

Obituary - The Right Hon. Sir Frank Walters Kitto AC, KBE

On Tuesday 15 February, 1994, there died the Rt Hon Sir Frank Walters Kitto AC, KBE. He was aged 90 years. Although perhaps little-known to the general public, he was one of Australia's greatest citizens: scholar, advocate, judge, university principal and Press Council administrator.

The son of the Deputy Director of Posts and Telegraphs in New South Wales, he was educated at North Sydney High School, in those days (before the arrival of political correctness), a nursery of academic excellence, staffed by brilliant teachers and producing a long line of famous judges, doctors, scientists and politicians.

He went to Sydney University, where he graduated with a BA (majoring in Latin and Greek, his easy acquaintance with which displayed itself in his distinguished prose style) and an LLB (with 1st class honours) in 1927, a year after Sir Garfield Barwick. His university degrees were attained whilst he was employed in the New South Wales Crown Solicitor's Office.

Three years after graduation he returned to his University in order to lecture in Bankruptcy and Probate, a typical manifestation of his fascination with matters intellectual.

He practised at the New South Wales Bar from 1928 to 1950. Despite the advent of the Depression, in the midst of which he threw his hat in the ring, he readily established his mastery at the Bar, taking silk in 1942 and specialising particularly in any field which constituted an intellectual challenge: equity, probate, intellectual property, taxation law, commercial law, constitutional law, even ecclesiastical law, and all forms of appellate law, although it is said that, at one stage, he actually conducted a common law case. In the late 1940s he appeared in the majority of all appeals before the High Court of Australia.

It was not only in forensic ability that he excelled: he was probably Australia's leading legal writer. He published nothing, alas, but his advices and opinions were famous and masterly. His written submissions to the Privy Council on behalf of the banks in the *Bank Nationalisation Case* were outstanding.

He was appointed a Justice of the High Court of Australia in 1950, and he did not retire until 1970. Whilst obviously independent in thought, his mind in general was much influenced by Sir Owen Dixon, the Chief Justice from 1952 to 1964.

In 1992 the *Australian Law Journal* published as an article a paper which Sir Frank had presented to a judicial conference 20 years earlier, called "Why Write Judgments?". In it may be discerned the judicial attributes he admired and, in fact, attained: learning and intelligence, clarity of thought, brevity of expression, discipline of thought, and felicity of phrase. It is hardly surprising that his judgments are today constantly cited.

Another noteworthy feature of his judicial career is that, like Sir Owen Dixon, he soon demonstrated his mastery of common law, a field in which he had rarely practised.

Sir Frank was also an adherent of Sir Owen Dixon's ideal of a "strict and complete legalism". In 1965, in the *Airlines of NSW Case No 2*, he said:

"The Court is entrusted with the preservation of constitutional distinctions and it both fails in its task and exceeds its authority if it discards them, however out of

touch with practical considerations, or with modern conceptions they may appear to be in some or all of their applications."

In the article to which I have referred he acknowledges that the law must develop, it is not static, but it should be developed "by applied logic from within principles already established", not by stating that the law is whatever the judge thinks it ought to be. He firmly believed that "an understanding of the conceptual foundations of established principles alone provides a permissible foundation for further advance".

Times have changed.

He breathed these principles with a language that was as memorable as it was precise. If the *Oxford Book of English Prose*, in search of stylistic elegance, were to include quotations from the Australian judiciary, Sir George Rich, Sir Frederick Jordan and Sir Frank Kitto would be the most obvious candidates for inclusion.

Although as a judge he was highly esteemed by many people, it must be said that when hearing a case he gave vent to constant asperities by interjecting during counsel's arguments, a practice which made him feared as much as he was respected.

In 1970, when he retired from the High Court, perhaps curiously, he abandoned all interest in law. Although exceptionally well-read, he devoted himself to further reading. He also undertook two more tasks. One was the governance of the University of New England to which he was particularly devoted, and of which he was Deputy Chancellor from 1968 to 1970 and Chancellor from 1970 to 1981.

It gave him great pleasure to steer what was a new University into the paths of scholarship and excellence. When Chancellor, he was an activist and busied himself with even the minutiae of academic decisions, as well as presiding over the deliberations of his Senate.

The other task was the Press Council of Australia, of which he was inaugural Chairman, a job from which he did not retire until 1982. When accepting the post, he said that there were two objects which he set himself: the first was the overriding object of preserving the freedom of the press, and the second was inducing those who exercise that freedom to recognise and use higher standards of journalism. He obviously had greater success in achieving the former object than he did with the latter.

He was married in 1928: his wife, Lady Eleanor, predeceased him, dying in 1982. They had four daughters, one of whom died.

He was, appropriately, showered with honours. He was knighted (KBE) in 1955 and made a member of the Privy Council in 1963. He was created a Companion of the Order of Australia in 1983. In 1982 he was awarded honorary degrees from both the University of New England and the University of Sydney.

He was quiet and retiring, a little shy; reluctant to express publicly the views he certainly arrived at privately; modest with little to be modest about; a potentially great writer who preferred silence. His loss is grievous - for the law and the country, as well as his family. □

The Hon. Roderick Pitt Meagher

