's return coincided with the debate on the *Banking Bill* 1947, where Part Five of the Bill was causing consternation in federal parliament. During the debates in the House of Representatives members of the government proclaimed that the High Court was obstructing the will of the government by striking down legislation. Rosevear's comments sparked the greatest response which he argued:

> I have no fundamental objection to the High Court playing its part, as provided for in the Constitution of this country; but I have a fundamental objection to people in a state of senility due to old-age being continued in positions where they can frustrate the will of the people as expressed in a popular vote.[29]

The following day, the same that Webb was being sworn onto the bench, Archie G. Cameron raised the matter of the new appointee during question time in a rebuttal to the complaints from the Labor members:

> On Rosevear's form one might reasonably say that the Government has recalled Mr. Justice Webb from Japan merely because it is well known that that gentleman is regarded as being more or less in sympathy with the Australian Labour [sic] party.[30]

---

[28] Philip Ayres, "John Latham in Owen Dixon's Eyes" (paper presented at the The Samuel Griffith Society, Stamford Plaza Adelaide Hotel, North Terrace, Adelaide, 23-25 May 2003 2003).

[29] *CPD*, HR, Vol. 194, 13 November 1947, 2071

[30] *CPD*, HR, Vol. 194, 14 November 1947, 2157; 'Vicious Personal Attacks in House. Criticism of Judges Leads to Hot Debate' *The Age*, 15 November 1947, 2

In at least one metropolitan paper Cameron was quoted without his subsequent qualification which followed:

> I do not know Mr. Justice Webb, but I have no reason to believe that he is not competent and impartial. He has not yet been sworn in as a justice of the High Court. If honorable [sic] members opposite cast aspersions on members of the judiciary simply because their political ideologies differ from their own, we are entitled to do likewise; but we set our faces against that. The personalities of the members of the judiciary should not concern us. The judgments they give are open to discussion and criticism, and that is as it should be.[31]

Webb was brought into the fray once again during this debate by ALP member, Sydney Falstein, who accused Anthony of making a slur against the recent appointee by commenting that the government was packing the High Court. Falstein stated that the 'suggestion Mr Anthony made imputes that the calibre of the man this Government appointed – Sir William Webb – is not up to standard'.[32] Anthony denied making any such comment on Webb, and examining the *Hansard* it would appear that Falstein was inferring too much or adding the statement of Cameron into the mix. In one way or the other, the impartial image of Webb had taken a battering during this debate, and his timing to return to Australia could not have come at a more inopportune moment.

As discussed previously, the timing of the government request for his return left Webb perplexed; he mused in correspondence that he was suspicious that he would be recalled for the Banking Case, but knew that the legislation was still being debated in parliament.[33]

---

[31] *CPD*, HR, Vol. 194, 14 November 1947, 2157. Other papers published the quote in full, for example, 'Judiciary Under Fire. Speaker's Remarks Deplored by Opposition', *Western Australian*, 15 November, 15.

[32] *CPD*, HR, Vol. 194, 14 November 1947, 2154 and 2160.

[33] AWM 3DRL/2481, Series 4, Wallet 2, Sir William Webb, President of the IMTFE and J of HCA to J. Mansfield, J of the Qld Supreme Court, 22 October 1947 and; NAA: A1067, UN46WC/8 Part 3, Sir William Webb, President of the IMTFE and J of HCA to John Burton, Secretary to the Department of External Affairs, 21 October 1947.

Speculation in some sections of the press questioned whether Webb's return was for the banking case.[34] Chifley explained to parliament that he was being brought back to help relieve the accumulation of work, although the Chief Justice did not support this proposition.[35] Perhaps the early return was engineered by Evatt, watchful of the court's integrity, to settle the court and diffuse allegations that the Justice was being returned solely for the purpose of sitting on the banking case. Evatt attempts to get Webb back again in the early part of 1948 was resisted in Tokyo. MacArthur refused to release Webb from the presidency of the IMTFE, concerned that his removal would bring further discredit to the trial. Webb added that he would have to declare to the parties in the case that his presence was at the request of the government.[36] Moreover, legal and political observers were crying foul in Australia. Dixon declared at the time that he felt that the Government as a party to the case was manipulating the bench which would bring discredit to the decision. Dixon further believed that he would support an appeal to the Privy Council if Webb's presence altered the decision.[37] Therefore, Webb remained in Japan for the remainder of the IMTFE. The decision to recall Webb negatively reflected on the perceptions of his independence with observers seeing through the thinly veiled rationales being forwarded by the government for his return. It is unlikely that Webb would have had any influence in the case as became evident with his return in 1948.

---

[34] 'Sir William Webb Recalled from Tokio: Banks Appeal Hint?' *Herald Pictorial* (Melbourne), 5 November 1947; 'Sir W. Webb Returning. High Court Duties', *Sydney Morning Herald*, 5 November 1947, 1

[35] *CPD*, HR, Vol. 194, 6 November 1947, 1755-1756 and; NAA: M1418, 11, Department of External Affairs to Sir William Webb, 2 October 1947, Latham's 'view is that the Court can carry on as at present until you become available as indicated'.

[36] AWM: 3DRL/2481, Series 4 Wallet 10, Sir William Webb, President of the IMTFE and J of HCA to the Department of External Affairs, 27 January 1948.

[37] Ayres, *Owen Dixon*: 186-87.

A Limited Impact: Webb's Time on the Bench

Sir William Webb experienced the end of the Latham Court (1935-1952) and the beginning of the Dixon Court (1952-1964), in which he experienced starkly different approaches by the two chief justices. There were severe personality clashes on the Latham Court, some of which were resolved with Evatt leaving the bench in 1940. Justice Starke's animosity towards his colleagues resulted in him rarely joining majority judgments.[38]

Webb's period on the High Court has been said to have been 'a period of personal decrescendo'.[39] This may have been more of a reflection of the period of the High Court. It is evident in Webb's correspondence on the IMTFE where he was pondering his life as a High Court Justice and considering the possibility of taking on additional diplomacy work for the Government. He confides to Lady Webb that he is unsure of the prospect and that retirement was more appealing.[40] Due to his commitments to the IMTFE Webb was absent for the series of important constitutional cases that tested the parameters of the Commonwealth's legislative powers. In the immediate post-war years the Chifley Labor government embarked on a programme of economic and social reform under the guise of post-war reconstruction. The High Court 'obstructed' this programme in a series of adverse decisions against the Commonwealth that invalidated legislation. The most significant of these cases were the *Pharmaceutical Benefits* cases of 1945 and 1949 and the *Bank*

[38] Russell Smyth, "Judicial Interaction on the Latham Court: A Quantitative Study of the Voting Patterns on the High Court," *Australian Journal of Politics and History* 47, no. 3 (2001): 330-48; Clem Lloyd, "Not Peace But a Sword! - The High Court under J.G. Latham," *Adelaide Law Review* 11(1987): 178-87.

[39] Fricke, *Judges of the High Court*; Callinan, "Sir William Webb."

[40] NAA: M1418, 5, Sir William Webb, President of the IMTFE and J of HCA to Lady Webb, 7 February 1947 and; Sir William Webb, President of the IMTFE and J of HCA to Marry Webb.

Nationalisation case of 1948.[41] Speculation regarding Webb's partisanship to the government was quelled in the *Second Pharmaceutical Benefits* case in which he joined the majority in striking down the legislation.[42]

Soon after Webb took his seat on the bench the Labor Party was removed from Government and the Menzies conservative reign began. Furthermore, Dixon became Chief Justice in 1952 which introduced a period of 'routine' and 'remarkable uniformity'. The post-war dominance of the Liberal-Country parties was an era when Australian politics ran 'smoothly within constitutionally appointed boundaries' and the High Court was merely making 'incremental adjustments'.[43] When Webb did return to the Bench he joined majority judgments against a number of cases that held the defence power regulations void.[44] Dixon generally thought Webb was a passenger on the High Court. On 11 May 1952 he discussed with the Prime Minister the possible removal of Webb and McTiernan from the bench by offering them diplomatic positions.[45] Richard Searby, a prominent Australian lawyer, told Dixon's biographer that Webb once told him: "You know, Searby, I shouldn't be on this Court. The Chief Justice is such a wonderful man and I really can't help him at all. I wish I could but he stands out from all of us. The others help him; I just can't".[46]

---

[41] Galligan, *Politics of the High Court*: 148-83.

[42] British Medical Assn v Commonwealth (1949) 79 CLR 201.

[43] Galligan, *Politics of the High Court*: 186; Michael Kirby, "Sir Edward McTiernan - A Centenary Reflection," *Federal Law Review* 20(1991): 184.

[44] Ayres, *Owen Dixon*: 191.

[45] Ibid., 234.

[46] Ibid., 363n.

One of the cases on which he sat that generated wide public interest was *Morrison v Jenkins* or the *Whose Baby* Case in which Sir William played a decisive role.[47] The circumstances of the case involved custody of children who were switched at birth and was an appeal from the Victorian Supreme Court. The presiding justice of the Victorian case was Justice J.V. Barry. Duck and Thomas have no qualms in expressing who should have received the appointment to the High Court and the implications it had for the Morrisons and Jenkins.[48] The court was evenly split over the application of the legal principle of the best interest of the child. Webb's decision has drawn criticism from observers due to him drawing on a separate issue of the possibility of two additional babies born at the hospital within 24 hours being possibly involved in the switch. This argument was not presented in the High Court case and was considered to be a 'red herring'.[49]

Webb sat on the *Communist Party Case* in 1950 where he joined the majority with some unease as he was sympathetic to the Commonwealth cause but found that he was bound by

[47] The case was followed in the major metropolitan newspapers from its appeal from the Victorian Supreme Court to the High Court and the Privy Council, see for example, 'High Court to hear "Whose Baby" appeal, *Argus*, 8 June 1949; '"Whose Baby" decision. Baby to stay with Jenkins', *Courier-Mail*, 23 December 1949 and; '"Mixed" Babies Must Stay with Present Parents, High Court Rules, 23 December 1949, 4. The case has also been examined by Colin Duck and Martin Thomas, *Whose Baby?* (Sydney: Collins, 1984).; *Morrison v Jenkins* (1949) 80 CLR 626

[48] 'No one was to know it at the time, of course, but Webb's appointment ahead of Barry was to ultimately have far-reaching effects on the lives of Nola Jenkins and Johanne Lee Morrison… With the sole exception of William Flood Webb, the High Court judges were men of exceptional ability… Despite his wide experience, many thought Webb a poor choice for the High Court, not of an intellectual stature of Dixon and Latham, ibid., 56, 77 & 175.

[49] Ibid.

the Jehovah Witness case.[50] His reasoning has been described as 'somewhat idiosyncratic', and he differed with the majority on the interpretation of the defence power.[51]

In the *Boilermakers' Case* (1956) he dissented from the Dixon majority which decided the Commonwealth Court of Conciliation and Arbitration was inconsistent with Chapter III of the Australian Constitution for exercising arbitral and judicial power concurrently.[52] The precedent established a strict interpretation of the doctrine of the separation of powers. It is perhaps not surprising given Webb's background and the decades he spent in the Queensland industrial court, in its various forms, where he exercised the dual roles of in administration and judicial functions in the position. These powers were also similar to those of the Sugar Prices Board. Webb dissented with Williams J and Taylor J although all three took different approaches in their judgments on the matter regarding the separation of powers.[53] Of particular significance for this thesis is Webb's separate opinion which provides insight into his views of judges acting in positions off the bench:

> The judges as individuals are subject to both State and Commonwealth laws and may be required to perform duties other than judicial duties; and may even be required to perform additional duties simply because, having become judges, they are believed to have special personal qualifications to discharge them. The judges as individuals must be distinguished from the

[50] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1; Roger Douglas, "A Smallish Blow for Liberty? The Significance of the Communist Party Case," *Monash University Law Review* 27, no. 2 (2001): 279.'The Justices who passed Judgment on the Red Act', *Sydney Morning Herald,* 10 March 1951, 2.

[51] George Winterton, "The Communist Party Case," in *Australian Consitutional Landmarks*, ed. H.P. Lee and George Winterton (Cambridge: Cambridge University Press, 2003), 126 & 28.

[52] R v Kirby and Others; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254.

[53] Galligan, *Politics of the High Court*: 207-09; Fiona Wheeler, "The Boilermakers Case," in *Australian Consitutional Landmarks*, ed. H.P. Lee and George Winterton (Cambridge: Cambridge University Press, 2003), 169.

courts which they constitute.[54]

Therefore, Webb's attitude towards extra-judicial activities is that he sees a clear distinction between the judge on the court and the judge as an individual who is free to fill any role at the bequest of the government. He elaborates that the same judges passing decisions could then exercise administrative powers in the capacity of *personae designatae*. What this position does not take into consideration is that an underlining principle of judicial independence is the perception of the public who may not draw a distinction between the judge on the court and the judge acting as an individual who has been commissioned to carry out a government function.[55] This is evident in his, with McTiernan, encouragement of Dixon to accept an appointment as royal commissioner into the Petrov Affair, while all the other judges on the High Court recommended that he decline the offer.[56] It is conceivable that had Labor stayed in government Webb would have had more opportunities to perform extra-judicial activities while sitting on the High Court. As mentioned previously, diplomatic roles for Webb had already been suggested by Evatt and it is clear that Sir William was of the mindset that it was compatible with his judicial post. These positions may have been held in a similar manner as Owen Dixon in his role as

[54] R v Kirby and Others; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 329.

[55] Neville Owen, "Royal Commissions - The Practicalities" (paper presented at the JCA Colloquium, Sydney, 11 October 2013); Murray McInerney, "The Appointment of Judges to Commissions of Inquiry and Other Extra-Judicial Activities," *The Australian Law Journal* 52(1978): 550-52; Murray McInerney and Garrie J. Moloney, "The Case Against," in *Judges as Royal Commissioners and Chairman of Non-Judicial Tribunal. Two Views presented at the Fourth Annual Seminar of the Australian Institute of Judicial Administration*, ed. G. Fraser (Adelaide: Australian Institute of Judicial Administration Incorporated, 1986), 51-52; ABA, "Independence of Judges: Should They Be Used for Non-Judicial Work?," *American Bar Association Journal* 33(1947): 795.

[56] Ayres, *Owen Dixon*: 244.

Minister to the United States and United Nations mediator in Kashmir while he served on the High Court.

Webb did participate in a number of constitutional and other significant cases that shaped Australian legal history. The examples above are just a few and demonstrate that his judgment do not show political colouring, if anything, it illustrates an individuality that may have missed the mark on occasion. Russell Smyth found that Webb is one of the jurists least cited by his contemporaries. During the years of 1995-1999 Webb was cited in decisions in the High Court for a total of 23 times compared to those who served in the same era, Williams (1940-58) 58 times, Dixon (1929-1964) 717 and Fullagar (1950-1961) 154.[57] Webb's time in the bench saw the tail end of the obstructionist court of Latham which blocked important components of the post-war social reform program of the Labor Party. The remainder of his career was shaped by the relatively harmonious atmosphere by the conservative hold on political power in Canberra and the leadership of Dixon as Chief Justice.

After the High Court

Sir William Webb's voluntary retirement from the High Court at the age of 71proved to be as controversial as the rest of his career and was decried as political manoeuvring. This was due to legislation being passed to increase High Court judge's pensions and entitlements a week before his retirement was announced. Calwell as Deputy leader of the opposition was scathing, declaring the legislation as 'all part of a scheme to benefit Sir William Webb', as

[57] Russell Smyth, "Who Gets Cited? An Emperical Study of Judicial Prestige in the High Court," *University of Queensland Law Journal* 21, no. 7 (2000): 12.

his imminent retirement was not made known in the parliament debate on the pension increase:

> The Government cooperated with Sir William to create a vacancy, which it can now proceed to fill by the appointment of a younger conservative successor, and this looks like packing the High Court Bench.[58]

The Labor Party's indignation was further incensed when after accepting his inflated pension, Webb returned to Queensland, where he filled the position of Chairman of the Queensland Television Ltd with the annual salary of £5000 and a car. Dixon had been critical of Latham accepting a similar position on his retirement, but had encouraged Webb to take the appointment.[59] John Playford refers to Webb accepting the chairman of directors of Australian Consolidated Press Ltd. In this role Webb oversaw an unsuccessful application for a television broadcasting license for Brisbane.[60] He later became chairman of directors of Electric Power Transmissions, 'the largest firm engaged in erecting steel towers for electricity commissions in Australia'.[61] His acceptance of these positions was commented on in Commonwealth Parliament by Edward Gough Whitlam as deputy leader of the opposition during the second reading of the *Judges Pension Bill* on 18 April 1961:

> We would hope that judges in retirement would conduct themselves with the same decorum and the same aloofness from commercial and business interests which they are expected– in fact required – to show when they are in the bench. There was recently an unfortunate case in which a federal judge, who retired with a considerable pension and a knighthood, accepted the office of chairman of directors of a company which was seeking a television licence. There is no question that the people who appointed him

[58] The legislation was passed just prior to Parliament going to recess. 'Retirement Brings Attack on Government, *Canberra Times*, 17 May 1958; *Age [Radio/TV Supplement]*, 16-22 May 1958, 3.

[59] Ayres, *Owen Dixon*: 267.

[60] John Playford, "Labour and the High Court," *Australian Left Review* 23(1970): 21.

[61] Ibid. 21

> as chairman of directors of the applicant company thought that his prestige would advance their cause.
>
> …The judge should not have allowed himself to be used in that position and in that way. When they retire, judges are given pensions which enable them to observe the same dignity in retirement as they have to observe while on the bench. While I am not suggesting that there should be any requirement in any statute for it, I think we should be failing in our duty if… we did not point to the regrettable position that can arise.[62]

Judges, especially of the superior courts, should carefully consider which positions they engage in post-retirement due to their standing in the community and the ongoing expectations of their having been members of the judiciary. Acceptance of commercial positions of retired judges is a complicated issue. Judges are provided with a public funded pension, however, they have often foregone lucrative careers at the bar to serve as a judge. Therefore, it seems reasonable for retired judges to accept commercial opportunities as they arise after leaving the bench to capitalise on their expertise and skill set. The current guiding principle in Australia for judges participating in commercial activities is that:

> …a former judge should be satisfied that any proposed… activity is not likely to bring the judicial office into disrepute, or put at risk the public expectation of judicial independence, integrity and impartiality.[63]

The main problem seen by Whitlam with Webb's position on the television board was that it could be viewed that the company was using Webb's judicial title, reputation and prestige to further their chances in bidding for broadcasting rights in Queensland.[64]

---

[62] *CPD*, HR, 938; John Playford, "Judges for Hire," *Outlook* June(1966): 13.

[63] James Burrows Thomas, *Judicial Ethics in Australia*, 3rd ed. (Chatswood, N.S.W.: LexisNexis Butterworths, 2009). 269.

[64] Playford, "Judges for Hire." Webb received permission from the Queen to retain his title "Honourable" after his retirement which is traditional for High Court justices, NAA: AA1980/642, NN, Neil O'Sullivan, Attorney-General's Department to Sir William Webb, 5 September 1958.

He was also appointed a chairperson of the committee inquiring into parliamentary salaries on two occasions in 1960 and 1963. During the first inquiry appointed on 15 July the Board held that the basic pay of £1,850 for parliamentary members and that the Premier's pay should be £2,200 with an additional £350 for entertainment. An independent board to determine salaries was recommended to be established.[65]

Sir William died on 11August 1972 at the age of eighty-five in his home city, Brisbane. Lady Webb had died two years earlier at the age of 76. The press articles reporting his passing focussed on his presidency of the IMTFE followed by summaries of the various extra-judicial activities he performed over his career. Only passing references were made to his sitting on the Supreme Court of Queensland and the High Court of Australia, with no mention to cases he heard or the judgments he passed.[66] Similarly, Ivor J Greenwood, the Commonwealth Attorney-General, press statement focussed on Webb's investigation of war crimes and presidency of the IMTFE: 'As with all of the other roles he undertook, he carried out this task with dignity and compassion'.[67] Webb's funeral service was held at Our Lady of Mount Carmel Church and he was buried at Nudgee Cemetery. Webb's contribution to the Australian judiciary was recognised at the service by the Chief Justice,

[65] Timothy Abey, Nicole Mary Wells, and Barbara Deegan, "Report of the Parliamentary Salaries and Allowances Tribunal Inquiring Into Basic Salary, Allowances and Benefits Provided to Members of the Tasmanian Parliament," (Hobart, Tasmania: Parliamentary Salaries and Allowances Tribunal, Tasmanian Industrial Commission, 2014), 67.

[66] 'Top Jurist Dies, 85. Headed War Tribunal', *Courier- Mail*, 12 August 1972, 2 and; 'Jurist dies', *Canberra Times*, 12 August 1972, 3.

[67] NLA: Biographical cuttings on William Flood Webb, Sir, High Court Judge, 1946-1958, 'Statement by the Commonwealth Attorney-General, Senator Ivor J. Greenwood, Q.C. – Death of Sir William Webb, 13 August 1958.

Sir Garfield, who spoke on behalf of the High Court and stated that the Webb had sat on fifty significant constitutional cases:

> As a justice of the High Court he played an important part in an important phase of this court's history…His experience of the law and his judgments earned him the respect of the community'.[68]

[68] 'Court's Tribute to Judge', *Sydney Morning Herald*, 16 August 1972, 8.

Conclusion

> As to our position as Commissioners, anybody can be appointed a Commissioner and the regulations say he may inform his mind as he thinks fit. This, according to the Privy Council, prevents him from being a judicial authority, I pointed this out in my Atrocities Report. I think judges are picked because they are experienced in sifting the truth and are not likely to be imposed upon.[1]

This thesis has examined the proposition that Sir William Webb was a political judge, that is, that he was held to be aligned to the Australian Labor Party, and it is often inferred in the literature relating to his career that he was politically motivated. Numerous people have been cited who have speculated on Webb's political allegiance, including members of the opposition political parties, fellow participants on the International Military Tribunal for the Far East and the Australian press. The question of Webb's politics is also cited widely within the literature regarding various aspects of his career. The exception is in the literature concerning his position on the High Court, where invariably the conclusion has been that there is no evidence of him having any political leanings in his judgments, and that he was appointed to the court as a safe option for the Labor Party. This is supported by one of the first cases in which he sat, where he joined the majority in invalidating a key piece of legislation in the Labor Party's post-war reconstruction policy. The focus of this thesis has been to examine whether the allegations of Webb's political allegiance extend to

[1] NAA: A6238, 3, Sir William Webb, Chairman of the Australian War Crimes Commissioner to Alan Mansfield, War Crimes Commissioner, 29 October 1945.

the extra-judicial activities that he undertook for the Commonwealth during the war years and leading to his appointment to the High Court.

It is evident in all of his extra-judicial activities that he displayed an acute awareness of his independence and implemented active steps to promote its protection from encroachment by the executive. In accepting the chair of the Industrial Relations Council, he demanded that the minister be excluded from the membership or take an active role in the functioning of the Council. He also sought tenure for this position, an important tenet of judicial independence, insisting that the appointment be for the duration of the war and that the chairman held the same status as a Justice of the High Court. The government was prepared to concede these demands to Webb for the IRC, but they proved to be a sticking point for his appointment to the Women's Employment Board, and consequently he was not given the latter position.

His next opportunity to be of use to the government during the war was with the War Crimes Commissions. Webb saw the need for the evidence that he was gathering to be of a high standard so that it would have international acceptance for prosecutions or compensation claims after the war and, therefore, sought to remove any appearance of executive influence. This included the army, which resulted in him reviewing the findings of the Allan military court against the wishes of the Minister and the High Command, and also in him seeking the release of his Secretary, John M. Brennan, from the military to ensure the appearance of independence for the commission. In Tokyo, Webb even reproached the most powerful man in occupied Japan, General Douglas MacArthur, in defending the independence of the International Military Tribunal for the Far East and denying the Supreme Commander's overtures to direct the Tribunal in interpreting its

charter. In Australia, Webb did not engage in politics to the same extent as his colleagues, such as Latham and Dixon, who frequently offered policy advice during the war to both political sides. Yet, both jurists are considered as exhibiting the qualities of prestige and impartiality required of judges. The fact that the perception of Webb being a political judge persists is due to the nature of extra-judicial activities and their frequent incompatibility with the notions of judicial independence and his limited judicial achievements while on the High Court. Furthermore, participation in extra-judicial activities presents 'hazards' for judges that have the potential to impact on their judicial functioning and can reflect poorly on their court.

Webb had a tendency to cause conflict throughout his career, and these impressions typically emanate from his extra-judicial activities. The individuals who have expressed their dislike of him professionally and personally tend to be more prominent in the literature than those who had a favourable impression of the irascible judge.[2] The criticism is not without merit. Certainly the employer representatives on the IRC found him difficult to work with, and he used his deciding vote without negotiation. There is ample evidence of Webb becoming hostile if he believed his authority was being undermined, which is seen in his protest to various authorities regarding misrepresentation in the press, his reaction to Judge Kirby's proposition during the Third War Crimes Commission and other incidents. It is particularly evident on the IMTFE, where there are numerous accounts of Webb clashing with other members of the court, whether from the prosecution, defence or his fellow judges. However, Webb had some supporters at Tokyo and at home. There are a

[2] John Alan Appleman, *Military Tribunals and International Crimes* (Indianapolis: Bobbs-Merill Company, 1954). 66.

number of warm letters of support to him as president of the IMTFE. It has also been commented that one of his attributes was an ability to produce harmony in his domestic courts.[3] In a tribute to Webb, Sir Garfield Barwick CJ commented that 'Sir William was equable and friendly… On the bench he was always attentive, most courteous…'.[4] Fellow Queenslander and High Court Justice, Sir Harry Gibbs wrote in 1979: 'He is still remembered with affection by many of us who knew him'.[5] It would appear that he was often ill-suited for the extra-judicial activities that he filled as he used the same approach to procedure and demanded the same respect as a judge that he would in a courtroom when greater flexibility and diplomacy were required.

Robert B. McKay's three hazards have been used throughout the thesis to examine the effect that Webb's wartime extra-judicial activities had on the functioning of him as a judge.

The first hazard regarding the time and energy that remains for the judge to conduct the primary function of sitting in their court was impaired by the activities in which Webb engaged. The War Crimes Commissions led to a prolonged absence from the Supreme Court of Queensland and led to complaints that the court load was being unreasonably placed on the remaining judges. This issue was met by appointing acting justices for the absence of Webb and Justice Alan Mansfield during the third commission. The use of

[3] Clem Lloyd, "Not Peace But a Sword! - The High Court under J.G. Latham," *Adelaide Law Review* 11(1987): 180; Ross Johnston, *History of the Queensland Bar* (Brisbane: Bar Association of Queensland, 1979). 82; Michael Kirby, "The Five Queensland Justices of the High Court of Australia," *Australian Bar Review* 15(1996): 8-9.

[4] (1972) 127 *CLR* v at vii.

[5] Harry Gibbs, "Some Aspects of the History of the Queensland Bar," *Australian Law Journal* 53, no. 2 (1979): 69.

acting justices has been criticised as undermining the independence of the judiciary, as it is argued that temporary judges are potentially inclined to make decisions favourable to the government in hope of a permanent elevation to the bench. Similarly, the length of time that the IMTFE sat was unexpected and caused great embarrassment to the Commonwealth government after appointing Sir William to the High Court bench. His absence undermined the Labor Government's rationale of expanding the bench which was based on relieving the workload on the sitting, ageing Justices and the expected increase in cases after the war. An attempt to secure his early return led to allegations of political motivations, raising doubts regarding Webb's impartiality.

There were elements of the second hazard in Webb's duties regarding the development of actual bias or the appearance of prejudgement of issues that may come before the court. The Industrial Relations Council collapse was alleged to have been partially caused by Webb's pro-Labor sympathies. However, this is unsupported, as Webb's position on compulsory unionism and pay in lieu for women were out of line with the current ALP policies. Furthermore, only a few months later he earned the animosity of Unions in Queensland, who demanded that the government have the Chief Justice removed from the Queensland Industrial Court for being anti-union. Political leanings were also suggested in relation to the Censorship Commission, which was criticised for providing a whitewash of government impropriety in using wartime powers. Webb's report was used to assist the government to reassure the Australian electorate going to the polls to approve increasing the constitutional powers of the government through referendum. While the war crimes commissions would not impact on his domestic courts, they would have a significant impact on his position on the IMTFE. It is widely held that he should have disqualified

himself from proceedings, as he had examined and drawn conclusions on a number of issues that were raised on that Tribunal. The IMTFE as an extra-judicial activity would indirectly cause suggestions that Webb had bias or prejudgment of issues to be brought before the High Court. This was caused by the government's attempts to bring him back to Australia before the Tokyo proceedings had concluded, leading to sections of Australian politics and press to speculate that this was to assist the government's constitutional cases that were being brought before the court.

The speculation and allegations that Webb was sympathetic to the Labor Party reflected on the dignity and esteem in which the Supreme Court of Queensland and the High Court should be held, McKay's third hazard. This was particularly in the case of the High Court, where Webb's promotion to the bench was viewed as being a result of his services to the government rather than his legal aptitude and ability. The impression that Webb was aligned to Labor policy undoubtedly was influenced by his extra-judicial activities, by the way the employer representatives walked out on the Industrial Relations Council, the favourable report he provided on the censorship controversy and the international acclaim the government received from his war crimes work. However, for opponents and critics, this did not support his judicial or legal ability or prove that he was the best man to receive promotion to the High Court bench. The IMTFE provides a clearer example of how an extra-judicial activity impairs the dignity and esteem in which a court should be held. His involvement in war crimes commissions have led most subsequent analysis to conclude that he should not have served on the bench and that his presence constitutes 'victor's justice', undermining the validity of the proceedings that attempted to hold Japanese leaders to account for beginning the war and how they conducted it. The international

community needed to react to the widespread commission of crimes against humanity and offending of the rules of war in all theatres of the Pacific conflict by the Japanese Imperial Forces.

Fiona Wheeler questions whether judicial involvement in political affairs is more acceptable under wartime conditions. It is evident that Webb, like other jurists in Australia, was patriotically motivated to offer the government his services beyond what was typical in times of peace. In accepting the position on the IRC he wrote to the attorney-general that he hoped that he would 'be of some real assistance' to the government in the position during the war. The case study of Sir William Webb supports Wheeler's conclusions with Justices John Latham and Owen Dixon that the hazards of participating in activities outside of the court remain in war and even actions that are motivated by the national emergency are subject to the same rigorous scrutiny as those in times of peace.

Webb's own views on extra-judicial activities are articulated clearly in a letter to Justice Mansfield (cited at the beginning of the conclusion) and in the *Boilermaker's* decision. Sir William saw a clear distinction in the dual roles that judges play in the legal system and that they are compatible. He made a distinction between the judge of the courtroom and the judge as an individual. The judge as an individual had a set of skills that are useful to governments and could be utilised in carrying out executive functions and this did not impair a judge to return to their court and perform their normal judicial functions. In the case of industrial relations, Webb argues that judges could perform both functions perfectly well within the same body. The difficulty that Webb does not articulate is that members of the public do not see the differentiation of the judge as a member of a court or as an individual carrying out a separate function. Moreover, political opponents who are seeking

to undermine a government are often willing to cast doubt and speculation on the motivations of judges performing these non-judicial roles. By judges acting in these roles, they are frequently inadvertently entering into the political realm by engaging in policy and politicking, while not being afforded the same protection as they would in making decisions from the bench.

Appendices

1. Wartime Royal Commissions

The Royal Commissions that are listed in the appendix include only those for which judges served as chairpersons. This list is based on the one provided in the appendix in McInerney, *Judges as chairman of Royal Commissions and non-judicial tribunals*.[1] Only commissions that were appointed under the *Royal Commission Act* 1902 (Cth) or the state equivalent legislation have been included. Additional commissions of inquiry that were appointed under the National Security Act 1939 (Cth) have been included in the list in appendix 2.

Commonwealth

Royal Commission into Contracts for the Supply of Bread to the Department of the Army (Chairman: Mr Justice A.V. Maxwell; appointed 28 March 1941).

Royal Commission into Secret Funds (Chairman: Mr Justice P.H. Rogers; appointed 27 September 1941).

Royal Commission into a Missing Document from the Official Files on "The Brisbane Line" (Chairman: Mr Justice C.J. Lowe; appointed 29 June 1943).

New South Wales

Royal Commission into Allegations of Improper Conduct on the Part of the Honourable Vernon Haddon Treeatt, Minister for Justice in New South Wales (Chairman: Mr Justice A.V. Maxwell; appointed: 11 March 1941).

[1] Murray V. McInerney et al., *Judges as royal commissioners and chairmen of non-judicial tribunals : two views presented at the Fourth Annual Seminar of the Australian Institute of Judicial Administration, 31 August, 1985, Adelaide*, Australian Institute of Judicial Administration. Papers presented at the ... annual AIJA seminar ... 4 (Canberra City, A.C.T.: Australian Institute of Judicial Administration, 1986).

Royal Commission into the Boundaries of the Local Government Areas in the County of Cumberland. (Chairman: Mr Justice J.S.J. Clancy; appointed: 20 June 1945).

Queensland

Royal Commission into the Thomas Hutton Case (Chairman: Mr Justice A.J. Mansfield; appointed 3 December 1941).

Royal Commission on the Sugar Industry (Chairman: Mr Justice A.J. Mansfield; appointed 15 October 1942).

Royal Commission on Cotton Growing in Burdekin District (Chairman: Mr Justice R.J. Douglas; appointed 8 November 1943).

Committee of Inquiry into Sexual Offences (Chairman: Mr Justice N.W. Macrossan; appointed 2 March 1944).

South Australia

Royal Commission into certain matters affecting the Adelaide Electric Supply Company (Chairman: Mr Justice G.S. Reed; appointed: 15 February 1945).

Special Committee of Milk-in-Schools Inquiry (Mr Justice H. Mayo, was a member of this committee but no its Chairman).

Tasmania

Royal Commission on the Hydro-Electric Commission (Chairman: Sir John D. Morris, Chief Justice of Tasmania; appointed: 8 October 1940).

Royal Commission on the Hobart Gaol (Chairman: Sir John Morris; appointed: 2 January 1944).

Board of Inquiry into Adult Education (Chairman: Sir John Morris; appointed: 2 January 1944).

Victoria

Royal Commission of Inquiry into Allegations of Bribery in Connexion with the Money Lenders Bill, 1938 (Vic) and the Milk Board Bill (Vic), (Chairman: Mr Justice C. Gavan Duffy; appointed: 24 November 1939).

Western Australia

Royal Commission on Stored Wheat (Chairman: Mr Justice A.A. Wolff; appointed 8 February 1940).

Royal Commission on the Administration of the University of Western Australia (Chairman: Mr Justice A.A. Wolff; appointed: 19 March 1941).

2. Inquires held under National Security (Inquiries) Regulations Chaired by a member of the Judiciary

The following list was compiled through searches on the National Archives of Australia database website and the Trove database. Every attempt has been made to make the list complete, however, due to the nature of the appointment and use of inquiries under this legislation there may be some inquiries that were conducted and not included below or some details missing.

1941

Prosecution of Lt J.D. Kearney (Chairman: Leonard Edward Bishop Stretton, Judge of the County Court, Victoria; appointed: 29 August 1941).

1942

Concerning the Japanese Aircraft Attack on Darwin (Chairman: Justice C.J. Lowe, Victorian Supreme Court; appointed: 3 March 1942).

Certain Trading Operation in Connection with the Sale or Disposal of Apples on Behalf of the Australian Apple and Pear Marketing Board (Chairman: Horace Francis Markell, District Court of New South Wales; appointed: 27 August 1942).

1943

Matters Relating to the Pay and Condition of Chinese Seamen (Chairman: Justice John Alexander Ferguson, New South Wales Industrial Commission; appointed: 6 January 1943).

Affairs of Pyrmont Laboratory (Chairman: Justice Edward Aloysius McTiernan, High Court of Australia; appointed: 25 February 1943).

Investigation of the Breaches of the Rules of Warfare (Chairman: Justice William Flood Webb, Supreme Court of Queensland; appointed: 23 June 1943).

1944

Matters Connected with the Legal Proceedings in the High Court by Angus Dean of Hobart (Chairman: Justice Geoffrey Sandford Reed, South Australian Supreme Court; appointed 28 January 1944).

War Crimes Against Australians Committed by Individual Members of the Armed Forces of the Enemy (Chairman: Sir William Flood Webb, Queensland Supreme Court; appointed 8 June 1944).

Matters Relating to the Detention of Certain Members of the "Australian First Movement" Group (Chairman: Justice Thomas Stuart Clyne, Federal Bankruptcy Court; appointed 3 June 1944).

The Truth of the Imputation Contained in Certain Statement Attributed to Albert James Hannan (Chairman: Justice Thomas Stuart Clyne, Federal Bankruptcy Court; appointed 8 July 1944).

Board of Inquiry into Overseas Internees (Chairman: Justice Wilfred Hutchins, Tasmanian Supreme Court; appointed 26 July 1944).

Postal, Telegraphic and Telephonic Censorship (Chairman: Sir William Flood Webb, Queensland Supreme Court; 25 July 1944).

Certain Charges of Mutiny Against Privates J. Wilson, J.J. Derrick and Sapper A.L. Chalmers (Chairman: Justice Geoffrey Sandford Reed, Supreme Court of South Australia; appointed 15 December 1944).

1945

Coal Mining Industry (Chairman: Justice Colin George Watt Davidson, Supreme Court of New South Wales; appointed 12 January 1945).

Certain Charges Made Against R.B.F. Wake (Chairman: Justice Geoffrey Sandford Reed, Supreme Court of South Australia; appointed 26 April 1945).

Board of Inquiry into the Coal Industry II (Chairman: Justice Colin George Watt Davidson, Supreme Court of New South Wales; appointed 14 June 1945).

Trial and Punishment of Offences Against Military Law and the Administration of Places of Confinement of Military Offenders (Chairman: Justice Geoffrey Sandford Reed, Supreme Court of South Australia; appointed 3 August 1945).

Australian War Crimes Board of Inquiry – Report on war crimes committed by enemy subjects against Australians and others (Chairman: Justice William Flood Webb, Supreme Court of Queensland; assisted by Justice Alan James Mansfield, Supreme Court of Queensland, Judge Richard Clarence Kirby, District Court of New South Wales and Justice Rosyln Foster Bowie Philp, Supreme Court of Queensland; appointed 3 September 1945).

Conditions of the Stevedoring Industry (Chairman: Judge Alfred William Foster, Commonwealth Arbitration Court; appointed 19 October 1945).

Repatriation of Local Internees (Chairman: Justice William Ballantyne Simpson, Supreme Court of the Australian Capital Territory; appointed 25 October 1945).

Board of Inquiry into Circumstances of Lieutenant General Gordon Bennett Escape from Singapore (Chairman: Justice George Coutts Ligertwood, Supreme Court of South Australia; appointed: 17 November 1945).

1946

Release of Overseas Internees (Chairman: Justice Wilfred Hutchins, Supreme Court of Tasmania; appointed 1 March 1946).

Claims by Jehovah Witnesses Against the Commonwealth (Chairman: Justice Thomas Stuart Clyne, Federal Bankruptcy Court; appointed 10 February 1946).

Administration of Rowville POW Control Hostel and Circumstances Resulting in the Death of Italian POW (Chairman: Justice William Ballantyne Simpson; appointed: 8 April 1946).

3. Important Australian political leaders in relation to Webb's judicial career

Premiers of Queensland

Premier	**Life Span**	**Serving Period**
William Kidston	1849-1919	19 Jan 1906 – 19 Nov 1911
Digby Frank Denham*	1859-1944	7 Feb 1911 – 1 June 1915
Thomas James Ryan	1876-1921	1 June 1915 – 22 Oct 1919
Edward Granville Theodore	1884-1950	22 Oct 1919 – 26 Jan 1925
William Neal Gillies	1868-1928	26 Feb 1925 – 22 Oct 1925
William McCormack	1879-1947	22 Oct 1925 – 21 May 1929
Arthur Edward Moore*	1876-1963	21 May 1929 – 17 June1932
William Forgan Smith	1887-1953	17 June 1932 – 16 Sept 1942
Frank Arthur Cooper	1872-1949	16 Sept 1942 – 7 March 1946
Edward Michael Hanlon	1887-1952	7 March 1946 – 17 Jan 1952
Vincent Clair Gair	1902-1980	17 Jan 1952 – 12 Aug 1957
George Nicklin*	1895-1978	12 Aug 1957 – 17 Jan 1963
Jack Charles*	1911-1968	17 Jan 1963 – 31 July 1968

* Denotes non-Labor premiers.

Attorneys-General of Queensland

James William Blair	1870-1944	17 September 1903 – 19 November 1907
Francis Isidore Power	1852-1912	19 November 1907 – 18 February 1908
James William Blair		18 February 1908 – 29 October 1908
Thomas O'Sullivan		29 October 1908 – 1 June 1915

Thomas Joseph Ryan	1876-1921	1 June 1915 – 22 October 1919
John Arthur Fihelly	1882-1945	22 October 1919 – 12 November 1920
John Mullan	1871-1941	12 November 1920 – 21 May 1929
Neil Francis McGroaty		21 May 1929 – 17 June 1932
John Mullan		17 June 1932 – 14 November 1940
John O'Keefe	1880-1942	14 November 1940 – 8 December 1941
David Alexander Gledson		8 December 1941 – 14 May 1949

Prime Ministers during Webb's participation with Commonwealth Extra-Judicial Activities and Tenure on the High Court

John Curtin	1885-1945	7 October 1941 – 5 July 1945
F.M. Forde	1890-1983	6 July 1945 – 13 July 1945
J.B. Chifley	1885-1951	13 July 1945 – 13 June 1949
R.G. Menzies	1894-1978	19 December 1949 – 26 January 1966

Commonwealth Attorneys-General during Webb's Tenure on the High Court

Dr Herbert Vere Evatt KC	1894-1965	7 October 1941– 19 December 1949
Senator John Spicer KC	1899-1978	19 December 1949 – 14 August 1956
Senator Neil O'Sullivan	1900-1968	15 August 1956 – 12 October 1958

4. Judges of the Supreme Court of Queensland during Sir William Webb's Tenure

<table>
<tr><td colspan="5">William Flood Webb

24 April 1925 – 15 May 1946
SPJ 17 May 1940 – 26 June 1940
CJ 27 June 1940 – 15 May 1946 (High Court)</td></tr>
<tr><td colspan="2">J. W. Blair
1 April 1922 - 16 May 1940
CJ 24 April 1925 – 16 May 1940 (resigned)</td><td colspan="3">Alan James Mansfield
17 May 1940 – 21 February
SPJ 20 March 1947 – 8 February 1956)
CJ 9 February 1956 – 21 February 1966 (retired)</td></tr>
<tr><td>Lional Oscar Lukin
26 July 1910 – 18 July 1926
(retired)</td><td colspan="2">Hugh Dennis Macrossan
23 July 1926 – 23 June 1940
SPJ 1 December 1926 – 17 May 1940
CJ 17 May 1940 – 23 June 1940
(death)</td><td colspan="2">Neal William Macrossan
27 June 1940 – 30 December 1955
SPJ 1 July 1940 – 22 April 1946
CJ 23 April 1946 – 30 December 1955 (death)</td></tr>
<tr><td colspan="2">Allan Wight Macnaugton
1 April 1922 – 21 March 1929 (retired)</td><td colspan="3">Edward Archibald Douglas
22 March 1929 – 27 August 1947 (death)</td></tr>
<tr><td colspan="2">William Alfred Byam Shand
3 November 1908 – 30 June 1925 (retired)</td><td colspan="3">Frank Tennison Brennan
1 July 1925 – 6 August 1949 (death)</td></tr>
<tr><td>Thomas O'Sullivan
1 April 1922 –

15 December 1926
(retired)</td><td>John Lasky Woolcock
1 February 1927 –

18 January 1929
(death)</td><td>Charles Stumm
6 February 1929
–

28 February 1929
(death)</td><td>Hereward Humfrey Henchman
5 March 1929 –

25 April 1939
(death)</td><td>Rosyln Foster Bowie Philp
4 May 1939 –

19 March 1965
8 February 1956 – 19 March 1965
(death)</td></tr>
<tr><td colspan="5">Robert Johnstone Douglas
24 January 1923 – 13 April 1953 (retired)</td></tr>
</table>

*Information drawn from McPherson, *Supreme Court of Queensland*, 1989 and entries from the *Australian Dictionary of Biography*

5. Terms of Reference for War Crimes Commissions

First Commission **23 June 1943**	**Second Commission** **8 June 1944**	**Third Commission** **3 September 1945**
…to inquire into, and report to the Attorney-General on, the following matters, being matters in relation to the public safety and the defence of the Commonwealth, namely:- Whether there have been any atrocities or breaches of the rules of warfare on the part of members of the Japanese Armed Forces in or in the neighbourhood of the Territory of New Guinea or of the Territory of Papua and, if so, what evidence is available of any such atrocities or breaches	…to inquire into, and report to the Attorney-General and Minister of State for External Affairs on, the following matters, being matters in relation to the public safety and the defence of the Commonwealth, namely:- Whether there have been any war crimes on the part of individual members of the Armed Forces of the enemy against any persons who were resident in Australia prior to the present war, whether members of the Forces or not, which, in the opinion of the said Commissioner, should, from time to time, be communicated by the Government of the Commonwealth to the United Nations Commission for the Investigations of War Crimes, and if so, what evidence is available of any such war crime. For the purpose of this inquiry the expression "war crime" includes the following :- (i) Murder and massacres – systematic terrorism (ii) Putting hostages to death (iii) Torture of civilians (iv) Deliberate starvation of civilians (v) Rape (vi) Abduction of girls and women for the purpose of enforced prostitution (vii) Deportation of civilians (viii) Internment of civilians under inhumane conditions (ix) Forced labour of civilian in connexion with the military operations of the enemy (x) Usurpation of sovereignty during military occupation (xi) Compulsory enlistment of soldiers among the inhabitants of occupied territory (xii) Attempts to denationalise the inhabitants of occupied territory (xiii) Pillage (xiv) Confiscation of property	…to inquire into and report to the Attorney-General and Minister of External Affairs on the following matters (except in so far as the said matters have already been inquired into by the said the Honourable Sir William Flood Webb), being matters in relation to the public safety and the defence of the Commonwealth, namely:- 1. Whether any war crimes have been committed by any subjects of any State with which His Majesty has been engaged in war since the second day of September, one thousand nine hundred and thirty-nine, against any persons who were resident in Australia prior to the commencement of any such war whether members of the Defence Force or not, or against any British subject or against any citizen of an allied nation. 2. If any war crimes have been so committed, whether in the opinion of the said Board particulars of the said war crimes should, from time to time, be communicated by the Government of the Commonwealth to the United Nations Commission for the Investigation of war crimes. 3. With respect to the war crimes the particulars of which should be so communicated, what evidence is available of these war crimes. For the purposes of said inquiry – (a) Any member (either alone or with any other member) shall constitute a quorum of the Board, and shall have any may exercise all the powers of the Board, and for the purpose of the exercise of those powers is hereby appointed to inquire into the matters above-mentioned; and (b) The expression "war crime" includes the following: - (i) Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing (ii) Murder and massacres – systematic terrorism

	(xv) Exaction of illegitimate or exorbitant contributions and requisitions (xvi) Debasement of the currency and issue of spurious currency (xvii) Imposition of collective penalties (xviii) Wanton devastation and destruction of property (xix) Deliberate bombardment of undefended places (xx) Wanton destruction of religious, charitable, educational and historic buildings and monuments (xxi) Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew (xxii) Destruction of fishing boats and of relief ships (xxiii) Deliberate bombardment of hospitals (xxiv) Attach and destruction of hospital ships (xxv) Breach of other rules relating to the Red Cross (xxvi) Use of deleterious and asphyxiating gases (xxvii) Use of explosive or expanding bullets and other inhuman appliances (xxviii) Direction to give no quarter (xxix) Ill-treatment of wounded and prisoners of war (xxx) Employment of prisoners of war on unauthorised works (xxxi) Misuse of flags of truce (xxxii) Poisoning of wells	(iii) Putting hostages to death (iv) Torture of civilians (v) Deliberate starvation of civilians (vi) Rape (vii) Abduction of girls and women for the purpose of enforced prostitution (viii) Deportation of civilians (ix) Internment of civilians under inhumane conditions (x) Forced labour of civilian in connexion with the military operations of the enemy (xi) Usurpation of sovereignty during military occupation (xii) Compulsory enlistment of soldiers among the inhabitants of occupied territory (xiii) Attempts to denationalise the inhabitants of occupied territory (xiv) Pillage *and wholesale looting* (xv) Confiscation of property (xvi) Exaction of illegitimate or exorbitant contributions and requisitions (xvii) Debasement of the currency and issue of spurious currency (xviii) Imposition of collective penalties (xix) Wanton devastation and destruction of property (xx) Deliberate bombardment of undefended places (xxi) Wanton destruction of religious, charitable, educational and historic buildings and monuments (xxii) Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew (xxiii) Destruction of fishing boats and of relief ships (xxiv) Deliberate bombardment of hospitals (xxv) Attack and destruction of hospital ships (xxvi) Breach of other rules relating to the Red Cross (xxvii) Use of deleterious and asphyxiating gases (xxviii) Use of explosive or expanding bullets and other inhuman appliances (xxix) Directions to give no quarter

		(xxx) Ill-treatment of wounded and prisoners of war *including –* *a. Transportation of prisoners of war under improper conditions* *b. Public exhibition or ridicule of prisoners of war; and* *c. Failure to provide prisoners of war or internees with proper medical care, food or quarters.* *(xxxi)* Employment of prisoners of war on unauthorised works (xxxii) Misuse of flags of truce *(xxxiii)* Poisoning of wells *(xxxiv) Cannibalism* *(xxxv) Mutilation of the dead*

6. Australian War Crimes Trials[1*]

Table compiled in AG Coordination, Army Headquarters, 1958 - MP742, A336/1/29 [2]

Place	Trials	Accused Tried	Accused Convicted	Accused Acquitted	Death		Imprisonment				
					Hung	Shot	Life	25 yrs	11-24 yrs	10 yrs	Under 10 yrs
Labuan (3/12/45 - 31/1/46)	16[3]	145	128	17	2	5	5	-	56	38	22
Wewak (30/11 - 11/12/45)	2	2	1	1	-	-	-	-	-	-	1
Morotai[4] (29/11/45 - 28/2/46)	25	148	81	67[5]	-	25	-	-	10	7	39
Rabaul[6] (12/12/45 - 6/8/47)	188	390	266	124	84	3	8	2	49	22	98
Darwin (1/3 – 29/4/46)	3	22	10	12	-	1	-	-	-	1	8
Singapore (26/6/46 - 11/6/47)	23	62	51	11	18	-	6	-	10	3	14
Hong Kong (24/11/47 – 25/11/48)	13	42	38	4	5	-	4	-	12	3	14
Manus Is (5/6/50 - 9/4/51)	26	113	69	44	5	-	16	-	17	6	25
Total	296[7]	924[8]	644	280[9]	114	34	39	2	154	80	223

Notes

[1] These figures incorporate the variations made to the findings and sentences by the confirming authority.

[*] Reproduction of Scissons table 'Sources on Australian Investigation into Japanese War Crimes in the Pacific' *Journal of the Australian War Memorial*, no. 30 (1997), http://www.awm.gov.au/journal/j30/wcrimes.htm

[2] This Table reproduced as in the original except for the addition of trial dates and explanatory footnotes

[3] The figure 16 would appear to be a clerical error. The register from which the Table was compiled shows 145 accused tried at Labuan in 15 trials.

[4] Included here is trial of SHIROZU Wadami and 90 others (M45) which began at Ambon 2-18 January 1946 and ended at Morotai 25 January to 15 February 1946. The figures for that trial are: Accused 91, Not Guilty 55, Convicted 34 (Shooting 4, 11-34 years 5, 10 years 2, under 10 years 25).

[5] According to the Register from which this Table was compiled, this figure should be 66.

[6] The trials at Rabaul took place over three periods: 12 December 1945-31 July 1946 (R1-167); 7 December 1946-23 January 1947 (R168-R170); and 3 April 1947-6 August 1947 (R172-R188).

[7] This figure does not include 5 trials (either aborted before a finding was made or where the finding of guilty was not confirmed) where the same accused were subsequently retried on the same charges: (i) YAMAMOTO Shoichi and 11 others, Labuan 23-28 January 1946 (M36), not confirmed, retried at Rabaul 20-27 May 1946 (R125); (ii) NEGISHI Kazue, Rabaul 12-13 February 1946 (unnumbered), aborted, retried 21-22 May 1947 (R178); (iii) SATO Jin, Rabaul, 25-26 April 1946 (unnumbered), aborted, retried Hong Kong 3-8 December 1948 (JK12); (iv) HAYASHI Eishun, Singapore 25 June 1946 (S2), not confirmed, retried 10-12 March 1947 (S27); (v) NAGATOMO Yoshitada and 14 others, Singapore 24-31 July 1946 (unnumbered), aborted, retried 8 August-16 September 1946 (S12).

[8] As some were defendants in more than one trial, the total number of persons tried was 814 (not 924). For this and the additional reason that 2 condemned men died in custody, the total number executed was 137 (not 148).

[9] According to the registers from which this Table was compiled, this figure comprises: (i) 253 found not guilty by the court - Labaun 17, Wewak 1, Morotai 65 (incl. Ambon 55), Darwin 12, Rabaul 102, Singapore 10, Hong Kong 3, Manus 43; (ii) 26 whose convictions were not confirmed - Morotai 1, Rabaul 22, Singapore 1, Hong Kong 1, Manus 1.

7. Departments and Information Obtained from Censorship Liaison

Exhibit A (of the Commission of Inquiry into Postal and Communication Censorship) – Principle Categories of Information Sought from the Postal and Telegraph Censorship by Commonwealth Departments (other than Navy, Army and Air) - List of agencies which were receiving information from censorship. Aircraft Production Commission: Aircraft, manufacture and material[1].

- Central Medical Co-Ordination Committee – Personnel (those available and comments on services), medical supplies, medical developments, illnesses and epidemics.

- Commonwealth Bank of Australia: monetary control (transactions from outside of Australia), gold, other financial matters.

- Department of Civil Aviation: criticism or comments on the Department, civil air transport services, aero clubs and training organisations, air ports, policy.

- Department of Commerce and Agriculture: particular crops etc, supplies, dried fruits, new industries development, trade.

- Department of Home Security: comment or criticism of policies.

- Department of the Interior: irregular arrivals or departures in the Commonwealth, information on adverse characters in Australia recently arrived, any irregularities within the Department, comments and criticism of the Department's policy.

- Department of Labour and National Service: industrial disputes, remuneration, shortages of labour, retention of surplus labour, new industries, criticism of manufacturers involved in war work.

- Department of Trade and Customs: exports of listed minerals, importation of artificial sausage casings, specific companies listed, evasion of regulations.

- Department of Treasury: Taxation (evasion), insurance of an usual nature, evasion of currency, exchange etc. controls, large financial movements that appear to attempt to weaken an economy.

- Post-Master's General Department: wireless information.

[1] NAA: W22283 PART 3 - Parliamentary Censorship Committee - Censorship Inquiry by Sir William Webb (including transcript).

- Repatriation Commission: medical supplies, inventions (artificial limbs), patriotic or other funds (criticisms), transportation of wives and children of overseas servicemen, persons receiving benefits who are unworthy.

- Department of Transport: virtually anything to do with transport connected to the war, including Qld rail.

- Department of Munitions: 23 items listed regarding the manufacturing on munitions, materials, staff, innovations, criticisms etc.

- Department of Supply and Shipping: information regarding supplies for war services, surveys of supplies, tin, shipping.

- Council for Scientific and Industrial Research: Aeronautics, chemical, industry and other related matters (supplies of materials and innovations in such areas as food preservation).

- External Affairs: all matters concerning foreign affairs (diplomatic, legations etc.), information on enemy states, significant bodies views on post war reconstruction, conferences etc., significant bodies and individuals acting in Allied interests.

- War Organisation of Industry: black markets, production and distribution of non-essential goods and services, shortages in materials, shortages and delays in transport.

- Security Services: personnel in merchant ships and aircraft, irregularities with passports or permits to access to wharves, ships, airports, suspicious behaviour of persons employed in those areas, irregular or unusual arrivals of persons, impending arrival of doubtful or suspicious persons, leakage of information, improper behaviour of people engaged in war work, aliens, POWs and Internees, subversive persons or behaviour.

8. List of Witnesses Appearing before the Censorship Parliamentary Committee and the Judicial Commissions of Inquiry

Parliamentary Committee	Clyne Commission	Webb Commission
Cumming, John B (Director of Rationing)	Abbott (delayed letter)	Anderson, George W (District Censor, Victoria)
Derham, John W (General Manager of Moulded Products)	Campbell, Arthur L. (District Censor for NSW & ACT)	Campbell, Arthur L (District Censor, NSW)
Drake, Edwin J (Ass. Controller Industrial Chemicals, Dept of Munitions)	Crossin (overseer of mails at the General Post Office, Sydney and liaison officer Nov-Dec 1942)	Cowen, Zelman (Lt RANVR, Naval Intelligence)
Ettleson, Philip N (Chief controller of Communication Censorship)	Dowse, Edgar M (Supervising engineer of telephone equipment, PMG Dept)	Dowse, Edgar M (Supervising Engineer of Tele. Equip, PMG Dept)
Green, Harold C (Ass Secretary, Munitions Department)	Ettleson, Phillip N (Chief controller of Communication Censorship)	Ellis, Ulrich R (Liaison Officer with Dept of Munitions)
Hosking, Jack S (Second in Charge of Information Section, Council for Scientific & Industrial Research)	Germein (Liaison Officer, Censorship, Adelaide)	Ettleson, Phillip N (Chief controller of Communication Censorship)
Jackson, Lawrence S (Cth Commissioner of Taxation)	Hannan, Albert J (Crown Solicitor of South Australia)	Greenland, Patrick C (As Sec in Dept of War Organisation of Industry)
Leckie, John W (Cth Senator, allegation of phone tapping)	Hannan (Wife)	Harrison, James C (Inspector of Telegraphs, PMG Dept)
Little, Robert A (Ass. Director of Military Intelligence)	Hannan (Daughter)	Hoey, Thomas P (Deputy Director of Dept of Information)
Nette, Percy W (Officer in Charge of Economic Control in the Treasury)	Healey (delayed letter)	Hunter (District Censor, SA)
Nixon, Edwin V (Chairman of Directors of Moulded Products)	Hunter (District Censor for South Australia)	Kelly, John E (Legal Officer, Rationing Commission)
Rusden,Leonnard U (Officer in Charge of Exchange Control, Commonwealth Bank)	Isaachsen (Constitutional Powers Committee)	Leckie, Hattie M (Wife of Senator, Telephone complaint)
Turner, William (Custom Inspector, Department of Trade and Customs)	Kirkman (Deputy-Director of Security for SA at relevant times)	Little, Robert A (Ass. Director of Military Intelligence)
	McCauley (Ass Secretary to the DoI, Nov-Dec 1942)	McElwee, Beryl G (Telephone Complaint)
	Piper (Postmaster in Canberra)	Massie, Gordon F (censor involved in the Plastic Formula extraction)
	Playford (Premier of South Australia)	Norris, Ewart F. (Managing Director of Monsanto)
	Powell, Sidney (Constitutional Powers Committee)	Simpson, William Valentine (Director-General of Security)
	Reynolds (Acting Postmaster in Canberra Nov-Dec 1942)	Smithers, Reginald A (FA RAAF, Security Section)
	Simpson, William V (Director-General of Security) – not clear if he gave testimony	
	Stacey (PMGs Dept)	
	Swanbury, (Liaison Officer between PMG Dept and Telephone Branch)	
	Ward (delayed letter)	
	Wright (PMGs Dept)	

9. Summary of the Defendants and the Final Judgement of the IMTFE

Defendant	Positions	Count 1	27	29	31	32	33	35	36	54	55	sentence release
ARAKI Gen Sadao 1877-1966	Minister War 1931-34; Supreme War Council 1934-36; minister of education 1939-40; adviser 1939-40.	G	G	A	A	A	A	A	A	A	A	Life 1955
DOHIHARA Gen Kenji 1883-1948	Kwantung Army Commander 1938-40; Supreme War Council 1940-3; Singapore Commander 1944-5.	G	G	G	G	G	A	G	G	G	O	Death
HASHIMOTO Col Kingoro 1890-1947	Various commanding posts; including a position during the rape of Nanking; contributed to the plots and propaganda.	G	G	A	A	A				A	A	Life 1954
HATA Field Marshal 1879-1962	Supreme War Council 1937; Commander in China Expeditionary Force 1938, 41-44; Minister of War 1939-40.	G	G	G	G	G		A	A	A	G	Life 1954
HIRANUMA Baron Kiichiro 1867-1952	Privy Council 1924-39, various portfolios; premier 1938; founder of right-wing Kokuhonsha.	G	G	G	G	G	A	A	G	A	A	Life 1955
HIROTA Baron Koki 1887-1948	Ambassador to USSR 1928-31, Foreign Minister 1933-7; premier 1936-7.	G	G	A	A	A	A	A		A	G	Death
HOSHINO Naoki 1892-1978	Chief of financial affairs Manchuria 1932-4; director of general affairs Manchuria; minister 1940-1; chief cabinet secretary 1941-44.	G	G	G	G	G	A	A		A	A	Life 1955
ITAGAKI Gen Seishiro 1885-1948	Chief of staff, Kwantung Army 1936-7; min of war 1938-9; commander in Korea 1941 and Singapore 1945; Supreme War Council 1943.	G	G	G	G	G	A	G	G	G	O	Death
KAYA Okinori 1889-1977	Minister of Finance 1937-8; 1941-44; president of North China Development. Company 1939-41.	G	G	G	G	G				A	A	Life 1955
KIDO MarquisKoichi 1889-1977	Chief secretary to the lord keeper of the privy seal, 1930-7; lord keeper of the privy seal 1940-45. Various ministerial portfolios.	G	G	G	G	G	A	A	A	A	A	Life 1955
KIMURA Gen. Heitaro 1888-1948	Chief of Staff, Kwantung Army, 1940-1; vice minister of War, 1941-43; Supreme War Council 1943; Commander in Burma 1944-5.	G	G	G	G	G				G	G	Death
KOISO Gen. Kuniaki 1880-1950	Vice min of war 1932; commanded Kwantung Army 1932-34 & Korea. 1935-8; governor-general in Korea 1942-4; Premier 1944-5.	G	G	G	G	G			A	A	G	Life
MATSUI Gen Inwane 1878-1948	Geneva Disarmament Conference 1932-7; commander China Expeditionary Force 1937-8, Nanking.	A	A	A	A	A	A		A	A	G	Death
MINAMI Gen Jiro 1874-1955	Minister of War 1931; Supreme War Council 1931-4; Commander of Kwantung 1934-6; governor-general Korea 1936-42; Privy Council 1942-5.	G	G	A	A	A				A	A	Life 1954
MUTO Gen Akira		G	G	G	G	G	A		A	G	G	Death

1892-1948	Commanded forces in China 1937 (Nanking), Sumatra 1942-3 & Philippines 1944-5; director of Military Affairs Bureau 1939-42.												
OKA Ad Takasumi 1890-1973	Chief Naval Affairs Bureau 1940-44, vice minister of the navy 1944. Responsible for naval planning and the 'hell ships'.	G	G	G	G	G				A	A		Life 1954
OSHIMA Gen Hiroshimi 1886-1975	Military attaché in Germany 1934-38; ambassador to Germany 1938-39, 1941-5.	G	A	A	A	A				A	A		Life 1955
SATO Gen Kenryo 1895-1975	Military Affairs Bureau 1942-44, ass. Chief of Staff China Expeditionary Force 1944. Commander in Indochina 1945.	G	G	G	G	G				A	A		Life 1956
SHIGEMITSU Mamoru 1887-1957	Ambassador China 1931-2, vice min. of foreign affairs 33-36, ambassador USSR 36-8, Britain 38-41, foreign min. 1943-5.	A	G	G	G	G	G	A		A	G		7 yrs 1950
SHIMADA Ad Shigetaro 1883-1976	Vice chief of naval staff 1935-7, commander China fleet 1940, navy min. 1941-4, Supreme War Council 1944.	G	G	G	G	G				A	A		Life 1955
SHIRATORI Toshio 1887-1949	Director Information Bureau, Foreign Ministry 1929-33, Ambassador to Italy 1938-40, adviser to foreign minister 1940.	G	A	A	A	A							Life
SUZUKI Gen Teiichi 1888	Chief China Affairs Bureau 38-41, president Cabinet Planning Board & Min without portfolio 41-43 cabinet adviser 43-44.	G	G	G	G	G		A	A	A	A		Life 1955
TOGO Shigenori 1884-1948	Ambassador to Germany 1937 & USSR 1938, Foreign Minister 1941-2, 45 where he handled negotiations with the US.	G	G	G	G	G			A	A	A		20 yrs
TOJO Gen. Hideki 1884-1948	Chief of staff Kwantung Army 1937-8, vice minister of war 1938, minister of war 1940-44; premier 1941-44.	G	G	G	G	G	G		A	G	O		Death
UMEZU Gen Yoshijiro 1882-1949	Sec. Chief of Staff 1931-4; China Expeditionary Force 1934; vice min of war 1936-8; commander of Kwantung 1939-44; army chief of staff 1944-5.	G	G	G	G	G			A	A	A		Life

Key: *Blank* – Not indicted on the count.

G – Guilty

A – Acquitted

O – Charged but no finding made by the Tribunal

Count 1 – The Over-all Conspiracy

Count 27 – Waging war against China

Count 29 – Waging war against the United States

Count 31 – Waging war against the British Commonwealth

Count 32 – Waging war against the Netherlands

Count 33 – Waging war against France

Count 35 – Waging war against USSR at Lake Khassan

Count 36 – Waging war against USSR at Nomonhan

Count 54 – Ordering, authorising or permitting atrocities

Count 55 – Disregard of duty to secure observance of and prevent breaches of Laws of War.

10. Sir William Webb Tenure on High Court
16 May 1946 – 16 May 1958

<table>
<tr><td colspan="2">Sir Edward Aloysius McTiernan
(1892-1990)
20 December 1930 – 12 September 1976</td></tr>
<tr><td>Sir Hayden Erskine Starke
(1871-1958)
5 February 1920 – 31 Jan 1950</td><td>Sir Wilford Kelsham Fullagar
(1892-1961)
8 February 1950 – 9 July 1961</td></tr>
<tr><td>Sir John Greig Latham
(1877-1964)
11 October 1935 – 7 April 1952</td><td>Sir Alan Taylor
(1901-1969)
3 September 1952 – 3 Aug 1969</td></tr>
<tr><td colspan="2">Sir Owen Dixon
(1886-1972)
4 February 1929 – 13 April 1964</td></tr>
<tr><td colspan="2">Sir Dudley Williams
(1889-1963)
15 October 1940 – 31 July 1958</td></tr>
<tr><td>Sir George Edward Rich
(1863-1953)
5 April 1913 – 5 May 1950</td><td>Sir Frank Walters Kitto
(1903-1994)
10 May 1950 – 1 August 1970</td></tr>
</table>

Bibliography

Archival Sources

Australian War Memorial

Official Records

AWM54 Written Records 1939-1945 War, 1951-1993.

AWM68 Official History, 1939-1945 War, Series 4 (Civil) Volumes I and II: Records of Paul Hasluck 1947-1969.

AWM226 Record of war crimes enquiries and trials, 1939-1945 War, 1942-1955.

Private Records

3DRL/2481 'Papers of Sir William Webb', 1946-1948.

National Archives of Australia

Brisbane Office

Investigation Branch, Queensland

BP242/1 Correspondence files relating to national security, 1924-1961

Canberra Office

Attorney-General's Department

A432 Correspondence files, 1929-1958.

A472 Correspondence files, 1939-1949.

AA1980/642 High Court judges personal history files.

Attorney-General's Department (Australian Delegation to the IMTFE)

M1417 Records Accumulated as Legal Secretary and Associate to Sir William Webb, 1946-1948.

M1418 Personal and official correspondence accumulated while President and Australian Member of the International Military Tribunal for the Far East, 1945-1948.

Attorney-General's Department, Australian War Crimes Commission

A6238 General correspondence files, 1946.

Australian Government Solicitor – Deputy Crown Solicitor, Brisbane

J1889 Correspondence files, 1942-1963.

Australian War Crimes Commission

A6238 General Correspondence Files, 1945-1946.

A10943 First Webb Report, 1944.

A10950 Second Webb Report, 1944.

A10952 Files of the Commission of Inquiry on War Crimes against Australians Committed by Individual Members of the Armed Forces of the Enemy, 1944.

A10953 Files of the Commission of Inquire on War Crimes Committed by Enemy Subjects against Australians and Others, 1945-1946.

A11049 Third Webb Report, 1946.

Department of Defence, Central Office

A663 Correspondence files, 1940-1957.

A2673 War Cabinet Minutes (carbon copies), chronological series.

A5954 'The Shedden Collection' [Records collected by Sir Frederick Shedden during his career with the Department of Defence and in researching the history of Australian Defence Policy].

A7711 Report on the Directorate of Prisoners of War and Internees of Army Headquarters, Melbourne, 1939-1951.

B883 Second Australian Imperial Force Personnel Dossiers, 1939-1947.

Department of External Affairs, Central Office

A989 Correspondence files, 1942-1945.

A1066 Correspondence files, 1945.

Department of External Affairs, External Affairs Liaison Officer, London

A2937 Correspondence files, 1924-1945.

Department of Labour and National Service, Industrial Welfare Division, Central Office

B3533 Correspondence files, 1941-1953.

Department of the Prime Minister and Cabinet

A461 Correspondence files, 1934-1950.

A1608 Correspondence files, 1939-1947.

M1415 Correspondence of John Curtin as Prime Minister, 1941-1944.

M1455 Correspondence of Joseph Benedict Chifley as Prime Minister, 1945-1949.

Department of the Prime Minster and Cabinet, Department of Post-War Reconstruction, Central Office

A9816 Correspondence files, 1943-1950.

Department of the Senate

CP12/4 Papers of the Hon. G. McLeay as Vice-President of the Executive Council, Minister for Commerce, Minister for Trade and Customs, Postmaster-General and Minister for Repatriation, 1941.

Melbourne Office

Commonwealth Archives Office, Victorian Branch

B5459 Miscellaneous library material, 1961-

Department of the Army, Central Office

MP508/1 General correspondence files, 1939-1942.

MP742/1 General and civil staff correspondence files and Army personnel files, 1943-1956.

Department of Labour and National Service, Central Office

MP574/1 General correspondence of the Secretariat, and Administrative and Industrial Relations Divisions, 1940-1950.

National Library of Australia

Papers of D.C.S. Sissons, 1950-2006 [Manuscript].

Biographical cuttings on William Flood Webb, Sir, High Court Judge, 1946-1958.

Flinders University

The Evatt Collection held by the Flinders University Library, Special Collections.

Cases

Commonwealth

Attorney-General (ViC); Ex rel Dale v Commonwealth (1945) 71 CLR 237.

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

British Medical Assn v Commonwealth (1949) 79 CLR 201.

Clough v Leahy (1905) 2 CLR 139.

McGuinness v Attorney-General (Vic) (1940) 63 CLR 73.

Nelungaloo Pty Ltd v Commonwealth (1947) 75 CLR 495.

R v Kirby; Ex Parte Boilermakers' Society of Australia, (1956) 94 CLR 254.

Queensland

R v Connolly & Sleeman (1922) St R Qd 278.

Legislation

Commonwealth

Judiciary Act 1903.

Judiciary (Diplomatic Representation) Act 1942.

National Security Act 1939.

National Security (General) Regulations, SR 1939, No. 87.

National Security (Australian Industrial Relations Council) Regulations (Amendment), SR 1942, No. 18

National Security (Inquires) Regulations, SR 1941 No. 74; SR 1941 No. 114; SR 1942, 273.

National Security (Regulations Revision) Regulations, SR 1943, No. 88.

Pacific Island Labourers Act 1901

Royal Commissions Act 1902

War Crimes Act 1945

Queensland

Judges Retirement Act 1921

Heavy Vehicles Act 1925

Heavy Vehicle Act Amendment Act 1931

Inquests of Deaths Act 1866

Railways Act 1914-23

Regulation of Sugar Prices Act 1915

Supreme Court Amendment Act 1946

Transport Act 1938

United Kingdom

Inquiries Act 2005

Newspapers

The following newspapers were consulted and referenced:

Advertiser (Adelaide)

Advocate (Tasmania)

Age (Melbourne)

Argus (Melbourne)

Barrier Miner (Broken Hill, NSW)

Barrier Truth (Broken Hill, NSW)

Brisbane Courier

Canberra Times

Cairns Post

Catholic Press

Courier-Mail (Brisbane)

Daily Telegraph (Sydney)

Examiner (Tasmania)

Freeman's Journal

Mercury

Northern Star (Lismore, NSW)

Singleton Argus (NSW)

Sydney Morning Herald

Townsville Daily Bulletin

The West Australian

Secondary Sources

ABA. "Independence of Judges: Should They Be Used for Non-Judicial Work?". *American Bar Association Journal* 33 (August 1947): 792-96.

Abey, Timothy, Nicole Mary Wells, and Barbara Deegan. "Report of the Parliamentary Salaries and Allowances Tribunal Inquiring into Basic Salary, Allowances and Benefits Provided to Members of the Tasmanian Parliament." Hobart, Tasmania: Parliamentary Salaries and Allowances Tribunal, Tasmanian Industrial Commission, 2014.

Adam-Smith, Patsy. *Australian Women at War*. Melbourne: Nelson, 1984.

———. *Prisoners of War. From Gallipoli to Korea*. Collingwood: Ken Fin Books, 1992.

ALRC. "Royal Commissions and Official Inquiries. Discussion Paper." Canberra: Australian Law Reform Commission, 2009.

Amerasinghe, A. R. B. "Judicial Independence - Some Core Issues." *Journal of Judicial Administration* 7 (1997): 76-82.

Ananian-Walsh, Rebecca, and George Williams. "Judicial Independence from the Executive." http://www.jca.asn.au/wp-content/uploads/2014/07/P62_02_09-Judicial-Independence-from-the-Executive-June-2014.pdf: Judicial Conference of Australia, 2014.

Appleman, John Alan. *Military Tribunals and International Crimes*. Indianapolis: Bobbs-Merill Company, 1954.

Armstrong, J. "The Traveston Smash." *Australian Railway Historical Society Bulletin* 386 (December 1969): 282-86.

Aroney, Nicholas. "Politics, Law and the Constitution in Mccawley's Case." *Melbourne University Law Review* 21 (2006): 605-56.

Askin, Kelly Dawn. *War Crimes against Women: Prosecution in International War Crimes Tribunals*. The Hague, Cambridge, Mass.: M. Nijhoff Publishers; Distributed in the USA and Canada by Kluwer Law International, 1997.

Aszkielowicz, Dean Michael. "After the Surrender: Australia and the Japanese B & C War Criminals, 1945 -1958 ", Murdoch University, 2012.

Australia, Department of External Affairs. "German Atrocities." *Current Notes on International Affairs* 12, no. 5 (1942): 134-37.

———. "War Crime Trials: Statement by the Prime Minister Rt. Hon. J. B. Chifley, 15 June 1948." *Current Notes on International Affairs* 19, no. 7 (July 1948): 424-25.

———. "War Crimes." *Current Notes on International Affairs* 15, no. 10 (October 1944): 302-05.

Australian War Memorial. "Centaur (Hospital Ship)." Australian War Memorial, www.awm.gov.au/encyclopaedia/centaur.htm.

Ayres, Philip. "John Latham in Owen Dixon's Eyes." Paper presented at the The Samuel Griffith Society, Stamford Plaza Adelaide Hotel, North Terrace, Adelaide, 23-25 May 2003 2003.

———. *Owen Dixon*. Carlton, Victoria: Miegunyah Press, 2003.

Ball, W. Macmahon. "Emperor and Government in Japan." *The Australian Outlook* (June 1948): 67-77.

Barry, John V. "The Moscow Declaration on War Crimes." *The Australian Law Journal* 17 (December 10 1943): 248-50.

———. "The Trial and Punishment of Axis War Criminals." *The Australian Law Journal* 17 (June 18 1943): 43-49.

Bathurst, M.E. "The United Nations War Crimes Commission." *American Journal of International Law* 39, no. 1 (1945): 565-70.

Beaumont, Joan. *Gull Force: Survival and Leadership in Captivity 1941-1945*. North Sydney: Allen & Unwin, 1988.

Behr, Edward. *Hirohito: Behind the Myth*. London: Hamish Hamilton, 1989.

Beigbeder, Yves. *Judging War Criminals: The Politics of International Justice*. Houndmills, Basingstoke, Hampshire, New York: Macmillan Press ; St. Martin's Press, 1999.

Bell, Roger. "Australian-American Disagreement over the Peace Settlement with Japan." *Australian Outlook* 30, no. 2 (August 1976): 238-62.

Bennett, J.M. "Street, Sir Kenneth Whistler (1890-1972)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/street-sir-kenneth-whistler-11790.

Benyon, John, ed. *Scarman and After. Essays Reflecting on Lord Scarman's Report, the Riots and Their Aftermath*. Pergamon Press: Potts Point, NSW, 1984.

Bergamini, David. *Japan's Imperial Conspiracy*. London: Heinemann, 1971.

Bergstrum, Lynette A. "Fallon, Clarence George (Clarrie) (1890?-1950)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/fallon-clarence-george-clarrie-10149.

Best, Geoffrey. "Peace Conferences and the Century of Total War: The 1899 Hague Conference and What Came After." *International Affairs* 75, no. 3 (July7 1999): 619-34.

Bix, Herbert P. *Hirohito and the Making of Modern Japan*. New York: Harper-Collins, 2000.

———. "The Showa Emperor's "Monologue" and the Problem of War Responsibility." *Journal of Japanese Studies* 16, no. 2 (1992): 295-363.

Bix, Herbert P. "Emperor Hirohito's War." *History Today* 41 (December 1991): 12-19.

Black, Tony. "Judges and Royal Commissions." *New Zealand Law Journal* (1982): 37-38.

Blackmur, Douglas. *Strikes: Causes, Conduct & Consequences*. Sydney: Federation Press, 1993.

Blackshield, Anthony. "Censorship and the Law." In *Australia's Censorship Crisis*, edited by Geoffrey Dutton and Max Harris. 9 - 26. Melbourne: Sun Books, 1970.

Blakeney, Ben Bruce. "International Military Tribunal. Argument for Motions to Dismiss." *American Bar Association Journal* 32 (August 1946): 475-77, 523.

Bloxham, Donald. "Britsh War Crimes Trial Policy in Germany, 1945-1957: Implementation and Collapse." *Journal of British Studies* 42, no. 1 (January 2003): 91-118.

Boister, Neil, and Robert Cryer. *The Tokyo International Military Tribunal: A Reappraisal*. Oxford; New York: Oxford University Press, 2008.

Bolton, G. C. *The Oxford History of Australia. Volume 5, 1942-1988 : The Middle Way*. Melbourne: Oxford University Press, 1990.

Bonomy, Lord Iain. "Justice Patrick (United Kingdom)." Chap. 8 In *Beyond Victors Justice? The Tokyo War Crimes Trial Revisited*, edited by Yuki Tanaka, Timothy McCormack and Gerry Simpson. 103-07. Leiden, The Netherlands: Martinus Nijhoff Biggleswade, 2011.

Brackman, Arnold C. *The Other Nuremberg. The Untold Story of the Tokyo War Crimes Trials*. New York: Quill-William Morrow, 1987.

Brennan, F. G. "Limits on the Use of Judges." *Federal Law Review* 9 (1978): 1-14.

Bridges, Lee. "The Lawrence Inquiry - Incompetence,Corruption, and Institutional Racism." *Journal of Law and Society* 26, no. 3 (1999): 298-322.

Brooks, Brenton. "The Carnival of Blood in Australian Mandated Territory." *Sabretache* 4, no. 4 (2013): 20-31.

Brown, A J. "The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge." *Federal Law Review* 21 (1992): 48-89.

Brune, Peter. *A Bastard of a Place: Australians in Papua, Kokoda, Milne Bay, Gona, Buna, Sanananda*. Crows Nest, N.S.W.: Allen & Unwin, 2003.

———. *Descent into Hell. The Fall of Singapore-Pudu and Changi-the Thai-Burma Railway*. Crowsnest, NSW: Allen & Unwin, 2014.

Burnside, Sarah. "Griffith, Isaacs and Australian Judicial Biography. An Evolutionary Development?". *Griffith Law Review* 18, no. 1 (2009): 151-84.

Butlin, S. J. *War Economy : 1939-1942*. Australia in the War of 1939-1945. Series 4, Civil ; Vol.3. Canberra: Australian War Memorial, 1955.

Butlin, S. J., and C. B. Schedvin. *War Economy, 1942-1945*. Australia in the War of 1939-1945. Series 4, Civil ; Vol.4. Canberra: Australian War Memorial, 1977.

Butow, Robert J. C. "[Review] the Dual-Image of the Emperor." *Journal of Japanese Studies* 16, no. 1 (Winter 1990): 178-84.

Callinan, Ian. "Sir William Webb." In *The Oxford Companion to the High Court*, edited by A. R. Blackshield, Michael Coper and George Williams. 706-08. South Melbourne: Oxford University Press, 2001.

Calwell, Arthur A. *Be Just and Fear Not*. Hawthorn, Vic.: Lloyd O'Neil in association with Rigby, 1972.

Campbell, Enid. *Contempt of Royal Commissions. Contemporary Legal Issues - No. 3*. Clayton, Victoria: Faculty of Law Monash University, 1984.

———. "Contemptuous Criticism of the Judiciary and the Judicial Process." *Australian Law Journal* 34 (1960): 224-32.

Campbell, Enid, and H.P. Lee. *The Australian Judiciary*. Cambridge: Cambridge University Press, 2001.

Carmody, Tim. "Royal Commissions, Parliamentary Privilege and Cabinet Secrecy." *Queensland University of Technology Law Journal* 11 (1995): 49-66.

Carrel, Michael. "Australia's Prosecution of Japanese War Criminals: Stimuli and Constraints." University of Melbourne, 2005.

Carrol, Brian. "William Forgan Smith: Dictator or Democrat?". In *The Premiers of Queensland*, edited by Denis Murphy, R. B. Joyce and Margaret Cribb. St Lucia, Qld: University of Queensland Press, 1990.

Carroll, V.J. "Henderson, Rupert Albert Geary (1896-1986)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/henderson-rupert-albert-geary-12621.

Castles, Alex C. "Executive References to a Court of Criminal Appeal." *Australian Law Journal* 34, no. 6 (1960): 163-71.

———. "Now and Then." *Australian Law Journal* 62, no. 8 (1988): 472-76.

Chinkin, Christine M. "Women's International Tribunal of Japanese Military Sexual Slavery." *The American Journal of International Law* 95, no. 2 (April 2001): 335-41.

Clark, Claire Skerman. "The Royal Commissions of Queensland." *The Australian Law Journal* 36 (27 September 1961): 131-37.

Clokie, Hugh McDowall, and Joseph William Robinson. *Royal Commissions of Inquiry. The Significance of Investigations in British Politics*. New York: Octagon Books, 1969.

Conners, Libby, Lynette Finch, Kay Saunders, and Helen Taylor. *Australia's Frontline. Remebering the 1939-45 War*. St Lucia: University of Queensland Press, 1992.

Connolly, P.D. "Macrossan, Neal William (1889-1955)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/macrossan-neal-william-11028.

Connolly, Terry. "Relations between the Judicial and Executive Branches of Government." *Journal of Judicial Administration* 6, no. 4 (1997): 215-25.

Coox, Alvin D. "Japan's Imperial Conspiracy [Book Review]." *American Historical Review* 77, no. 4 (October 1972): 1169-70.

Cope, Malcom. "Mccawley, Thomas William (1881-1925)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://www.adb.online.anu.edu.au/biogs/A100214b.htm.

———. "The Political Appointment of T.W. Mccawley as President of the Court of Industrial Arbitration, Justice of the Supreme Court and Chief Justice of Queensland." *The Univerisity of Queensland Law Journal* 9, no. 2 (1976): 224-42.

Coper, Michael. "Court as Political Institution." In *Oxford Companion to the High Court*, edited by A. R. Blackshield, Michael Coper and George Williams. 539. South Melbourne: Oxford University Press, 2001.

Cowen, Zelman. *Sir John Latham and Other Papers*. Melbourne: Oxford University Press, 1965.

Creed, David, Moira Rayner, and Sue Rickard. "'It Will Not Be Bound by the Ordinary Rules of Evidence'." *Journal of the Australian War Memorial* 27 (October 1995): 47-53.

"Current Topics: Royal Commissions." *Australian Law Journal* 28, no. 5 (23 September 1954): 229 - 30.

D'Alpuget, Blanche. *Mediator: A Biography of Sir Richard Kirby*. Carlton, Vic.: Melbourne University Press, 1977.

D., W.J. "Privilege of Parliament." *The Australian Law Journal* 18 (14 July 1944): 70-76.

Day, David. *The Politics of War*. Sydney: HarperCollins, 2003.

Day, David, and Australian Customs Service. *Contraband & Controversy: The Customs History of Australia from 1901*. Canberra: AGPS Press, 1996.

Dennis, Peter. *The Oxford Companion to Australian Military History*. Melbourne ; New York: Oxford University Press, 1995.

Dickinson, George. "Japanese War Trials." *The Australian Quarterly* 24 (June 1952): 69-75.

———. "Manus Trials. Japanese War Criminals Arraigned." *Royal Australian Historical Society* 38 (1952): 67-77.

Donaghue, Stephen. *Royal Commissions and Permanent Commissions of Inquiry*. Chatswood, N.S.W.: Butterworths, 2001.

Douglas, Roger. "Saving Australia from Sedition: Customs, the Attorney-General's Department and the Administration of Peacetime Political Censorship." *Federal Law Review* 30, no. 1 (2002): 135 - 75.

———. "A Smallish Blow for Liberty? The Significance of the Communist Party Case." *Monash University Law Review* 27, no. 2 (2001): 253-89.

Dower, John W. *Embracing Defeat: Japan in the Wake of World War Ii*. New York: W.W. Norton & Co., 1999.

Drea, Edward J. *In the Service of the Emperor. Essays on the Imperial Japanese Army*. Lincoln: University of Nebraska Press, 1998.

Drewry, Gavin. "Judges and Political Inquiries: Harnessing a Myth." *Political Studies* 23, no. 1 (1976): 49-61.

———. "Judicial Inquiries and Public Reassurance." *Public Law* (1998 1998): 368-72.

Duck, Colin, and Martin Thomas. *Whose Baby?* Sydney: Collins, 1984.

Dunkley, Graham. "Crofts, Charles Alfred (1871-1965)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/crofts-charles-alfred-5823.

Duxbury, Neil. "Lord Wright and Innovative Traditionalism." *University of Toronto Law Journal* 59, no. 3 (2009): 265 - 338.

Else-Mitchell, R. "Roper, Ernest David (1901-1958)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/roper-ernest-david-11559.

"Enough Inquiries?". *Maclean's* 111, no. 3 (19 January 1998): 11.

Evans, Harold. "The Trial of Major Japanese War Criminals. The International and Military Tribunal for the Far East." *New Zealand Law Journal* 23 (January 21 1947): 8-10.

Farrell, Frank. "King, Robert Arthur (1886-1960)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://www.adb.online.anu.edu.au/biogs/A150030b.htm.

Finnane, M., and J. Myrtle. *J V Barry: A Life*. Sydney: UNSW Press, 2007.

Finnane, Mark, and Jonathon Richards. ""You'll Get Nothing out of It"? The Inquest, Police and Aboriginal Deaths in Colonial Queensland." *Australian Historical Studies* 123 (2004): 84-105.

Finnin, Sarah, and Tim McCormack. "Tokyo's Continuing Relevance." Chap. 22 In *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, edited by Yuki Tanaka, Timothy McCormack and Gerry Simpson. 353-82. Leiden, The Netherlands: Martinus Nijhoff Biggleswade, 2011.

Fiset, Louis. "Return to Sender: Us Censorship of Enemy Alien Mail in World War Ii." *Prologue* 33, no. 1 (2001).

Fitzgerald, Ross. *From 1915 to the Early 1980s : A History of Queensland*. St. Lucia, Qld.: University of Queensland Press, 1984.

———. *Red Ted : The Life of E. G. Theodore*. St. Lucia, Qld.: University of Queensland Press, 1994.

Fitzgerald, Ross, Lyndon Megarrity, and David Symons. *Made in Queensland: A New History*. St Lucia, Qld.: University of Queensland Press, 2009.

Fitzgerald, Ross, and Harold Thornton. *Labor in Queensland: From the 1880s to 1988*. St. Lucia, Qld.: University of Queensland Press, 1989.

Fitzpatrick, Georgina. "War Crimes Trials, 'Victor's Justice'and Australian Military Justice in the Aftermath of the Second World War." Chap. 16 In *The Hidden Histories of War Crime Trials*, edited by Kevin Jon Heller and Gerry Simpson. 327-47. Oxford: Oxford University Press, 2013.

Forbes, Cameron. *Hellfire : The Story of Australia, Japan and the Prisoners of War*. Sydney: Pan MacMillan Australia, 2005.

Fort, Carol. "Developing a National Employment Policy, Australia 1939-45." Unpublished Thesis, University of Adelaide, 2000.

Fox, John P. "The Jewish Factor in British War Crimes Policy in 1942." *English Historical Review* 92, no. 1 (January 1977): 82-106.

Frazer, Andrew, and John Goldring. "Obituary: The Hon Sir Richard Clarence Kirby Ac." *Australian Law Journal* 75, no. 12 (2001): 788-91.

French, Robert. "The Chief Justice and the Governor-General." In *Melbourne University Law Review Annual Dinner*. Melbourne, 2009.

Freudenberg, Graham. "Calwell, Arthur Augustus (1896-1973)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/calwell-arthur-augustus-9667.

Fricke, Graham. *Judges of the High Court*. Melbourne: Hutchinson of Australia, 1986.

Futamura, Madoka. *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy*. London: Routledge, 2008.

Galligan, Brian. *Politics of the High Court: A Study of the Judicial Branch of Government in Australia*. St. Lucia, Qld.: University of Queensland Press, 1987.

Garner, James Wilford. "Recent Conventions for the Regulation of War." *The American Journal of International Law* 26, no. 4 (October 1932): 807-11.

"General Considerations Relating to and Procedures Followed by Royal Commissions." *Australian Law Journal* 57, no. 11 (November 1983): 601-03.

"The Geneva Convention for the Amelioration of the Condition of the Sick and the Wounded of Armies in the Field Concluded, August 22, 1864." *The American Journal of International Law* 1, no. 2 (1907): 90-92.

Gibbs, Harry. "Some Aspects of the History of the Queensland Bar." *Australian Law Journal* 53, no. 2 (1979): 63-69.

Gill, G. Hermon. *Royal Australian Navy, 1942-1945*. Australia in the War of 1939-1945. Series 2, Navy ; V. 2. Canberra: Australian War Memorial, 1968.

Gillespie, Alexander. *A History of the Laws of War: The Customs and Laws of War with Regards to Combatants and Captives*. Vol. 1, Oxford, United Kingdom: Hart Publishing, 2011.

Gilligan, George. "Royal Commissions of Inquiry." *Australian and New Zealand Journal of Criminology* 35, no. 3 (2002): 289-307.

Girard, Philip. "Judging Lives: Judicial Biography from Hale to Holmes." *Australian Journal of Legal History* 7 (2003): 87-106.

Gold, Hal. *Unit 731 Testimony*. Tokyo: Yenbooks, 1996.

Goodwin, Michael J. *Shobun. A Forgotten War Crime in the Pacific*. Mechanicsburg, PA: Stackpole Books, 1995.

Gosnell, Harold F. "British Royal Commissions of Inquiry." *Political Science Quarterly* 49 (1934): 84.

Graeme-Evans, Alex. *Of Storms and Rainbows. The Story of the Men of the 2/12th Battalion A.I.F.* Vol. 2, Hobart: 12th Battalion Association, 1991.

Green, Guy. "The Rationale and Some Aspects of Judicial Independence." *Australian Law Journal* 59, no. 3 (March 1985): 135-50.

Greenwood, R.H. "The Challenge of Tropical Australia." *Pacific Affairs* 29, no. 2 (June 1956): 126-40.

Guy, Scott, Tony McKinnon, and Barbara Hocking. "Thomas Mccawley's Tenure on the Queensland Supreme Court and Industrial Court: A Political Appointment." *Legal History* 12 (2008): 201-39.

Hadley, Gregory, and James Oglethorpe. "Mackay's Betrayal: Solving the Mystery of the "Sado Island Prisoner-of-War Massacre"." *The Journal of Military History* 71 (April 2007): 1-24.

Hall, Timothy. *New Guinea 1942-44*. Sydney: Methuen Australia, 1981.

Hallett, Leonard Arthur. *Royal Commissions and Boards of Inquiry. Some Legal and Procedural Aspects*. Sydney: The Law Book Company, 1982.

———. "Royal Commissions: Do They Still Have a Place?". *Law Institute Journal* 69, no. 12 (December 1982): 1242-43.

Ham, Paul. *Kokoda*. Pymble, N.S.W.: HarperCollins, 2004.

———. *Sandakan: The Untold Story of the Sandakan Death Marches*. [2013 edition] ed. 2012.

Hanser, Charles J. *Guide to Decision : The Royal Commission*. Totowa, N.J.,: Bedminister Press, 1965.

Harper, N. D. "Australian Policy Towards Japan." *The Australian Outlook* 1, no. 4 (December 1947): 14-24.

Harris, Meirion, and Susie Harris. *Sheathing the Sword: The Demilitarisation of Japan*. London: Hamish Hamilton, 1987.

Harris, Sheldon H. *Factories of Death. Japanese Biological Warfare 1932-45 and the American Cover-Up*. New York: Routledge, 1994.

Harry, Ralph. "Glasgow, Sir Thomas William (1876-1955)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/glasgow-sir-thomas-william-6397.

Harvey, Robert. *American Shogun: General Macarthur, Emperor Hirohito and the American Duel with Japan*. New York: Overlook Press, 2006.

Hasluck, Paul. *The Government and the People, 1939-1941*. Vol. 1, Canberra: Australian War Memorial, 1952.

———. *The Government and the People, 1942-1945*. Vol. 2, Canberra: Australian War Memorial, 1970.

Hawker, G.N. *The Parliament of New South Wales. 1856-1965*. Ultimo, NSW: Victor C.N. Blight, 1971.

Henderson, P.G.F. "Brennan, Keith Gabriel (1915-1985)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/brennan-keith-gabriel-12252.

Henning, Peter. *Doomed Battalion: Mateship and Leadership in War and Captivity : The Australian 2/40 Battalion 1940-45*. St Leonards, N.S.W.: Allen & Unwin, 1995.

Henry, Nicola. "Memory of an Injustice: The "Comfort Women" and the Legacy of the Tokyo Trial." *Asian Studies Review* 37, no. 3 (2013): 362-80.

Herbert, H. P. "Anything but Action? A Study of the Uses and Abuses of Committees of Inquiry." In *Radical Reaction. Essays in Competition and Affluence*, edited by Ralph Harris. 249-302. London: Hutchinson & Co, 1961.

Hewton, Terry. "'Webb's Justice': The Role of Sir William Flood Webb in the Tokyo Trial, 1946-1948." University of Adelaide, 1976.

Heydon, J.D. "Outstanding Australian Judges." *The Judicial Review* 7, no. 3 (2005): 255-92.

Higashizawa, Yasushi. "When Will Justice Be Relized?". *Law Asia Journal* (2005): 83-108.

Hilvert, John. *Blue Pencil Warriors. Censorship and Propaganda in World War Ii*. St Lucia: University of Queensland, 1984.

———. "More on Australia's Curious War Censorship." *Media Information-Australia* 7 (February 1978): 41-44.

Hisakazu, Fujita. "The Tokyo Trial: Humanity's Justice V Victors' Justice." In *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, edited by Yuki Tanaka, Tim McCormack and Gerry Simpson. 3-21. Biggleswade: Leiden: Martinus Nijhoff, 2011.

Hogan, Michael. *The Sectarian Strand : Religion in Australian History*. Ringwood, Vic.: Penguin Books, 1987.

Holmes, J.D. "Royal Commissions." *The Australian Law Journal* 29 (19 August 1955): 253-72.

Holmes, Richard. "The Proper Study?". Chap. 1 In *Mapping Lives. The Uses of Biography*, edited by Peter France and William St Clair. 7 - 18. Oxford: Oxford University Press for the British Academy, 2002.

Horwitz, Solis. "The Tokyo Trial." *International Conciliation* 465 (1946): 473-78.

———. "The Tokyo Trial." *International Conciliation* 465 (November 1950): 473-78.

Hosoya, C., N. Ando, Y. Onuma, and Richard H. Minear. *The Tokyo War Crime Trial. An International Symposium*. Tokyo: Kodansha, 1986.

House of Commons Public Administration Select Committee. "Government by Inquiry." United Kingdom, 2005.

Howard, J. Woodford. "Commentary." *N. Y. U. L. Rev.* 70, no. 3 (1995): 533 - 47.

Humphreys, Leonard A. "[Review] in the Service of the Emperor: Essays on the Imperial Japanese Army." *Journal of Military History* 63, no. 1 (January 1999): 204-05.

Hyder, Elton M. Jr. "The Tokyo Trial." *Texas Bar Journal* 10 (April 1947): 136-37, 66-67.

Ian G. Sharp. "Drake-Brockman, Edmund Alfred (1884–1949)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/drake-brockman-edmund-alfred-6014.

International Military Tribunal for the Far East., R. John Pritchard, Sonia M. Zaide, and Donald Cameron Watt. *The Tokyo War Crimes Trial*. 22 vols New York: Garland Pub., 1981.

Ireland, Gordon. "Uncommon Law in Martial Tokyo." *The Year Book of World Affairs* 4 (1950): 54-104.

Jayasimha, Shreyas. "Victor's Justice, Crime of Silence and the Burden of Listening: Judgement of the Tokyo Tribunal 1948, Womaen's International War Crimes Tribnunal 2000 and Beyond." *Law, Social Justice and Global Development* 1 (21 June 2001).

Jenkins, David, and Peter Sullivan. *Battle Surface: Japan's Submarine War against Australia 1942-44*. Milsons Point, N.S.W.: Random House Australia, 1992.

Johnson, Claudius O. "The State of Victoria Investigates Communism." *The Western Political Quarterly* 8, no. 3 (1955): 367-80.

Johnston, Mark. *Fighting the Enemy: Australian Soldiers and Their Adversaries in World War Ii*. Cambridge: Cambridge University Press, 2000.

Johnston, Ross. *History of the Queensland Bar*. Brisbane: Bar Association of Queensland, 1979.

———. "Sir Edward Henry Macartney (1863-1956)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://www.adb.online.anu.edu.au/biogs/A100193b.htm?hilite=Macartney.

"Judicial Impartiality - Extra Judicial Chores." *New Law Journal* 121 (18 February 1971 1971): 119.

Kay, Robin, ed. *The Surrender and Occupation of Japan. Documents on New Zealand External Relations*. Vol. 2. Wellington: P.D. Hasselberg, 1982.

Keenan, Joseph Berry, and Brendan Francis Brown. *Crimes against International Law*. Washington D.C.: Public Affairs Press, 1950.

Ken'ichi, Matsumoto, and Shoji Jun'ichiro. "Critquing Herbert Bix's "Hirohito"." *Japan Echo* 29, no. 6 (2002): 64-68.

Kiernan, Colm. *Calwell : A Personal and Political Biography*. West Melbourne, Vic.: Thomas Nelson (Australia), 1978.

Kirby, Michael. "Acting Judges - a Non-Theoretical Danger." Paper presented at the New South Wales Young Lawyers' Conference: Young Lawyers and Hope, Sydney, 1998.

———. "Attacks on Judges - a Universal Phenomenon." *Australian Law Journal* 72, no. 8 (1998): 599-610.

———. "Australia." Chap. 2 In *Judicial Independence: The Contemporary Debate*, edited by Shimon Shetreet and Jules Deschênes. 8-27. Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1985.

———. "The Five Queensland Justices of the High Court of Australia." *Australian Bar Review* 15 (November 1996): 2-32.

———. "Sir Edward Mctiernan - a Centenary Reflection." *Federal Law Review* 20 (1991): 165-84.

Kochavi, Arieh J. "Britain and the Establishment of the United Nations War Crimes Commission." *English Historical Review* 107, no. 423 (April 1992): 323-49.

Lack, Clem. *Three Decades of Queensland Political History, 1929-1960*. Brisbane: Govt. Printer, 1962.

Lamont-Brown, Raymond. *Ships from Hell. Japanese War Crimes on the High Seas*. Phoenix Mill, UK: Sutton Publishing, 2002.

Larmour, Constance. "Foster, Alfred William (1886-1962)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/foster-alfred-william-6217.

———. *Labor Judge: The Life and Times of Judge Alfred William Foster*. Sydney: Hale & Iremonger, 1985.

Lee, H. P., and George Winterton. *Australian Constitutional Landmarks*. Cambridge: Cambridge University Press, 2003.

Lewis, John R. *Uncertain Judgment : A Bibliography of War Crimes Trials*. The War/Peace Bibliography Series ; 8. Santa Barbara, Calif.: ABC-Clio, 1979.

Lloyd, C.J. "Clarey, Percy James (1890-1960)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/clarey-percy-james-9751.

Lloyd, Clem. "Not Peace but a Sword! - the High Court under J.G. Latham." *Adelaide Law Review* 11 (1987): 173-202.

Londey, Peter. "Remembering 1942. Milne Bay, 5 September 1942." Australian War Memorial, https://www.awm.gov.au/education/talks/1942-milne-bay/.

Lyon, Alan B. *Japanese War Crimes. The Trials of the Naoetsu Camp Guards*. Loftus, Australia: Australian Military Historical Publications, 2000.

MacArthur, Brian. *Surviving the Sword. Prisoners of the Japanese 1942-1945*. Great Britain: Time Warner Books, 2005.

MacIntyre, Stuart. "Latham, Sir John Greig (1877-1964)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/latham-sir-john-greig-7104.

———. "What Makes a Good Biography." *Adelaide Law Review* 32, no. 1 (2011): 7-16.

MacKay, James. *Betrayal in High Places*. Auckland: Tasman Books, 1996.

Maclean, Mavis. "How Does an Inquiry Inquire? A Brief Note on the Working Methods of the Bristol Royal Infirmary Inquiry." *Journal of Law and Society* 28, no. 4 (2001): 590-601.

Maga, Tim. "'Away from Tokyo:' The Pacific Islands War Crimes Trials, 1945-1949." *The Journal of Pacific History* 36, no. 1 (2001): 37-50.

———. *Judgement at Tokyo*. Lexington, Kentucky: The University Press of Kentucky, 2001.

Maher, Laurence W. "Tales of the Overt and the Covert: Judges and Politics in Early Cold War Australia." *Federal Law Review* 21, no. 2 (1993): 151-201.

Markey, Ray, and Stuart Svesen. "Healy, James (1898-1961)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/healy-james-jim-10470.

Marsden, Susan. "Perry, Sir Frank Tennyson (1887-1965)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://www.adb.online.anu.edu.au/biogs/A150696b.htm.

Matthews, B.H. "A History of Industrial Law in Queensland with a Summary of the Provisions of the Various Statutes." *Royal Historical Society of Queensland* 4, no. 2 (December 1949): 150-81.

McCarthy, Greg. "The Hih Royal Commission and the Tangled Web of Truth." *Australian Journal of Public Administration* 60, no. 3 (September 2001): 110-12.

McClemens. "The Legal Position and Procedure before a Royal Commissioner." *The Australian Law Journal* 35 (30 November 1961): 271-78.

McCloy, John J. "Owen J Roberts' Extra Curiam Activities." *University of Pennsylvania Law Review* 104 (1955): 350-53.

McCormack, Gavan. "'Apportioning the Blame: Australian Trials for Railway Crimes." In *The Burma-Thailand Railway: Memory and History*, edited by Gavan McCormack and Hank Nelson. 85-119. St. Leonards, N.S.W.: Allen & Unwin, 1993.

McCormack, Gavan, and Hank Nelson. *The Burma-Thailand Railway: Memory and History*. St Leonards, N.S.W.: Allen & Unwin, 1993.

McGregor, Douglas G. "The Case For." In *Judges as Royal Commissioners and Chairman of Non-Judicial Tribunal. Two Views Presented at the Fourth Annual Seminar of the Australian Institue of Judicial Administration*, edited by G. Fraser. Adelaide: Australian Insititute of Judicial Administration Incorporated, 1986.

McInerney, Murray. "The Appointment of Judges to Commissions of Inquiry and Other Extra-Judicial Activities." *The Australian Law Journal* 52 (October 1978): 540-53.

———. "Procedural Aspects of a Royal Commission Part 1." *The Australian Law Journal* 24 (15 February 1951): 386-92.

———. "Procedural Aspects of a Royal Commission Part 2." *The Australian Law Journal* 24 (15 March 1951): 438-44.

McInerney, Murray, and Garrie J. Moloney. "The Case Against." In *Judges as Royal Commissioners and Chairman of Non-Judicial Tribunal. Two Views Presented at the Fourth Annual Seminar of the Australian Institute of Judicial Administration*, edited by G. Fraser. Adelaide: Australian Institute of Judicial Administration Incorporated, 1986.

McInerney, Murray V., Garrie J. Moloney, D. G. McGregor, Glenys Fraser, Australian Institute of Judicial Administration., and Victoria Law Foundation. *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals : Two Views Presented at the Fourth Annual Seminar of the Australian Institute of Judicial Administration, 31 August, 1985, Adelaide*. Australian Institute of Judicial Administration. Papers Presented at The ... Annual Aija Seminar ... 4. Canberra City, A.C.T.: Australian Institute of Judicial Administration, 1986.

McKay, Robert B. "The Judiciary and Non-Judicial Activities." *Law and Contemporary Problems* 35 (1970): 9-36.

McMullin, Ross. "Ward, Edward John (Eddie), 1899-1963." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://www.adb.online.anu.edu.au/biogs/A160579b.htm.

McPherson, Bruce Harvey. *The Supreme Court of Queensland, 1859-1960: History, Jurisdiction, Procedure*. Sydney: Butterworths, 1989.

Mellor, D.P. *The Role of Science and Industry*. Australia in the War of 1939-45. Canberra: Australian War Memorial, 1958.

Mignone, A. Frederick. "After Nuremberg, Tokyo." *Texas Law Review* 25 (May 1947): 475-90.

Minear, Richard H. *Victor's Justice. The Tokyo War Crimes Trial*. Princeton, New Jersey: Princeton University Press, 1972.

Moffitt, A. R., and Australian Broadcasting Corporation. *Project Kingfisher*. Sydney: ABC Books for the Australian Broadcasting Corporation, 1995.

Moore, W. Harrison. "Executive Commissions of Inquiry." *Columbia Law Review* 13 (1913): 500-23.

Morris, Narrelle. "Justice for 'Asian Victims': The Australian War Crime Trials of the Japanese, 1945-51." In *The Hidden Histories of War Crime Trials*, edited by Kevin Jon Heller and Gerry Simpson. 348-66. Oxford: Oxford University Press, 2013.

Muir, R. "The Australian Sugar Industry." *The Australian Quarterly* 24 (1934): 78-90.

Mummery, D.A. "Due Process and Inquisitions." *Law Quarterly Review* 97 (1981): 287.

Murphy, Denis. *The Big Strikes : Queensland 1889-1965*. St. Lucia, Qld.: University of Queensland Press, 1983.

———. *T.J. Ryan: A Political Biography*. St Lucia, Qld.: University of Queensland Press, 1990.

Murphy, Denis, R. B. Joyce, and Margaret Cribb. *The Premiers of Queensland*. Rev. ed. St. Lucia, Qld.: University of Queensland Press, 1990.

Murphy, Denis, R. B. Joyce, and Colin A. Hughes. *Labor in Power: The Labor Party and Governments in Queensland, 1915-57*. St. Lucia, Q.: University of Queensland Press, 1980.

Murphy, Kate. ""Very Decidedly Decadent". Elite Responses to Modernity in the Royal Commission on the Decline of the Birth Rate in New South Wales, 1903-04." *Australian Historical Studies* 126 (2005): 215-33.

Nandy, Ashis. "The Other Within: The Strange Case of Radhabinod Pal's Judgment on Culpability." *New Literary History* 23, no. 1 (1992): 45-67.

National Archives of Australia. "Fact Sheet 61-World War Ii War Crimes." National Archives of Australia, www.naa.gov.fsheets/fs61.html.

Nelson, Hank. "Blood Oath: A Reel History." *Australian Historical Studies* 24, no. 97 (October 1991): 429-42.

———. *Prisoner of War. Australians under Nippon*. Sydney: Australian Broadcasting Corporation, 1985.

Neumann, Eddy. *The High Court of Australia: A Collective Portrait, 1903-1972*. Occasional Monograph; No. 6. edited by Sydney University of, Government Dept. of and Administration Public. 2nd ed. [Sydney]: Dept. of Government and Public Administration University of Sydney, 1973.

O'Neil, Maureen. "Why We Need More Royal Commissions." *Herizons* Fall (2001): 14-16.

"Obituary. Sir William Webb." *The Australian Law Journal* 46 (September 1972): 477.

Odgers, George. *Air War against Japan, 1943-1945*. Australia in the War of 1939-1945 Series 3, Air. Canberra,: Australian War Memorial, 1957.

Okada, Emmi. "The Australian Trials of Class B and C Japanese War Crimes Suspects, 1945-51." *Australian International Law Journal* 16 (2009): 47-80.

Orr, James. "Review: Yuma Totani. The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War Ii." *The American Historical Review* 115, no. 3 (2010): 825-26.

Otomo, Yoriko. "The Decision Not to Prosecute the Emperor." Chap. 5 In *Beyond Victor's Justice? Tokyo War Crimes Trial Revisited*, edited by Yuki Tanaka, Timothy L.H. McCormack and Gerry Simpson. 63-78. Leiden, Biggleswade: Martinus Nijhoff, 2011.

Owen, Neville. "Royal Commissions - the Practicalities." Paper presented at the JCA Colloquium, Sydney, 11 October 2013.

P. A. Selth. "Piper, Harold Bayard (1894–1953)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/piper-harold-bayard-11430.

Pal, R. *Crimes in International Relations*. University of Calcutta, 1955.

———. *International Military Tribunal for the Far East. Dissentient Judgment of Justice R.B. Pal*. Calcutta, 1953.

Pappas, Caroline. "Law and Politics: Australia's War Crimes Trials in the Pacific, 1943-1961." University of New South Wales - Australian Defence Force Academy, 1998.

Parker, Stephen. "The Independence of the Judiciary." In *The Australian Judicial System*, edited by Brian Opeskin and Fiona Wheeler. 62-92. Carlton South, Victoria: Melbourne: Melbourne University Press, 2000.

Parry, R Gwynedd. "Is Legal Biography Really Legal Scholarship?". *Legal Studies* 30, no. 2 (June 2010): 208-29.

Parsons, R., and Giorgio Del Vecchio. "On the History of the Red Cross." *Journal of the History of Ideas* 24, no. 4 (October-December 1963): 577-83.

Patmore, Grey. "Cranwell, Joseph Archibald (1889-1965)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/cranwell-joseph-archibald-9857.

Penton, Brian. *Censored! Being a True Account If a Notable Fight for Your Right to Read and Know, with Some Comment Upon the Plague of Censorship in General*. Sydney: Shakespeare Head, 1947.

Piccigallo, Philip R. *The Japanese on Trial. Allied War Crime Operations in the East, 1945-1951*. Austin: University of Texas Press, 1979.

Pilger, Alison. "Oberg, David Olof August (1893-1975)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://www.adb.online.anu.edu.au/biogs/A150587b.htm.

Playford, John. "Hannan, Albert James (1887-1965)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/hannan-albert-james-10415.

———. "Judges for Hire." *Outlook* June (1966): 13.

———. "Labour and the High Court." *Australian Left Review* 23 (1970): 16-22.

Plunkett, James. "The Role of the Attorney-General in Defending the Judiciary." *Journal of Judicial Administration* 19, no. 3 (2010): 160-75.

Popkin, Jeremy D. "Review: Barbara Caine, *Biography and History*." *Biography* 34, no. 2 (2011): 329-31.

Posner, Richard A. "Judicial Biography." *N. Y. U. L. Rev.* 70 (1995): 502 -23.

———. "The Learned Hand Biography and the Questions of Judicial Greatness." *Yale Law Journal* 104 (1994): 511-40.

Powell, John. W. "Japan's Germ Warfare: The U.S. Cover-up of a War Crime." *Bulletin of Concerned Asia Scholars* 12, no. 4 (1980): 2-16.

Prasser, Scott. "Public Inquiries in Australia: An Overview." *Australian Journal of Public Administration* 44, no. 1 (March 1985): 1-15.

———. "Public Inquiries. Their Use and Abuse." *Current Affairs Bulletin* 68, no. 9 (February 1992): 4-12.

———. "The Queensland Health Royal Commissions." *The Australian Journal of Public Administration* 69, no. 1 (2010): 79-87.

———. *Royal Commissions and Public Inquiries in Australia*. Chatswood, N.S.W.: LexisNexis Butterworths, 2006.

———. "Royal Commissions and Public Inquiries: Scope and Uses." In *Royal Commissions and the Making of Public Policy*, edited by Patrick Weller. South Melbourne: McMillan Education Australia, 1994.

———. "Royal Commissions in Australia: When Should Governments Appoint Them." *Australian Journal of Public Administration* 65, no. 3 (2006): 28-47.

Pritchard, R. John, Sonia M. Zaide, and Donald Cameron Watt. *The Tokyo War Crimes Trial*. New York: Garland Pub., 1981.

Privy Council Office. "Commission of Inquiry. Current Commissions." http://www.pco-bcp.gc.ca/index.asp?lang=eng&Page=information&Sub=commissions.

Queensland Ex-POW Reparation Committee. *Nippon Very Sorry-Many Men Must Die: Submission to the United Nations Commission of Human Rights (Ecosoc Resolution 1503).* Bowen Hills, Brisbane: Boolarong Publications, 1990.

Queensland, Royal Commission on Sugar Peaks and Cognate Matters. "Report of the Royal Commission on Sugar Peaks and Cognate Matters." Brisbane: Government Press, 1939.

R. Else-Mitchell. "'Roper, Ernest David (1901–1958)'." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/roper-ernest-david-11559/text20629.

Ransley, Janet. "The Powers of Royal Commissions and Controls over Them." In *Royal Commissions and the Making of Public Policy*, edited by Patrick Weller. Melbourne: McMillan Education Australia, 1994.

Ratnapala, Suri. "Sir William Webb - a Hobbesian Jurist?". In *Queensland Judges on the High Court*, edited by Michael White and Aladin Rahemtula. 133-50. Brisbane: Supreme Court of Queensland Library, 2003.

Rawson, Don. "Keane, Richard Valentine (1881-1946)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/keane-richard-valentine-10663.

Rees, Laurence. *Horror in the East*. London: BBC Worldwide, 2001.

Reeson, Margaret. "Searching for Dad. Unsolved Mysteries of the War." In *From a Hostile Shore. Australia and Japan at War in New Guinea*, edited by Steven Bullard and Kieko Tumura. 156-69. Canberra: Australian War Memorial, 2004.

Resodihardjo, Sandra L. "Wielding a Double-Edged Sword: The Use of Inquiries at Times of Crisis." *The Journal of Contingencies and Crisis Management* 14, no. 4 (December 2006): 199-206.

Roach, James R. "Australia Moves to Outlaw Communist." *Far Eastern Review* 19, no. 16 (27 September 1950): 173-76.

Robertson, C. J. "Cane-Sugar Production in the British Empire." *Economic Geography* 6, no. 2 (April 1930): 135-51.

Roling, B. V. A. "The Nuremberg and Tokyo Trials in Retrospect." In *A Treatise on International Law. Crimes and Punishment*, edited by M. Cherif Bassiouni and Ved P. Nanda. 590-608. Springfield, Illinois: Charles C Thomas, 1973.

Roling, B. V. A., and Antonio Cassese. *The Tokyo Trial and Beyond: Reflections of a Peacemonger*. Cambridge, UK: Polity Press, 1993.

Rosenthal, Newman. *Sir Charles Lowe. A Biographical Memoir*. Melbourne: Robertson and Mullens, 1968.

Ross, Lloyd. *John Curtin: A Biography*. South Melbourne, Vic: MacMillan, 1977.

Rowland, Robin. *A River Kwai Story : The Sonkrai Tribunal*. Crows Nest, N.S.W.: Allen & Unwin, 2007.

Russell, Lord E.F. *The Knights of Bushido. A Short History of Japanese War Crimes*. London: Cassell & Company, 1958.

Rutledge, Martha. "Davidson, Sir Colin George Watt (1878-1954)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/davidson-sir-colin-george-watt-5896.

S., R.A, and Enid Campbell. "Contempt of Royal Commissions (Book Review)." *Australian Law Journal* 60, no. 6 (June 1986): 361.

Sackville, Ronald. "Law Reform Agencies and Royal Commissions." Chap. 19 In *The Promise of Law Reform*, edited by Brian R. Opeskin and David Weisbrot. 274-87. Annandale, NSW: Federation Press, 2005.

———. "Royal Commissions in Australia. What Price Truth?". *Current Affairs Bulletin* 60, no. 12 (May 1984): 3-13.

Saunders, Cheryl. "The Separation of Powers." In *The Australian Federal Judicial System*, edited by Brian Opeskin and Fiona Wheeler. 3-36. Carlton South, Victoria: Melbourne: Melbourne University Press, 2000.

Saunders, Kay. *War on the Homefront: State Intervention in Queensland 1938-1948*. St. Lucia, Qld.: University of Queensland Press, 1993.

Sawer, Geoffrey. *Australian Federal Politics and Law 1929-1949*. Vol. 2, Melbourne: Univiversity Press, 1956.

———. *Australian Federalism in the Courts*. Melbourne: Melbourne University Press, 1967.

Schwelb, Egon. "The United Nations War Crimes Commission." *British Year Book of International Law* 23 (1946): 269-376.

Scott, Ernest. *Australia During the War*. Official History of Australia in the War of 1914-1918. 7th ed. Vol. 11, Sydney: Angus & Robertson, 1941.

Sebald, William J., and Russell Brines. *With Macarthur in Japan. A Personal History of the Occupation*. London: The Cresset Press, 1965.

Sharp, Ian G. "Drake-Brockman, Edmund Alfred (1884-1949)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/drake-brockman-edmund-alfred-6014.

Sharwood, R.L. "Dean, Sir Arthur (1893-1970)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/dean-sir-arthur-9933.

Shaw, J.W. "Clancy, Sir John Sydney James (1895-1970)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/clancy-sir-john-sydney-james-9749.

Sheldon, Charles D. "Scapegoat or Instigator of Japanese Aggression? Inoue Kiyoshi's Case against the Emperor." *Modern Asian Studies* 12, no. 1 (1978): 1-40.

Shillony, Ben-Ami. "[Review] Dual Image of the Japanese Emperor." *Monumenta Nipponica* 44, no. 3 (Autumn 1989): 375-77.

Silver, Lynette Ramsay. *The Bridge at Parit Sulong. An Investigation of Mass Murder. Malaya 1942*. Sydney: Watermark Press, 2004.

Simonett, David S. "Sugar Production in North Queensland." *Economic Geography* 30, no. 3 (July 1954): 223-35.

Simpson, A. W. B. *Cannibalism and the Common Law: The Story of the Tragic Last Voyage of the Mignonette and the Strange Legal Proceedings to Which It Gave Rise*. Chicago: University Of Chicago Press, 1984.

"Sir William Webb." *The Australian Law Journal* 32 (June 23 1958): 57.

"Sir William Webb." *The Australian Law Journal* 20 (May 17 1946): 15.

Sissons, D.C.S. "The Australian War Crimes Trials and Investigations (1942-51)." University of California at Berkeley - War Crimes Studies Centre, http://socrates.berkeley.edu/~warcrime/index.htm.

———. "War Crimes Trials." In *The Australian Encyclopaedia*. 2980-83. Terry Hills, NSW: Australian Geographic Society, 1988.

Sissons, David. "Sources on Australian Investigations into Japanese War Crimes in the Pacific." *Journal of the Australian War Memorial*, no. 30 (April 1997).

Smith, Anne. "The Railway Strike, 1925." In *The Big Strikes: Queensland 1889-1965*, edited by Denis Murphy. 162-73. St Lucia: University of Queensland Press, 1983.

Smith, Dayle. *Macarthur's Kangaroo Court. The Tokyo War Crimes Trial*. Brisbane: Envale Press, 2000.

Smith, F. T., C. J. Lloyd, and Richard Hall. *Backroom Briefings : John Curtin's War*. Canberra: National Library of Australia, 1997

Smyth, Russell. "Explaining Historical Dissent Rates in the High Court of Australia." *Commonwealth and Comparative Politics* 41, no. 2 (July 2003): 83-114.

———. "Judicial Interaction on the Latham Court: A Quantitative Study of the Voting Patterns on the High Court." *Australian Journal of Politics and History* 47, no. 3 (2001): 330-48.

———. "Who Gets Cited? An Emperical Study of Judicial Prestige in the High Court." *University of Queensland Law Journal* 21, no. 7 (2000).

Spain, Ian. "Trials of War Criminals." *The Australian Law Journal* 20 (September 13 1946): 171-73.

Spratt, Elwyn. *Eddie Ward, Firebrand of East Sydney*. Seal Books. Adelaide: Rigby, 1978.

Stanton, John. "Canada and War Crimes. Judgment at Tokyo." *International Journal* 55 (2000): 376-400.

Starke, J.G. "Royal Commissions - Review of Order by Commissioner - Extent of Commissioner's Duty to Observe Rules of Natural Justice." *Australian Law Journal* 58, no. 3 (March 1984): 169-70.

Sulitzeanu-Kenan, Raanan. "If They Get It Right: An Experimental Test of the Effects of the Appointment and Reports of Uk Public Inquiries." *Public Administration* 84, no. 3 (2006): 623-53.

Takatori, Yuki. "America's' War Crime Trial? Commonwealth Leadership at the International Military Tribunal for the Far East, 1946-48." *The Journal of Imperial and Commonwealth History* 35, no. 4 (2007): 549-68.

Tanaka, Yuki. *Hidden Horrors. Japanese War Crimes in World War Ii*. Boulder, Colorado: Westview Press, 1996.

———. "Poison Gas: The Story Japan Would Like to Forget." *Bulletin of the Atomic Scientists* 44, no. 8 (October 1988): 10-19.

Tanaka, Yuki, Timothy L.H. McCormack, and Gerry Simpson. *Beyond Victor's Justice: The Tokyo War Crimes Trial Revisited* Martinus Nijhoff, Biggleswade: Leiden, 2011.

Tennant, Kylie. *Evatt; Politics and Justice*. Sydney: Angus and Robertson, 1970.

Thomas, J.B. "The Time of Cooper." *Journal of the Royal Historical Society of Queensland* 14, no. 3 (August 1990): 61-80.

Thomas, James B. "Philp, Sir Roslyn Foster Bowie (1895-1965)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/philp-sir-roslyn-foster-ross-11389.

Thomas, James Burrows. *Judicial Ethics in Australia*. 3rd ed. Chatswood, N.S.W.: LexisNexis Butterworths, 2009.

Thomis, Malcolm I. *A Place of Light & Learning : The University of Queensland's First Seventy-Five Years*. St. Lucia, Qld.: University of Queensland Press, 1985.

Thompson, Brian. "Conclusion: Judges as Trouble-Shooters." *Parliamentary Affairs* 50, no. 1 (1997): 182-89.

Thomson, Robert. *The Judges*. Sydney: Allen & Unwin, 1987.

Totani, Yuma. *The Tokyo War Crimes Trail: The Pursuit of Justice in the Wake of World War Ii*. Massachusetts: Cambridge, 2008.

Trotter, Ann. "Justice Northcroft (New Zealand)." In *Beyond Victor's Justice: The Tokyo War Crimes Trial Revisited*, edited by Yuki Tanaka, Timothy L.H. McCormack and Gerry Simpson. 81-91. Biggleswade, Leiden: Martinus Nijhoff, 2011.

United Kingdom. "Report on Postal Censorship During the Great War (1914-1918)," In, (1920).

United Nations War Crimes Commission. *History of the United Nations War Crimes Commission and the Development of the Laws of War*. London: H.M.S.O. for the United Nations War Crimes Commission, 1948.

van Poelgeest, L. "The Netherlands and the Tokyo Tribunal." In *Aspects of the Allied Occupation of Japan*, edited by Ian Nish. 25-43. London: Suntory-Toyota International Centre for Economics and Related Disciplines, 1991.

Vickery, Edward Louis. "Telling Australia's Story to the World: The Department of Information 1939-1950." Austrailan National University, 2003.

W., T., and A. G. "Commentary: Reinventing Royal Commissions." *Political Quarterly* (2001): 411-13.

Walkinshaw, Robert B. "The Nuremberg and Tokyo Trials: Another Step toward International Justice." *American Bar Association Journal* 35 (April 1949): 299-302, 62-63.

Wall, Don. *Kill the Prisoners*. Mona Vale, New South Wales: Don Wall, 1996.

Ward, Ian. *Snaring the Other Tiger*. Singapore: Media Masters, 1996.

Watt, Donald Cameron. "Historical Introduction." In *Tokyo War Crimes Trial*, edited by R. John Pritchard and Sonia M. Zaide. vii-xxix. New York: Garland Publishers, 1981.

Webb, William Flood, John Robert Kemp, and James David Bell. "Report of the Royal Commission on Transport." 1938.

Webster, D. B. "Heath, Albert Edward (1871-1955)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/heath-albert-edward-6624.

Weld, H. A. "Webb, Sir William Flood (1887-1972)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://www.adb.online.anu.edu.au/biogs/A160612b.htm.

Weller, Patrick, ed. *Royal Commissions and the Making of Public Policy*. South Melbourne: McMillan Education Australia, 1994.

Wheeler, Fiona. ""Anomalous Occurences in Unusual Circumstances"? Extra-Judicial Activity by High Court Justices: 1903-1945." *Public Law Review* 2, no. 2 (2013): 125-41.

———. "The Boilermakers Case." Chap. 7 In *Australian Consitutional Landmarks*, edited by H.P. Lee and George Winterton. 160-79. Cambridge: Cambridge University Press, 2003.

———. "Federal Judges as Holders of Non-Judicial Office." In *The Australian Judicial System*, edited by Brian Opeskin and Fiona Wheeler. 442-74. Carlton South, Vic: Melbourne University Press, 2000.

———. "Parachuting In: War and Extra-Judicial Activity by High Court Judges." *Federal Law Review* 38, no. 3 (2010): 485-502.

———. "Sir John Latham's Extra-Judicial Advising." *Melbourne University Law Review* 35 (2011): 651-76.

White, G. Edward. "The Renaissance of Judicial Biography." *Reviews in American History* 23, no. 4 (1995): 716-22.

Whitford, Troy, and Don Boadle. "Australia's Rural Reconstruction Commission, 1943-46: A Reassessment." *Australian Journal of Politics and History* 54, no. 4 (2008): 525-44.

Whitington, Don. *Ring the Bells. A Dictionary of Australian Federal Politics*. Melbourne: Georgian House, 1956.

Wigmore, Lionel. *The Japanese Thrust*. Australia in the War of 1939-1945. Series 1, Army ; V. 4. Canberra: Australian War Memorial, 1957.

Wiley, Alexander, and United States Senate Committee on the Judiciary. "Nominations of Hon. Marvin Jones and Hon. John Caskie Collett: Report on the Use of Judges in Nonjudicial Offices in the Federal Government." In *Executive Report of the United States Senate No. 7*, 1-8, 1947.

Winterton, George. "The Communist Party Case." Chap. 5 In *Australian Consitutional Landmarks*, edited by H.P. Lee and George Winterton. 108-44. Cambridge: Cambridge University Press, 2003.

———. "Judges as Royal Commissioners." *University of New South Wales Law Journal* 10 (1987): 108-26.

Wood, C. T., and Queensland Cane Growers' Council. *Sugar Country: A Short History of the Raw Sugar Industry of Australia, 1864-1964*. Brisbane: The Council, 1965.

Wood, David. "Judges and Community Involvement." *Journal of Judicial Administration* 7 (1998): 229-55.

Woodward, Edward. "An Insight into Royal Commissions." *Law Institute Journal* (December 1984): 1458-61.

Wylie, Neville. "Prisoners of War in the Era of Total War." *War in History* 13, no. 2 (2006): 217-33.

Yost, Michelle. "Hirohito: Dunce or Duplicitous Leader?". *Aegis* (2006): 96-103.

Young, J. Mcl. "O'bryan, Sir Norman John (1894-1968)." Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/obryan-sir-norman-john-11279.

Zeitz, Susan. "Security of Tenure and Judicial Independence." *Journal of Judicial Administration* 7, no. 3 (1998): 159-82.